November 2024

VBB on Belgian Business Law

Issue Highlights

"Van Bael & Bellis' Belgian competition law practice [...] is a well-established force in high-stakes, reputationally-sensitive antitrust investigations."

Legal 500, 2019

Topics covered in this issue

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COMPETITION LAW

Belgian Competition Authority Offers Only Qualified Support for Bill Seeking to Prohibit Dynamic Pricing for Cultural and Sporting Events

The committee for Economic Affairs, Consumer Protection, and Digitalisation of the federal Chamber of Representatives requested the Belgian Competition Authority (***BCA***) to give an advice on bill 56K0234 (here and here) which seeks to prohibit dynamic pricing for the sale of entrance tickets to events, including sporting and cultural happenings.

While the BCA expressed sympathy for the bill's rationale, which is to keep such events accessible to the widest possible audience, it took issue with the bill's blanket prohibition of dynamic pricing and the concept's definition (see, here and here).

Definition - The bill defines dynamic pricing as "a price determination technique that implies a very flexible and quick price change because of market demand". The BCA sensibly proposes an alternative definition as follows: "a mechanism to determine prices of entrance tickets that vary in accordance with changes in supply and demand or other criteria during the period of reserving such tickets". If adopted, this definition would do away with vague terms such as flexible and quick and would capture all pricing developments, including price increases and price reductions. It would also focus on changes during the process of reserving tickets.

Blanket prohibition - The BCA is of the opinion that a blanket prohibition would be an unnecessary and disproportionate encroachment on free market forces and is instead in favour of less intrusive alternatives that also do justice to a possible downward effect of dynamic pricing. The BCA is concerned that such a prohibition could cause event organisers to shun Belgium in favour of neighbouring countries. It therefore cites the possibility of a controlled or capped form of dynamic pricing that could have a downward effect on initial prices.

The BCA makes it clear that its advice does not prejudge a possible inquiry in a specific case and also shows awareness of recent developments in other jurisdictions, including the decision of the UK Competition and Markets Authority to open "a project to consider how dynamic pricing is being used across different sectors of the economy".

The fate of the bill will remain uncertain as long as no new federal government succeeds the current caretaker government.

Brussels Court of Appeal Rejects Action for Damages of European Commission Against Members of Elevator and Escalator Cartel

On 18 November 2024, the Brussels Court of Appeal (***Court of Appeal***) rejected the action for damages of the European Commission (***Commission***) against four elevator and escalator suppliers that had participated in a cartel for which the Commission imposed fines back in 2007. Even though the Court of Appeal recognised that the Commission had established several violations of the competition rules, it also held that, as a private plaintiff, the Commission had failed to demonstrate that these violations (or the causal link with any possible damage) took place for each of the 20 agreements which it had entered into with a supplier as a purchaser of maintenance and modernisation services and for which it sought to obtain damages. In the Court of Appeal's view, the Commission had also failed to show that it had suffered any damage at all, despite its reliance on expert economic advice. Additionally, the Court of Appeal did not consider it appropriate to appoint an expert of its own.

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The Commission's attempts to recover damages as an aggrieved party took several twists and turns, including a 2012 judgment of the Court of Justice of the European Union holding that the Commission was entitled to bring an action for damages as a private party, provided that it did not rely on the confidential information which it had obtained during the enforcement proceedings which resulted in the 2007 decision.

The Commission still has the opportunity to lodge a further appeal to the Supreme Court (*Hof van Cassatie / Cour de cassation*).

A more detailed analysis will follow once the judgment of the Court of Appeal becomes publicly available.

CONSUMER LAW

Court of Justice of European Union Clarifies Concept of Average Consumer and Impact of Cognitive Biases

On 14 November 2024, the Court of Justice of the European Union (***CJEU***) ruled on the interpretation of the notion of "average consumer" and the role of cognitive biases under Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (***UCP Directive***) (CJEU, 14 November 2024, Case C-646/22, *Compass Banca*, ECLI:EU:C:2024:957).

Background

The case concerned the commercial practices of the Italian bank Compass Banca SpA (***Compass Banca***), which presented personal loans alongside unrelated insurance products in a way that could mislead consumers into believing that the loan was contingent on the purchase of the insurance product. In addition, Compass Banca did not allow for a cooling-off period between the date of signing of the loan and that of the insurance policy. The CJEU described these practices as "framing", a term that refers to the exploitation of cognitive biases by influencing consumer choices on the basis of how offers are presented.

The Italian consumer authority considered this practice to be aggressive and unfair under the UCP Directive due to its potential to mislead and unduly influence consumers. It ordered Compass Banca to observe a seven-day cooling-off period between the date of signing of the loan contract and that of the signing of the insurance policy. Compass Banca failed to comply with this request, which led the Italian consumer authority to impose a fine on the bank.

Compass Banca challenged the decision of the Italian consumer authority before the administrative courts, which led the Italian Council of State (*Consiglio di Stato*) to seek a preliminary ruling from the CJEU on the following questions:

1. Should the concept of the "average consumer" as defined in the UCP Directive account for the fact that consumers might act irrationally due to cognitive biases, such as framing, necessitating greater consumer protection?

2. Can a commercial practice that uses framing to present information in a way that makes a choice appear obligatory and with no alternatives be inherently aggressive?

3. Does the UCP Directive authorise national authorities to impose measures like a cooling-off period to address the potential psychological influence of framing?

4. Does Directive (EU) 2016/97 of 20 January 2016 on insurance distribution (recast) (***Directive (EU) 2016/97***) preclude national authorities from adopting measures like a cooling-off period in the case of the cross-selling of a financial product and an unrelated insurance product?

5. Does the characterisation of the mere combination of a financial product and an unrelated insurance product as an aggressive practice place an unfair burden of proof on the trader? Specifically, does it require the trader to demonstrate that its practices are not aggressive, contrary to the principle that authorities must provide evidence of unfairness?

CJEU Judgment

The CJEU answered the questions raised as follows:

1. The CJEU acknowledged that cognitive biases could impact the decision-making of the consumer but emphasised that they must be significant enough to materially distort consumer behaviour.

CONSUMER LAW

The standard of an "average consumer" remains an objective one, requiring national courts to evaluate the likely effects of a practice on an average consumer in specific circumstances.

2. The CJEU ruled that framing alone does not inherently amount to coercion, harassment, or undue influence, as required for the existence of an aggressive commercial practice within the meaning of the UCP Directive. However, framing could still qualify as a misleading practice if it deceives or is likely to deceive consumers into believing that the loan is conditional on the purchase of the insurance, thereby distorting their decision-making autonomy.

3. While the UCP Directive precludes general preventative obligations, it allows national authorities to impose specific remedies when unfair practices are identified. However, these measures must strike a balance between consumer protection and business freedom, ensuring that no less restrictive alternatives are available.

4. Directive (EU) 2016/97 does not prevent authorities from addressing unfair commercial practices under the UCP Directive. National measures, such as a cooling-off period, are acceptable as long as they are proportionate and necessary to address the risks identified.

5. The CJEU did not address the fifth question in view of its finding in response to the second question that framing does not qualify as an aggressive or unfair commercial practice in all circumstances. Thus, the existence of an aggressive or unfair commercial practice within the meaning of the UCP Directive must be proven.

To conclude, the CJEU confirmed that the "average consumer" concept under the UCP Directive remains a rational, fictive construct while at the same time highlighting the need to take account of demonstrably established cognitive biases when assessing the expectations of the average consumer. Concretely, practices that exploit cognitive biases, even subtly, may be deemed misleading if they compromise the consumer's autonomy in specific instances. For national authorities, the judgment paves the way for a more sophisticated and context-sensitive approach to applying the UCP Directive.

The judgment can be found here.

INTELLECTUAL PROPERTY

Court of Justice of European Union Confirms Direct Effect of Article 5(2)(a) and (b) of Directive 2001/29 Harmonising Copyright in Information Society

On 14 November 2024, the Court of Justice of the European Union (the ***CJEU***) delivered a judgment in the *Reprobel CV v Copaco Belgium NV* case (C-230/23) which concerns the interpretation of Article 5(2)(a) and (b) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (***InfoSoc Directive***).

Background

The dispute arose between Reprobel CV (***Reprobel***), a copyright collecting society entrusted by law with the task to collect and distribute the remuneration to which authors and publishers are entitled as fair compensation for reprography activities, and Copaco Belgium NV (***Copaco***), a distributor of IT products for businesses and consumers, including reproduction devices such as photocopiers and scanners.

Until the end of 2016, Copaco was liable to pay Reprobel a flat-rate remuneration for the reproduction of works protected by copyright or related rights. This situation changed when Copaco suspended payment of the invoices issued by Reprobel for remuneration covering the period from November 2015 to January 2017. Copaco argued that the CJEU, in its judgment of 12 November 2015 in the case *Hewlett-Packard Belgium,* had decided that Article 5(2)(a) and (b) of the InfoSoc Directive precluded the "flat-rate" component of the remuneration system established by Belgian law. Based on this judgment, Copaco contended that it could rely on the direct effect of Article 5(2)(a) and (b) InfoSoc Directive against Reprobel, as the copyright collecting society is an emanation of the State, against which the direct effect could be invoked.

On 16 December 2020, Reprobel brought an action against Copaco, seeking payment of the outstanding remuneration for the reproduction of works. The case was brought before the Enterprise Court of Ghent (the ***Referring Court***) which subsequently referred a question to the CJEU as to whether an entity like Reprobel could be considered an emanation of a Member State and whether Article 5(2)(a) and (b) of the InfoSoc Directive could be directly relied upon.

CJEU Judgment

As regards the qualification of Reprobel, the CJEU concluded that the fee imposed by Reprobel constitutes an administrative fee on copying devices and media and that by collecting this fee and disbursing fair compensation, Reprobel fulfills a public interest role rather than just managing exclusive rights. The CJEU added that Reprobel is the sole entity authorised to collect and distribute the fair compensation and has a series of specific powers, in particular in respect of requesting information, to enable it to perform the task in the public interest. According to the CJEU, an organisation like Reprobel should thus be considered to be an emanation of the state

The CJEU also analysed the question whether Article 5(2)(a) and (b) of the InfoSoc Directive must be interpreted as having direct effect, and that therefore, in the absence of a correct transposition of that provision, an individual may rely on it for the purposes of disapplying national rules under which that individual is obliged to pay remuneration by way of fair compensation imposed in contravention of that provision. The CJEU recalled that whenever the provisions of a directive appear to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State when the latter has failed to implement the Directive. The CJEU also referred to case-law (judgments of 21 October 2010, *Padawan*, C 467/08, and of 22 September 2016, *Microsoft Mobile Sales International and Others*, C 110/15) in which the CJEU had already established

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that Article 5(2)(a) and (b) of the InfoSoc Directive satisfies these criteria as it imposes specific obligations on Member States which choose to apply exceptions or limitations in respect of the reproduction right in order to ensure that fair compensation is granted to the rights holders.

The CJEU concluded that the fact that the Belgian legislation at issue is incompatible with Article 5(2)(a) and (b) of the InfoSoc Directive 2001/29, the Referring Court must guarantee the full effectiveness of that provision by disapplying that national legislation for the purposes of resolving the dispute pending before it.

Several courts had previously allowed Reprobel to continue collecting fees (*See,* this Newsletter, Volume 2017, No. 6) , a stance which even the Belgian Supreme Court did not object to, despite the CJEU's clear ruling in *Hewlett-Packard Belgium*. Following this judgment, such case law will probably no longer emerge.

The judgment can be found here.

EU Design Legislative Reform Package Published

On 18 November 2024, the EU Design Legislative Reform Package was published in the *Official Journal of the European Union* as Regulation 2024/2822 of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (***Regulation 2024/2822***) and Directive 2024/2823 of 23 October 2024 on the legal protection of designs (recast) (***Directive 2024/2823***).

The most important amendments are summarised below:

- Community designs will now be referred to as EU Designs. There will also be a new registration symbol, an encircled letter D, to indicate that the relevant product was indeed registered.

- The number of views for EU designs will no longer be limited to seven. This has in the past been proven to be very difficult for more elaborate designs. The new (higher) number still has to be determined by secondary legislation.

- EU design holders will be able to act against copies made using 3D printing technologies as the text clarifies that also "*creation, downloading, copying and making available of any medium or software recording the design amounts to use of the design*" are covered;

- There is no longer a requirement of unity of class for the filing of multiple designs. EU design applicants will be allowed to file for multiple design applications covering designs falling into different Locarno classes, without being restricted to products of the same class. A maximum of 50 designs can be included in each multiple application;

- There is no longer a visibility requirement which means that all visible design features included in the registration of a product will benefit from design protection even if they do not remain visible at a later stage.

- The definitions of "design" and "product" will be broadened to ensure that "*the movement, transition or any other sort of animation of those features*" will also qualify for protection by design rights.

- A repair clause is introduced pursuant to which design protection will not be afforded to component parts whose appearance is dependent on the appearance of the complex product concerned ("must-match" spare parts). However, national systems which conferred design protection on spare parts before 8 December 2024 may continue to do so until 9 December 2032 for designs whose registration had been sought before 8 December 2024.

The EU Design Legislative Reform Package entered into force on 8 December 2024 but will apply only later. Regulation 2024/2822 will be applicable from 1 May 2025. As regards Directive 2024/2823, Member States will have until 9 December 2027 to transpose it into national law.

INTELLECTUAL PROPERTY

General Court Upholds Invalidation of Chiquita Trade Mark

On 13 November 2024, the General Court (the ***GC***) delivered a judgment in case T 426/23 in which it confirmed the decision of the European Union Intellectual Property Office (***EUIPO***) invalidating Chiquita Brands LLC's (***Chiquita***) EU figurative mark representing a blue and yellow oval (the ***Figurative Mark***).

On 14 May 2020, Compagnie financière de participation (***CFP***) submitted an application to the EUIPO for a declaration of invalidity of the EU trade mark which Chiquita had filed on 29 December 2008 in respect of the Figurative Mark. CFP argued that the Figurative Mark was not sufficiently distinctive and thus had to be annulled. The EUIPO eventually declared the Figurative Mark invalid as regards Class 31 "fresh fruits and vegetables" holding that the contested mark was devoid of any distinctive character.

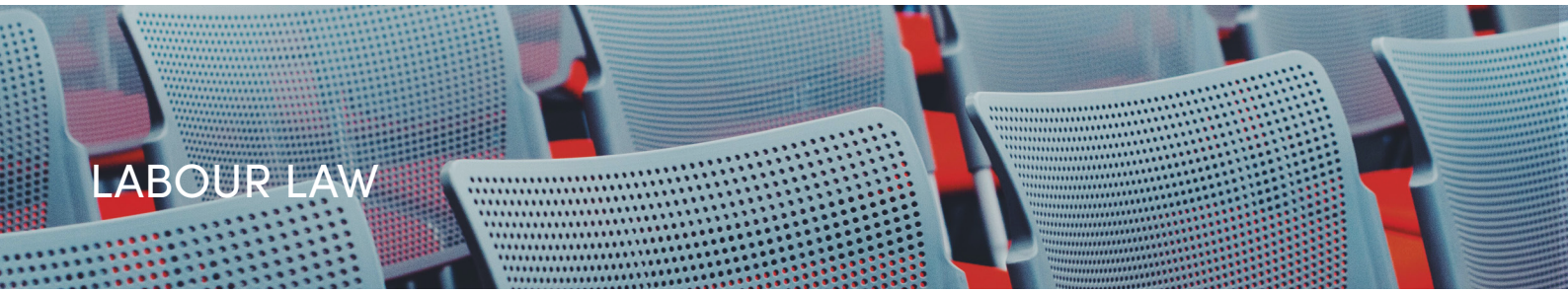
Chiquita challenged the EUIPO's decision before the GC which upheld the decision of the EUIPO. The GC first considered that neither the shape nor the blue and yellow colour scheme of the Figurative Mark had a distinctive character. As regards the shape of the Figurative Mark, the GC noted that it did not contain any specific or characteristic element which the relevant public might perceive as distinctive and which would thus be capable of serving as an indication of commercial origin. The shape of the Figurative Mark corresponded to a simple geometric figure, namely "*a variation of an oval with no easily and instantly memorable characteristics*" which is often used in the banana sector as they stick easily to curved fruit. On this basis, the GC concluded that in case no elements are available to distinguish the Figurative Mark in such a way that it does not appear as a simple geometric figure, the shape of the contested mark lacks the minimum level of distinctiveness needed to serve its purpose of identifying the fresh fruit associated with it.

As regards the colour scheme, the GC agreed with the EUIPO that the blue and yellow colour scheme of the contested mark did not have any distinctive character. The colours used by Chiquita (blue and yellow) are primary colours that are very common in the fresh fruits business. The GC agreed with the EUIPO that the use of these colours does not make the Figurative Mark particularly characteristic or striking and is therefore not capable of distinguishing fresh fruits and vegetables.

The GC also followed the EUIPO in its assessment that the evidence which Chiquita had submitted during the proceedings was not sufficient to establish that the Figurative Mark had acquired distinctive character through use in the territory of the European Union for fresh fruits and that the relevant consumers would identify the commercial origin of the goods based on the Figurative Mark. Most evidence which Chiquita provided only related to four Member States, namely Belgium, Germany, Italy and Sweden. Additionally, the GC noted that almost all of the evidence provided by Chiquita featured the word "Chiquita".

In this judgment, the GC applied a high bar for considering geometric shapes as valid trade marks and also demonstrated the significant challenge of providing evidence for distinctiveness through use. However, this judgment still comes as a surprise, given Chiquita's longstanding presence and recognition in the market.

The judgment can be found here.



LABOUR LAW

2023 European Directive on Principle of Equal Pay for Equal Work or Work of Equal Value Between Men and Women is Already in Force in Specific Segments of Public Sector

On 17 May 2023, Directive 2023/970 of 10 May 2023 "to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms" (the ***Directive***) was published in the *Official Journal of the European Union* (the ***EU***). The Directive seeks to tackle pay discrimination at work and contribute to closing the gender pay gap across the EU.

Access to Information During Recruitment Process and Employment

The Directive obliges employers to disclose starting salaries or pay ranges for advertised job vacancies. This information must be provided either in the job posting or before the interview process. Furthermore, employers are expressly prohibited from asking candidates about their salary history.

Once employed, employees have the right to request specific information. This includes (a) the average pay levels disaggregated by gender for employees performing the same or equivalent work; and (b) the criteria used for determining salary and career progression.

Pay Gap Reporting Obligations

Employers with more than 250 employees are required to submit annual reports on the gender pay gap to the relevant national authority. Smaller organisations must report every three years, while those with fewer than 100 employees are exempt. These reports must include: (a) the overall gender pay gap; (b) the median gender pay gap; (c) the proportion of female and male employees receiving variable salary; (d) the distribution of male and female employees across pay quartiles; and (e) the gender pay gap across employee categories broken down by basic and variable salary components.

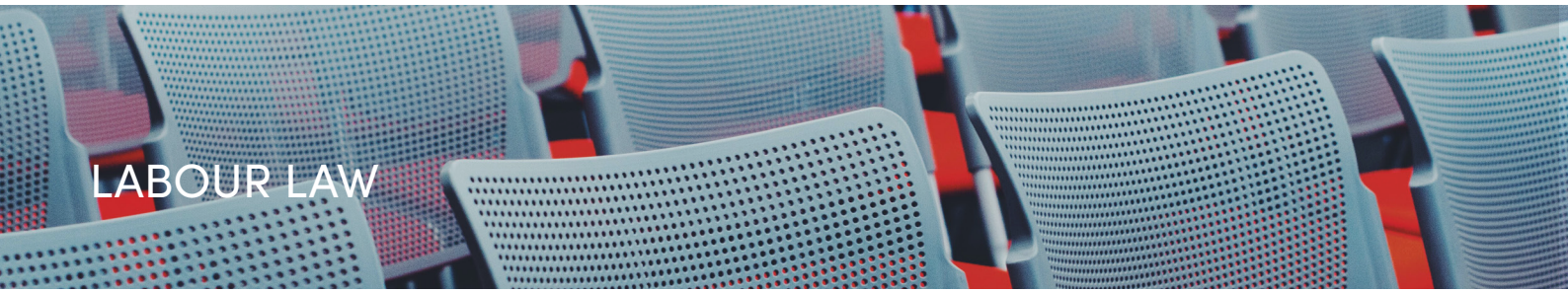
If a report reveals a pay gap exceeding 5% that cannot be objectively justified, the employer must conduct a joint pay assessment with the employee representatives. This assessment must include: (a) an analysis of the proportion of female and male employees; (b) information on average salary levels for female and male employees; (c) any differences in average salary levels between female and male employees; (d) the reasons for any salary differences; (e) the proportion of female and male employees who received salary improvements following their return from maternity leave, paternity leave, parental leave, or a career break; (f) measures to address unjustified salary differences; and (g) an evaluation of the effectiveness of measures implemented during previous joint pay assessments.

Remedies and Enforcement

The Directive ensures that employees facing gender pay discrimination are entitled to full compensation. This encompasses the recovery of back pay, variable salary, and any associated benefits. To further support employees, the burden of proof shifts to the employer when employees present facts that create a presumption of direct or indirect discrimination. In such cases, employers must demonstrate that no gender-based discrimination occurred. This approach is consistent with the existing Belgian anti-discrimination law which already provides for such a shift in the burden of proof.

Implementation

Member States have until 7 June 2026 to implement the Directive into national law. While Belgium has yet to implement the Directive for private sector organisations, some elements of the Directive are already in effect in public sector organisations in the French Community.



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The frequency and entry into force of the reporting obligations also vary depending on the size of the organisation:

- 250 employees or more: the first deadline is 7 June 2027 and there is a reporting obligation every following year.
- 150 to 249 employees: the first deadline is also on 7 June 2027, but the subsequent reporting obligation is only every three years.
- 100 to 149 employees: the first deadline is on 7 June 2031 and the subsequent reporting obligation is every three years.

Federal Parliament Postpones Registration Deadline for Federal Learning Account

On 28 November 2024, the Federal Chamber of Representatives approved a governmental bill to postpone the deadline for employers to register their employees' professional training sessions in the Federal Learning Account (***FLA***) to 1 April 2025 (*Wetsontwerp houdende diverse wijzigingsbepalingen met het oog op een tijdelijk uitstel van de verplichting tot registratie binnen de Federal Learning Account / Projet de loi portant diverses dispositions modificatives en vue d'un report temporaire de l'obligation d'enregistrement dans le Federal Learning Account* – the ***Law***).

The FLA was introduced by the Law relating to the creation and management of the "Federal Learning Account" of 20 October 2023 (*Wet betreffende de oprichting en het beheer van de "Federal Learning Account" / Loi relative à la création et la gestion du "Federal Learning Account"* – the ***Law***). The FLA is an online platform enabling employers to collect all information related to employees' rights to individual training days. All employers were initially obliged to report each quarter and for each employee the number of training days to which the employee is entitled and the training sessions which the employee attended during that quarter (*See*, this Newsletter Volume 2023, No. 12). The Law came into force on 1 April 2024 and employers had to comply with the registration requirements by 30 November 2024.

However, the FLA faced criticism from employers and employers' organisations because of operational challenges and a heavy administrative burden. The time extension introduced by the Bill, acknowledges these concerns and provides employers with additional time to prepare for the rollout of the FLA. The extension was only announced a few days before the original registration deadline of 30 November 2024 would become effective.

Importantly, the Bill reinstates the employer's obligations concerning the individual training account introduced by the Law of 3 October 2022 on various provisions relating to work (*Wet houdende diverse arbeidsbepalingen / Loi portant des dispositions diverses relatives au travail*). The individual learning account, which had been replaced by the FLA, requires employers to register specific data on employees' training. Because this obligation was reintroduced, employers must now register individual training rights and records either manually (digitally or on paper) or opt to voluntarily use the FLA until 31 March 2025. However, this obligation does not apply if a collective labour agreement concluded in the applicable joint (sub)committee of the employer applies that details the specific obligations in that specific industry, as is the case in most industries.

From 1 April 2025, registration through the FLA will become mandatory for all employers and other registration methods will no longer be permitted.

LITIGATION

Court of Justice of European Union Holds that Article 1(2)(b) of Brussels Ibis Regulation Does Not Apply to Actions Seeking Payment from Insolvent Company

On 14 November 2024, the Court of Justice of the European Union (the ***CJEU***) handed down its judgment in case C-394/22, *Oilchart International NV v O.W. Bunker (Netherlands) BV and ING Bank NV*, following a request for a preliminary ruling made by the Court of Appeal of Antwerp regarding the interpretation of Article 1(2)(b) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels Ibis Regulation***). In these proceedings concerning the recovery of an unpaid invoice for bunkering services against an insolvent company, the CJEU held that Article 1(2)(b) of the Brussels Ibis Regulation does not apply to an action for the payment of a claim which was lodged after the debtor company had been put into liquidation.

Background

Article 1(2)(b) of the Brussels I*bis* Regulation provides that the Regulation does not apply to "*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*".

In this matter, Oilchart International NV (***Oilchart*** – the creditor) issued an invoice to O.W. Bunker (Netherlands) BV (***OWB*** – the debtor) for fuel it had delivered on its behalf to a vessel located in a Dutch port. The invoice remained unpaid and Oilchart brought an action against OWB before the Commercial Court of Antwerp. ING Bank, acting as assignee of OWB's claim, intervened voluntarily in the proceedings.

In the meantime, OWB had been declared insolvent by the District Court of Rotterdam, following which Oilchart submitted its claim with OWB's liquidators. The Commercial Court of Antwerp declared Oilchart's action to be inadmissible based on Dutch insolvency law.

Subsequently, Oilchart appealed this judgment to the Court of Appeal of Antwerp, which raised doubts as to whether Oilchart's action was based on the ordinary rules of civil and commercial law or on specific insolvency rules. The Court of Appeal of Antwerp therefore stayed the proceedings and referred a question to the CJEU asking whether the exclusion of the application of the Brussels Ibis Regulation to insolvency proceedings, as laid down in Article 1(2)(b) of the Regulation, applies to an action brought against a company seeking payment for goods delivered which does not mention either the insolvency proceedings opened previously against that company or the fact that the claim had already been declared to be part of the insolvency estate.

CJEU Judgment

The CJEU started out by positing the following principles:

- The Brussels I*bis* Regulation must be interpreted in such a way as to avoid any overlap, not only between the rules law laid down in it, but also between its rules and those of other legal instruments.
- The goal of the EU legislator was to provide for a broad definition of the concept of "civil and commercial matters" covered in the Brussels I*bis* Regulation.
- It follows from these principles that only actions which derive directly from insolvency proceedings and are closely connected with them are excluded from the scope of the Brussels I*bis* Regulation.

The CJEU thus had to determine whether an action for payment for goods delivered brought against a company subject to insolvency proceedings (the ***action***) derives directly from insolvency proceedings and is closely connected with them.

LITIGATION

The Court found that:

- The action brought by Oilchart seeks to have OWB ordered to make payment for goods delivered pursuant to a contract which was concluded before the opening of OWB's insolvency proceedings.
- The action appears to be necessary in order for Oilchart to enforce the bank guarantee established in its favour.
- The action is autonomous since it may be brought outside any insolvency proceedings.
- The contractual obligations relied on in the action and the relevant enforcement mechanisms are based on contract law and are independent from specific rules governing insolvency proceedings.
- Neither the opening of insolvency proceedings nor the appointment of a liquidator alter the legal basis of the action.

Despite these findings, the CJEU held that Article 1(2)(b) of the Brussels I*bis* Regulation does not apply to an action brought in a Member State against a company seeking payment for goods delivered which does not mention either the insolvency proceedings opened previously against that company in another Member State or the fact that the action had already been declared to form part of the insolvency estate.

The full judgment is available here.

Constitutional Court Confirms Use of Electronic Procedure before Council of State

On 7 November 2024, the Constitutional Court (the ***Court***) confirmed the validity of Article 5 of the Law of 11 July 2023 amending the Coordinated Laws on the Council of State (the ***Law***) (*See*, this Newsletter, Volume 2023, No. 7), which establishes the compulsory use of the electronic procedure for filing and processing the application for suspension and interim measures, at least when the parties are assisted or represented by a lawyer or when they qualify as a public authority under the Law.

Several lawyers and individuals had brought an action for annulment before the Court, claiming that Article 5 of the Law infringes the principles of equality and non-discrimination, the right of access to (competent) courts, the general principle of proper administration of justice, the right to freedom of expression, the right to a fair trial and the general principles of legal certainty.

In its 20-page judgment, the Court held that Article 5 of the Law intends to speed up and simplify summary proceedings and, indirectly, annulment proceedings before the Council of State. According to the Court, this objective is legitimate and in the general interest. The Court also pointed out that the formality laid down in Article 5 of the Law only applies to applicants assisted or represented by a lawyer, who can reasonably be presumed to have the appropriate IT equipment to comply with that rule, and to public authorities.

The Court therefore held that Article 5 of the Law does not disproportionately affect the rights of the persons concerned and dismissed the action for annulment.

The full judgment is available in Dutch (here) and in French (here).

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