December 2022

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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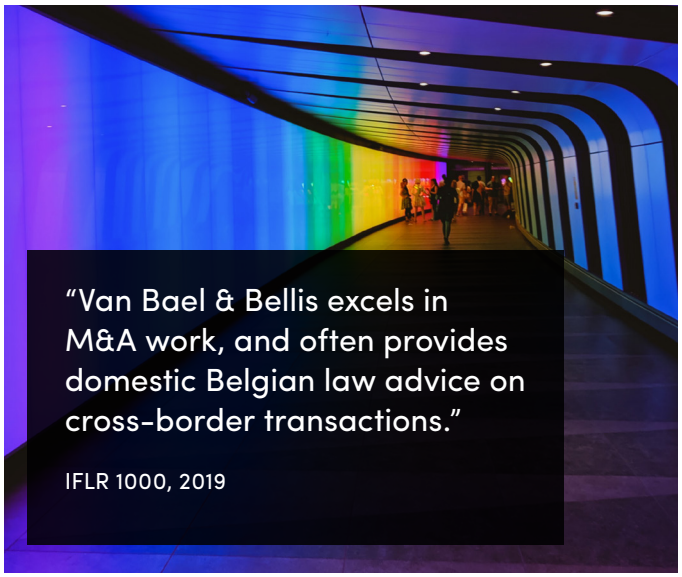

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COMPETITION LAW

Belgian Competition Authority Opens Investigation into Automated Teller Machines Pooling by Belgian Banks

On 23 December 2022, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) indicated in a press release (available here) that it had opened an investigation into the agreement by which the four largest Belgian banks, Belfius, BNP Paribas Fortis, KBC and ING, agreed to bring together their automated teller machines (***ATMs***) into a single network of neutral ATMs managed by a joint venture entity called Batopin (www.batopin.be). According to an article published by *De Tijd* (here), the Chief Competition Prosecutor of the BCA, Damien Gerard, indicated that the *ex officio* investigation followed a series of concerns expressed by stakeholders.

The BCA seeks to determine whether the Batopin project infringes Article IV.1 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) and Article 101 of the Treaty on the Functioning of the European Union by affecting the quality of cash dispensing and automatic deposit services, as well as competition between retail banking service providers.

Although the BCA's press release remains evasive on the exact nature of the possible competition law infringement, *De Tijd* suggests this investigation could be related to the ATM coverage of the Belgian territory. The perceived lack of ATMs in Belgium has been discussed multiple times in the federal Parliament. As far back as 18 November 2021, a parliamentary resolution considered that Batopin reduced the number of ATMs in Belgium, thus particularly harming rural areas, and requested the federal Government to tackle this problem (see here). Several parliamentary questions also expressed doubts regarding the number of ATMs in Belgium and their coverage of the Belgian territory. In an answer provided on 14 November 2022 to one of these questions (available here), the Minister of Economy and Labour, Pierre-Yves Dermagne, indicated that he was working on a list of objective accessibility criteria for ATMs throughout Belgium and that he had asked the BCA for advice to ensure that these criteria comply with the competition rules.

Belgian Competition Authority Rejects Abuse of Dominance Complaint against HP

On 23 November 2022, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) dismissed a complaint accusing electronic equipment manufacturer HP and its subsidiary HP Belgium BV (together, ***HP***) of abuse of dominance.

On 7 February 2020, DPI, a company active in the field of large format printing, filed a complaint before the BCA regarding HP's decision to stop producing and supplying ink cartridges and printheads for its first- and second-generation large format latex ink printers. These printers had been last supplied in Europe in May 2016 and the ink cartridges and printheads for those printer models had been made available in Europe until 3 December 2020. The BCA opened an investigation into a possible abuse of dominant position by HP (Article IV.2 of the Belgian Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) and Article 102 TFEU).

During the investigation, HP clarified that its decision was due to a change in EU law. Commission Delegated Regulation 2020/784 of 8 April 2020 had banned the use of one of the components of HP's ink, perfluorooctanoic acid (***PFOA***), as of 3 December 2020. HP explained that developing PFOA-free latex inks while maintaining the printer's qualities proved complex. Any change of ink required changes in the architecture of the printer that could not be implemented in older printers.

The BCA concluded that HP's decision to stop selling ink cartridges and printheads for its first- and second-generation wide-format latex printers appeared

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objectively justified "without it being necessary to establish the existence of a dominant position or abuse thereof". The BCA therefore dismissed the complaint.

The decision of the BCA can be found here.

Markets Court Rejects Carrefour's Request for Suspension of Decision of Belgian Competition Authority to Authorise Intermarché's Acquisition of Mestdagh

On 23 December 2022, the Markets Court of the Brussels Court of Appeal (*Marktenhof / Cour des Marchés* – the ***Markets Court***) rejected Carrefour's request to suspend the decision by which the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) had authorised the acquisition of Mestdagh by ITM Alimentaire Belgium (***Intermarché***) (the ***BCA Decision***) until the Markets Court rules on the legality of the BCA Decision.

On 9 November 2022, the BCA unconditionally approved Intermarché's acquisition of Mestdagh (the ***Transaction***). Both companies are active in the retail distribution of fast-moving consumer goods, mainly food, in supermarkets. Eleven months earlier, on 23 December 2021, Mestdagh had decided to end its franchise agreement with Carrefour, under which it operated stores using Carrefour's name, with effect on 1 January 2023 (the ***Franchise Agreement***).

Carrefour appealed the BCA Decision to the Markets Court, seeking both (i) the annulment and the suspension of the BCA Decision; and (ii) the "preservation" of the effects of the terminated Franchise Agreement, which Carrefour considered to be closely linked to the Transaction. The judgment delivered by the Markets Court on 23 December 2022 is limited to Carrefour's request for suspension of the BCA Decision.

The Markets Court summarised the conditions under which it can suspend a decision of the BCA:

1. the Markets Court is never obliged to suspend a decision;

2. the default situation is that decisions of the BCA are not suspended;

3. a request for suspension must establish that the contested decision is *prima facie* illegal or erroneous and will almost certainly be annulled – if a plea requires the Markets Court to examine the merits of the case, it cannot support a request for suspension;

4. the applicant must establish the urgency of the situation, *i.e.*, that the applicant is exposed to serious and imminent harm that would be difficult to remedy (not a mere economic loss as that can be compensated); and

5. even if the above conditions are satisfied, the Markets Court can balance the advantages and disadvantages of a suspension and deny a request for suspension on that basis, considering not only the rights of all the parties but also the public interest (such as the consumer interest) and the "economic reality in which the contested decision was adopted".

Based on the above, the Markets Court denied Carrefour's application for suspension.

The Markets Court first considered that Carrefour's general claim that the suspension of the BCA Decision was necessary to ensure the effectiveness of its appeal would amount to considering that actions for annulment have a suspensory effect, which the law does not provide for (point (ii) above).

Turning to the urgency requirement (point (iv) above), the Markets Court observed that Carrefour confused the Transaction authorised by the BCA Decision and the termination of the Franchise Agreement by

COMPETITION LAW

Mestdagh (that termination was being contested by Carrefour in arbitration proceedings (which stalled due to Carrefour's failure to pay the arbitration costs)). The Markets Court held that Carrefour's expectation that it will lose market share is due to the termination of the Franchise Agreement, not to the BCA Decision, and that Carrefour had sufficient time to prepare for this situation.

The Markets Court also rejected Carrefour's argument that the Franchise Agreement and the Transaction are closely linked. Referring to the *Ernst & Young* judgment of the Court of Justice of the European Union, the Markets Court considered that the termination of the Franchise Agreement could be regarded as a preparatory act that could be implemented independently of the BCA Decision. Suspending the BCA Decision would have no impact on this termination.

As a result, the Markets Court considered that Carrefour had failed to demonstrate the urgency required to suspend a decision of the BCA (point (iv) above).

The judgment of the Markets Court can be found here.

COMPLIANCE

Orde van Vlaamse Balies: Court of Justice of European Union Rules that Legal Professional Privilege Extends to All Communications from External Counsel

On 8 December 2022, the Court of Justice of the European Union (***CJEU***) handed down a judgment (C-694/20, *Orde van Vlaamse Balies*) which appears to strengthen the protection afforded by legal professional privilege (***LPP***) under EU law. In its judgment, the CJEU has held for the first time that LPP is based on the right to privacy in addition to the right to a fair trial. Although the ruling concerned notification obligations imposed on tax lawyers, it is likely to be highly significant for EU competition law as it holds that the right to privacy extends to all communications between external counsel and their clients. Applying this approach in EU competition proceedings would expand the scope of LPP beyond that recognised in the landmark *AM&S* judgment of 1982, where, based on the right to a fair trial, the CJEU held that LPP in competition proceedings was limited to "*written communications exchanged after the initiation of proceedings*" as well as "*earlier written communications which have a relationship to the subject-matter of that procedure*". Determining whether these conditions are met has long been a source of uncertainty when assessing which external counsel-client communications are protected from disclosure to the European Commission in the context of competition law investigations. The judgment may have other important implications for the Commission's ability to examine and require the disclosure of external legal advice in such proceedings.

Background

The judgment concerned the implementation of a provision in Directive 2011/16 on administrative cooperation in the field of taxation (the ***Directive***) which requires intermediaries to report information on certain cross-border tax arrangements to competent authorities. The Directive provides that if reporting the tax arrangement would breach LPP recognised in national law, the intermediary (*i.e.*, the lawyer) must notify any other intermediary or the taxpayer if there is no other intermediary, that they are under a duty to report the arrangement to the tax authorities (***Notification Obligation***). Ruling on a reference from the Belgian Constitutional Court, the CJEU examined, among other things, whether the Notification Obligation infringed the right to privacy (including privacy of communications) enshrined in Article 7 of the EU Charter of Fundamental Rights (***Charter***).

Right to Privacy

The CJEU found that the Notification Obligation infringes the right to privacy protected by Article 7 of the Charter, in particular the right to respect for communications between client and lawyer. In reaching this conclusion, the CJEU pointed to the need to ensure consistency between corresponding rights guaranteed by each of the Charter and the European Convention on Human Rights (***ECHR***). The European Court of Human Rights has held that Article 8(1) ECHR (equivalent to Article 7 of the Charter) protects communications between lawyers and their clients, and covers not only the activity of defence, but also legal advice, both in terms of its content as well as its existence. The CJEU considered that Article 7 of the Charter must be interpreted identically and therefore must also protect communications between lawyers and their clients. The CJEU also held that, consistent with the Charter and related case law, any interference with the Article 7 rights must be provided for by law, respect the essence of the right, and be necessary and proportionate to meet objectives of general interest or to protect the rights of others.

Key Takeaways

While the case specifically concerned the Notification Obligation of tax lawyers, the CJEU's ruling on the basis and scope of LPP is of broader significance and may have an important impact in the field of EU competition law. In particular, the CJEU's anchoring of LPP in the right to privacy under Article 7 of the Charter (in

addition to the right to a fair trial) means that LPP would cover all communications between external lawyers and their clients, irrespective of whether these are exchanged after an investigation is initiated or are related to the subject matter of a subsequent investigation (the conditions of the *AM&S* case-law). Applying the same principle, LPP would cover not only the advice of external competition lawyers but also, for instance, the advice of external tax or IP lawyers, which could be relevant in competition law proceedings (e.g., cases involving alleged state aid through tax arrangements or the licensing of standard essential patents).

The anchoring of LPP in Article 7 of the Charter may also have implications for the Commission's practices during inspections and for the exercise of its investigative powers in competition proceedings more broadly. For example, the Commission currently assumes that it has the right to take a "cursory glance" at external legal advice during an inspection to confirm an LPP claim. However, given that the CJEU recognises that the very fact of having sought legal advice falls within the scope of Article 7, this practice would likely be regarded as infringing LPP and, to be potentially justified, would have to be provided for by law, respect the essence of rights of the defence and genuinely meet objectives of general interest. It remains to be seen how the Commission will react, but it is arguable that it would be necessary to put any such exceptions to the privacy of clients' communications with their lawyers on a formal statutory footing in order to comply with the Charter and avoid legal challenges.

By contrast, the judgment does not appear to signal any intention to reverse or refine the position towards advice of in-house counsel established in *AM&S* and the subsequent *Akzo* case, under which such advice does not benefit from LPP (the situation under Belgian law is different in that correspondence of inhouse counsel who are members of the Institute of Enterprise Counsel are afforded LPP).

Similarly, it is unclear to what extent the judgment affects the European Commission's current position that the advice of external counsel who are not admitted to practice in an EEA Member State does not benefit from LPP. While there are strong arguments that the ECHR and the Charter should recognise LPP irrespective of the jurisdiction in which a lawyer is admitted (particularly given the recognition that LPP is based on a right to privacy of legal consultation generally rather than only on the right to a fair trial in any particular jurisdiction), it seems likely that the application of the principles set out in *Orde van Vlaamse Balies* to this question, as well as to the scope of LPP in EU competition proceedings more generally, will need to be further tested and defined in future litigation before the EU courts.

Law Transposing European Whistleblowing Directive is Published

On 15 December 2022, the Law of 28 November 2022 transposing the European Whistleblowing Directive (*See*, this Newsletter, Volume 2022, No. 10) was published in the Belgian Official Journal. The Law enters into force on 15 February 2023 (the ***Law***).

The Law can be consulted here.

CORPORATE LAW

New Directive on Corporate Sustainability Reporting is Published

On 16 December 2022, Directive 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, was published in the EU Official Journal (the ***Directive***).

The Directive forms part of the European Green Deal as it aims to strengthen European companies' transparency on sustainability matters, including environmental rights. However, the Directive also covers social rights, human rights and corporate governance. To this end it imposes reporting obligations on companies' management when it comes to their company's strategy, targets, internal organisation and due diligence processes, as well as the risk to which they are exposed in relation to sustainability matters, including the transition towards a sustainable economy in line with the limits set by the Paris Agreement.

The Directive's scope is far-reaching as it applies to: (i) large EU undertakings, parent undertakings of large groups and large EU public interest entities; (ii) EU small and medium-sized enterprises (SMEs) that are listed on an EU-regulated market; and (iii) non-EU undertakings that have a large subsidiary established in the EU, a subsidiary listed on an EU regulated market and/or a large EU branch. The qualification as a large undertaking, group or branch depends on turnover, the number of employees and, as the case may be, the balance sheet total.

Most provisions (except for several specific previsions that will enter into force at a later stage) entered into force on 5 January 2023.

The Directive is available here.

Commission on Accounting Standards Updates Opinions on Qualification as Branch Offices in Belgium

On 26 October 2022, the Commission for Accounting Standards (*Commissie voor Boekhoudkundige Normen/ Commission des Normes Comptables* - the ***CAS***) updated its opinions on when the presence of a foreign company in Belgium qualifies a Belgian branch office under the Belgian Companies and Associations' Code (*Wetboek van vennootschappen en verenigingen / Code des sociétés et des associations*).

The CAS did not introduce any novelties but simply reiterated the key indicators of what constitutes a branch office of a foreign company. The qualification as a branch office gives rise to several accounting and administrative obligations under Belgian law.

The CAS relies on case-law of the Supreme Court (*Hof van Cassatie / Cour de Cassation*) to posit that the presence in Belgium of a foreign company will cause a branch office of a foreign company to exist if the following three cumulative conditions are satisfied:

- the foreign company carries out commercial activities in Belgium on a regular basis;
- the foreign company is represented by an agent, authorised to represent and bind the foreign company towards third parties (the scope of the representation powers is not relevant); and
- there is a permanent representative in Belgium with whom third parties can have direct contact and who is authorised to represent and bind the foreign company towards third parties. The presence of an intermediary who simply brings the parties in contact or facilitates communication between the third parties and a foreign company, without any representation powers is not sufficient.

Opinion 2022/14 can be found in Dutch here and in French here. Opinion 2022/15 can be found in Dutch here and in French here.

DATA PROTECTION

European Commission Publishes Draft Adequacy Decision for US Data Flows

On 13 December 2022, the European Commission launched the process to formally adopt an adequacy decision for the EU-U.S. Data Privacy Framework (***EU-U.S. DPF***) and published a draft adequacy decision. This is the latest step towards facilitating trans-Atlantic data flows and bringing these into compliance with the General Data Protection Regulation (***GDPR***). The EU-U.S. DPF was developed in response to the 2020 judgment of the Court of Justice of the European Union in *Schrems II* (C-311/18), which invalidated a previous adequacy decision for the then existing EU-U.S. Privacy Shield Framework (*See*, this Newsletter, Volume 2020, No. 7).

Background

An adequacy decision, as provided for under the GDPR, is a decision by the European Commission recognising that a third country offers an adequate level of personal data protection which is comparable to that of the European Union (***EU***). The effect of such a decision is that personal data can flow from the European Economic Area (***EEA***) to the third country subject to an adequacy decision without further conditions or authorisations, thus making data flows to the third country comparable to intra-EU transmissions of data. Once the adequacy decision for the EU-U.S. DPF is adopted, European entities will be able to transfer personal data to participating companies in the United States (***U.S.***), without any need for additional data protection safeguards.

The draft adequacy decision for the EU-U.S. DPF follows a U.S. Presidential Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities of 7 October 2022 (***EO***) (see here for the full text of the EO) and a Rule issued by the U.S. Attorney General on 14 October 2022 establishing a Data Protection Review Court within the Department of Justice. The EO implements commitments made by the U.S. as part of the EU-U.S. DPF announced in March 2022 in a joint statement with the European Commission.

The EU-U.S. DPF and the Draft Adequacy Decision

The draft adequacy decision evaluates the current state of U.S. law in detail and analyses the EU-U.S. DPF principles against those of the GDPR. It concludes that the U.S. ensures a level of protection for personal data transferred from the European Union to certified organisations in the U.S. under the EU-U.S. DPF that is essentially equivalent to the level of protection guaranteed by the GDPR.

Furthermore, the draft adequacy decision concludes that:

1. the effective application of the EU-U.S. DPF principles is guaranteed by transparency obligations and the administration of the DPF by the Department of Commerce,

2. the oversight mechanisms and redress avenues in U.S. law enable mechanisms to address infringements of the data protection rules and offer legal remedies to the data subject,

3. any interference by the U.S. public authorities with the fundamental rights of the individuals whose personal data are transferred from the EU to the U.S. under the EU-U.S. DPF in the public interest, including for criminal law enforcement and national security purposes, will be limited to what is strictly necessary, and that there will be effective legal protection against undue interference.

According to the draft adequacy decision, organisations in the U.S. can join the EU-U.S. DPF if they commit to complying with the privacy obligations, including the requirement to delete personal data when they are no longer necessary, and to ensure continuity of protection when sharing the personal data with third parties. In addition, the Commission notes that the EU-U.S. DPF provides data subjects with various redress mechanisms. Also, a binding arbitration by the EU-US DPF Panel is available in specific circumstances.

DATA PROTECTION

Next Steps and Options Available in the Meantime

The EU-U.S. DPF, with its accompanying Q&A published by the European Commission, is the latest piece of the puzzle, but there are still more steps to be taken to complete the picture. First, the European Data Protection Board (***EDPB***) will deliver its opinion on the draft adequacy decision. Second, the European Commission will seek approval from a committee composed of representatives of the EU Member States. Third, the European Parliament has a right to review the adequacy decision. Once the procedure is completed, the European Commission will be able to formally adopt the adequacy decision for the EU-U.S. DPF. After its adoption, the functioning of the EU-U.S. DPF will be subject to periodic reviews. The adoption of the adequacy decision is expected by mid-2023.

In the meantime, with regard to EU-U.S. data flows, companies can continue using and relying on the existing tools, such as Binding Corporate Rules or Standard Contractual Clauses. All the safeguards that the European Commission has agreed with the U.S. Government in the area of national security will be available for all transfers to the U.S. under the GDPR, regardless of the transfer tool used.

Waiting for Schrems III?

NOYB, the NGO founded by EU privacy activist Max Schrems has already commented on the draft adequacy decision, with Schrems stating that he "*can't see how this would survive a challenge*". Nevertheless, the EU Commissioner for Justice, Didier Reynders, remains hopeful that the adequacy decision will resist a legal challenge which is likely to end up before the CJEU.

Court of Justice of European Union Clarifies Rules on Right to Be Forgotten and Google Search Results

In a judgment of 8 December 2022, the Court of Justice of the European Union (***CJEU***) ruled in case C-460/20 *TU and RE v Google LLC* on the right of individuals to request Google and similar search engines to dereference allegedly inaccurate content from the list of search results, and the obligations of search engines in that regard.

Background

Back in 2015, two managers of a group of investment companies sought to exercise their so-called "right to be forgotten" (known as the "right to erasure" under the GDPR) and requested Google to de-reference results of a search made on their names. The search results linked to articles criticising the group's investment model on the basis of claims which the managers labelled as "inaccurate". They also requested Google to remove photos of them which were shown as 'thumbnails' in the search results.

Google rejected their request, and the managers brought an action in Germany. The case ended up before the German Federal Court of Justice which requested a preliminary ruling from the CJEU.

CJEU Judgment

The German court first asked whether the request to dereference inaccurate content is subject to the condition that the question of the accuracy must be resolved, at least provisionally, by a court decision.

The CJEU noted that when search engine operators are faced with a request from a data subject to exercise their right to erasure, they have to balance the fundamental right of data subjects to privacy and data protection against the fundamental right of internet users to freedom of information. The person requesting de-referencing must establish the manifest inaccuracy

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of the information which he or she asks to be de-referenced. This person cannot be required to produce a judicial decision against the publisher to support his or her claim, as such a requirement would be disproportionate and would undermine the data subject's right to erasure.

On the other hand, the CJEU also clarified that the search engine operator cannot be required to play an active role in trying to find facts which are not substantiated by the request for de-referencing, for the purposes of determining whether that request is meritorious. The search engine receiving the request must only heed requests when the relevant information is "manifestly inaccurate".

Finally, as regards the request to de-reference photos of a natural person from the results of an image search, the CJEU noted that an image search must be considered as an autonomous processing of personal data carried out by the search engine operator which requires a separate weighing of rights. In this balancing exercise, the CJEU held that "*account must be taken of the informative value of those photographs regardless of the context of their publication on the internet page from which they are taken*". As a result, the image must be assessed separately from the website on which it is published. However, the court went on to clarify that the text accompanying the image is still relevant in the assessment and therefore the search engine should take account of: "*any text element which accompanies directly the display of those photographs in the search results and which is capable of casting light on the informative value of those photographs*".

The judgment can be consulted here.

INTELLECTUAL PROPERTY

Court of Justice of European Union Holds that Online Market Place May Be Held Liable for Trade Mark Infringements on Its Platform

On 22 December 2022, the Court of Justice of the European Union (***CJEU***) delivered a judgment in the notorious *Louboutin v Amazon* case (joined cases C-148/21 and C-184/21). The CJEU ruled that Amazon may be held liable for trade mark infringements on its online market place.

Louboutin started in 2019 two cases against Amazon in the French-language Brussels Enterprise Court (*Ondernemingsrechtbank/Tribunal de l'entreprise*) and the District Court of Luxembourg (*Tribunal d'Arrondissement*), claiming that Amazon regularly displayed advertisements for red-soled shoes put on the market without Louboutin's consent and thus infringed Louboutin's trade marks. On 8 and 24 March 2021, both courts referred identical questions to the CJEU on whether Amazon is in breach of Regulation 2017/1001 on the European Union Trade Mark (***Regulation 2017/1001***) when it advertises, offers, stocks and ships counterfeit goods.

The CJEU first repeated the principles which it had already set out in its judgment of 2 April 2020 in *Coty Germany v Amazon* (C 567/18):

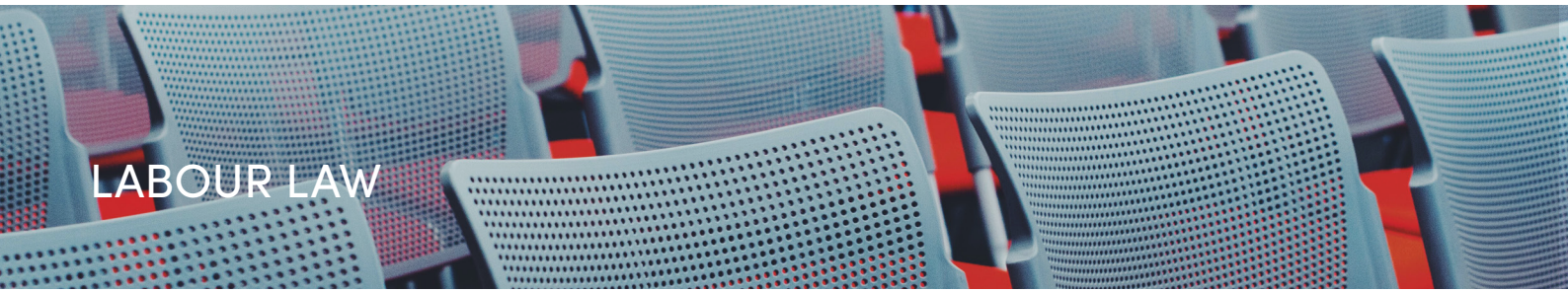
- only a third party which has direct or indirect control over the act constituting the use of an infringing sign is able to cease such use and thus to comply with a court order to that effect;
- the use of a sign identical with, or similar to, the proprietor's trade mark by a third-party, implies, at the very least, that the latter makes use of the sign in the context of its own commercial communication; and
- the operator of an online market place is not liable if it offers storage services to third-party sellers active on that market place, thereby storing goods infringing a trade mark for those third-party sellers provided, however, that it has no knowledge of the infringing nature of the goods and has no intention to offer these goods or place them on the market.

The CJEU then noted that in Coty and in older cases it had not been required to consider the specific situation of Amazon which makes its own offers on its market place but also serves as a conduit for the offers of third-party sellers.

The CJEU then observed that in the case at hand the referring courts had asked whether Amazon's particular situation may create the impression with visitors of the online market place that the advertisements for the goods in question do come not from third-party sellers but from the operator of the market place. In that case, users may be led to believe that it is the operator of the market place which uses the sign in question for its own commercial communications. According to the CJEU, this factual issue will have to be assessed and decided upon by the referring courts.

The CJEU nevertheless added that it is relevant to consider that Amazon uses a uniform method of presenting the offers for sale on its website, displaying both its own advertisements and those of third-party sellers, and exhibiting its own logo as that of a renowned supplier in all of these advertisements. The CJEU also noted that Amazon is offering additional services to the third-party sellers in connection with the marketing of their products, such as storage and shipment. The CJEU concluded that these circumstances may make it difficult for users to distinguish between different categories of sellers and may create the impression in a 'normally informed and reasonably attentive internet user' that it is Amazon which sells, in its own name and for its own account, the Louboutin products.

The CJEU's judgment (available here in French) which, unusually, did not side with the Opinion of its Advocate-General (in this case Advocate-General Szpunar), is good news for trade mark proprietors whose products are sold on online market places as these can now be held directly liable for trade mark infringements by third-party sellers.



LABOUR LAW

Programme Law Creates Set of New Employment Rules

On 30 December 2022, the Programme Law of 26 December 2022 (*Programmawet (I) van 26 december 2022 / Loi-programme (I) du 26 décembre 2022* – the ***Law***) entered into force. It contains several new employment rules most of which entered into force on 1 January 2023.

Temporary Reduction of Employer's Social Security Contributions

Employers will be entitled to a 7.07% reduction of the "total employer's net basis contribution" to the social security scheme (for the first and second quarters of 2023) and partial deferral of payment (for the third and fourth quarters of 2023).

Work Resumption Premium for Recruitment of Employee Emerging from Long-Term Illness

A work resumption premium of EUR 1,000 will apply from 1 April 2023 onwards and will be granted to employers who hire an employee emerging from illness causing the incapacity to work during at least one year.

Back to Work Fund

Employers who terminate the employment contract of an employee afflicted by a long-term illness on the basis of *force majeure* should notify the "*back to work fund*" (*terug naar werk- fonds / fonds retour au travail*) to which they should pay a financial contribution of EUR 1,800.

The date of entry into force of this measure will be determined by a Royal Decree.

Recovery of Unlawfully Paid Unemployment Benefits for Temporary Unemployment

If an employer applies temporary unemployment for its employees, these are entitled to unemployment benefits from the National Employment Office (*Rijksdienst voor Arbeidsvoorzieningen/ Office National de l'Emploi*). The National Employment Office will now be able to recover unlawfully paid unemployment benefits directly from the employer who wrongfully relied on temporary unemployment. Previously, such a recovery was only possible from the employee.

Electronic Attendance Recording for Maintenance and Cleaning Activities

The attendance and rest breaks at work of employees or self-employed contractors in the maintenance and cleaning industries will have to be recorded to fight fraud.

This measure will enter into force on a date determined by Royal Decree, at the latest on 1 January 2024.

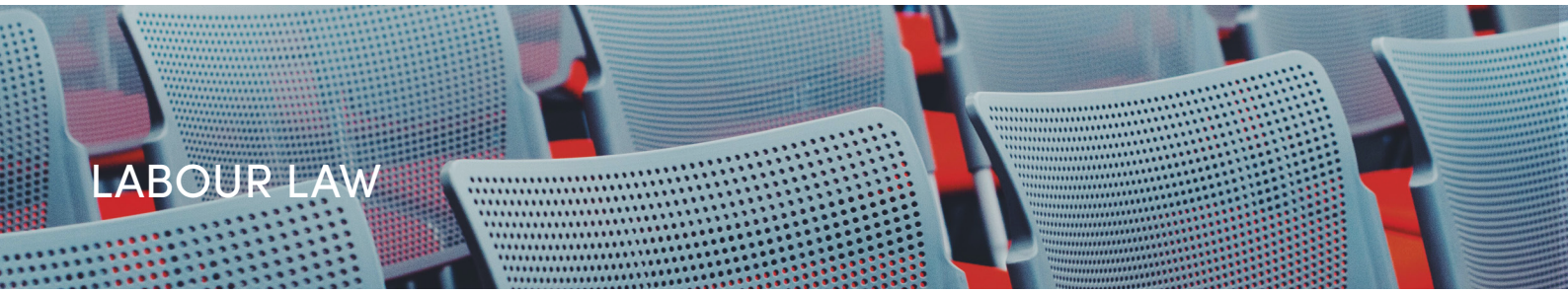
New Statute of Limitations for Social Security Claims in Fraud Cases

The statute of limitations for claims of the National Social Security Office (*Rijksdienst voor Sociale Zekerheid / Office National de Sécurité Sociale*) in case of fraud of the employer will be extended from seven to ten years.

Discontinuance of Reimbursement of Activation Allowance in Case of Collective Redundancy

The employer who proceeds with collective redundancy must establish an employment unit which offers the employees outplacement training. During this period of training, the employees are entitled to what is referred to as an activation allowance.

If the activation allowance exceeded the amount of the legal indemnity in lieu of notice which was due to the employee, the employer could request the National Employment Office to reimburse this additional cost.



LABOUR LAW

The Law has now abolished this possibility on 1 January 2023 for collective redundancies announced after 31 December 2022.

Additional Contributions

The percentage of the special employer's contributions due in the event of unemployment schemes with company allowance (referred to as the bridge pension scheme) will be increased for two years.

Additionally, the special activation contribution due when employers fully or partially exempt employees from performance at work with pay will be increased.

LITIGATION

Court of Justice of European Union Upholds Validity of Jurisdiction Clause Contained in General Terms and Conditions Referred to by Hyperlink

On 24 November 2022, the Court of Justice of the European Union (***CJEU***) delivered a judgment in case C-358/21, *Tilman SA v Unilever Supply Chain Company AG*, which concerns the validity of a jurisdiction clause contained in general terms and conditions (***GTCs***) referred to by a hyperlink (available here). The CJEU held that a jurisdiction clause in GTCs is valid if the contract was concluded in writing, refers to the GTCs, and contains a hyperlink which allows the GTCs to be accessed, downloaded and printed prior to the signing of the contract. It is not necessary for the party against whom the jurisdiction clause operates to have been formally asked to accept the GTCs by ticking a box on the website.

Factual Background and Procedure

On 6 January 2011, Unilever Supply Chain Company AG (***Unilever***) and Tilman SA (***Tilman***) (together, the ***Parties***) concluded a service agreement which specified that it was governed by Unilever's GTCs. These GTCs could be viewed and downloaded through a hyperlink included in the contract and conferred exclusive jurisdiction on the English courts for the resolution of conflicts directly or indirectly arising from the agreement. The GTCs also provided for the applicability of the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Lugano II Convention***).

Following a disagreement between the Parties in relation to a price increase by Tilman, Tilman brought proceedings against Unilever before the Belgian courts. In 2015, the commercial court determined in the first instance that Belgian courts had jurisdiction over the dispute at hand, but that the service agreement was governed by English law. Unilever challenged the Belgian court's jurisdiction, a claim that was upheld by the Liège Court of Appeal in 2020. Tilman appealed to the Supreme Court (*Hof van Cassatie / Cour de Cassation*), alleging an infringement of Articles 23(1)(a) and (2) of the Lugano II Convention.

Article 23(1)(a) of the Lugano II Convention provides that if the parties, one or more of whom is domiciled in a State bound by this Convention, agreed in writing that a court of a State bound by this Convention is to have jurisdiction over any disputes that arose in connection with a particular relationship, that court will have jurisdiction. Article 23(2) of the Lugano II Convention specifies that "[a]*ny communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'*".

In a judgment of 20 May 2021, the Supreme Court submitted a request for a preliminary ruling to the CJEU. The question referred sought to clarify whether the requirements of Article 23(1)(a) and (2) of the Lugano II Convention were satisfied as Tilman had not been asked to accept the GTCs, including the jurisdiction clause, by ticking a box on Unilever's website (*see*, this Newsletter, Volume 2021, No. 6).

Impact of Brexit

Since the GTCs conferred exclusive jurisdiction on the English courts, the CJEU had to examine the temporal scope of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the ***Withdrawal Agreement***). The CJEU held that both the Lugano II Convention and the Brussels I*bis* Regulation were still applicable *ratione temporis*. The case had been brought before 31 December 2020, the expiry date of the transition period provided for in Article 126 of the Withdrawal Agreement, with the result that the interpretation of the Lugano II Convention remained necessary in order to resolve the dispute in the main proceedings.

Reasoning of CJEU

The CJEU analysed whether the jurisdiction clause satisfied the requirements of Article 23(1) and (2) of the Lugano II Convention. In order to be valid, such

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a clause has to be in writing or evidenced in writing. Regarding online clauses, having the possibility of providing a durable record of that clause is sufficient to meet this condition. The CJEU noted that it was not in dispute that the jurisdiction clause formed part of Unilever's GTCs and that express reference to the GTCs had been made in the written contract between the Parties.

Regarding the communication of those GTCs to Tilman, the Court held that the inclusion of a hyperlink leading to the GTCs provided sufficient evidence of this communication, assuming that the hyperlink functioned properly.

As to the absence of a ticking box permitting the acceptance of the GTCs, the CJEU held that such absence was not conclusive as it had been possible to access the GTCs before the signing of the contract and the GTCs had been accepted when the contract was signed. The CJEU noted that the formal requirements of the Brussels I*bis* Regulation and of the Lugano II Convention reflect a wish not to impede commercial practices but to override the effects of contractual clauses that may go unnoticed. The CJEU held that such was not the case in the matter at hand and that the possibility of saving and printing the GTCs before signing the contract was sufficient to satisfy the formal requirements. Accordingly, it concluded that the jurisdiction clause at hand did not breach Article 23(1) and (2) of the Lugano II Convention.

Conclusion

The CJEU's judgment will in all likelihood affect the way businesses integrate their GTCs in their B2B commercial contracts. Many GTCs contain jurisdiction clauses.

Its impact will not only be felt for contracts falling within the scope of the Lugano II Convention, but also for those governed by the Brussels I*bis* Regulation. In practice, the CJEU's ruling will affect all GTCs providing for the jurisdiction of an EU-based court, regardless of the domicile of the parties that concluded them, as well as all GTCs conferring jurisdiction on a court based in the EU, Denmark, Iceland, Norway and/or Switzerland, if at least one of the parties that concluded them are domiciled in a State bound by the Lugano II Convention.

Law on Indication of Remedies and Laying Down Various Provisions in Judicial Matters Published

On 30 December 2022, the Belgian Official Journal published the Law of 26 December 2022 on the indication of remedies and laying down various provisions in judicial matters (*Wet betreffende de vermelding van de rechtsmiddelen en houdende diverse bepalingen in gerechtelijke zaken / Loi relative à la mention des voies de recours et portant dispositions diverses en matière judiciaire*) (the Law). The Law (i) adapts the denominations of the bar associations to reflect the amalgamation of bar associations; (ii) modifies the rules governing the collective debt settlement procedure in order to extend the time limit within which the creditor must communicate his claim to the debt mediator in international situations; and (iii) offers better protection to victims of terrorism. It also introduces the following two important reforms of Belgian procedural law:

International Notification Terms

The Law introduces the so-called "double date" system for international notifications, together with the obligation to notify these by means of registered mail with proof of receipt. As a consequence, the terms related to such notifications will now be computed differently for the issuer of the notification and for its recipient.

For the issuing party, the notification will be considered completed on the date when the documents were delivered to the post office against proof of receipt.

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By contrast, for the receiving party, the term will only start to run on the date when the act was delivered to its domicile or residency, a date which will be certified by the use of registered mail.

This new system aims to strengthen the rights of addressees residing abroad as it ensures that terms only start to run as of the effective date of notification. The Judicial Code provided previously for a theoretical date. Judges will therefore have a duty to verify that the notifying party made its best efforts to reach the addressee.

Broader Duty to Inform on Available Remedies

The Law creates a general duty to inform on available remedies by inserting Article 780/1 in the Judicial Code. Any notification of a judgment in civil matters that triggers the time limit for appeal will have to include an information sheet offering information on: (i) the remedies available against the judgment, and (ii) the time limit for lodging them. The information sheet should also state whether third-party opposition is possible.

Article 780/1 of the Judicial Code entered into force on 1 January 2023. The duty to inform applies to all notifications taking place from that date, even if the judgment was handed down earlier.

The Law can be consulted here. A model information sheet was determined by Royal Decree, which is available here.

Primacy of EU Law Prevents Court from Being Obliged to Comply with Supreme Court Annulment Ruling

On 1 December 2022, the Constitutional Court (*Grondwettelijk Hof / Cour Constitutionnelle;* the ***Constitutional Court***) ruled that Article 435(2) of the Code of Criminal Procedure establishing the special authority of the Belgian Supreme Court (*Hof van Cassatie / Cour de Cassation;* the ***Supreme Court***) is unconstitutional. This provision obliges the court to which the Supreme Court refers a case following the annulment of a judgment to comply with that annulment ruling.

Background

Back in 2017, the Court of First Instance of West-Flanders, Bruges, upheld on appeal a judgment of the Police Court of Bruges. The Supreme Court annulled that judgment for being incompatible with EU law and referred the case to the Court of First Instance of East-Flanders, Ghent. That court referred a question for a preliminary ruling to the Constitutional Court regarding the obligation of having to comply with the annulment ruling of the Supreme Court, as this ruling may have been inconsistent with later case-law of the Court of Justice of the European Union (the ***CJEU***).

The referring court asked the Constitutional Court whether this obligation violates the principle of equality, the right of access to justice and the right to a fair trial because the court cannot adapt to developments in the case law of the highest courts. Also, a judge ruling on a factually identical case would not be bound by this annulment ruling of the Supreme Court.

Judgment Constitutional Court

The Constitutional Court firstly observed that EU law manifestly precludes statutory provisions that would oblige a court to be bound by a judgment of a higher court, when the former believes this judgment to be contrary to EU law.

Secondly, it found that, in the concrete circumstances of the case, the court of first instance was indeed unable to give precedence to EU law, as interpreted by the CJEU in a later judgment, due to Article 435(2) of the Code of Criminal Procedure which requires it to abide by the judgment of the Supreme Court. The consequences are disproportionate, given that the parties cannot rely on the judgment of the CJEU to defend their rights and interests.

The Constitutional Court therefore held that Article 435(2) of the Code of Criminal Procedure violates the principle of equality, read in conjunction with the right of access to justice and the right to a fair trial.

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This is because this provision obliges a court to which the Supreme Court refers a case following an annulment ruling to comply with that ruling even if the lower court considers the ruling to be contrary to EU law.

The judgment is available in Dutch and in French.

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