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VBB on Belgian Business Law

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

Legal 500, 2019

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ARTIFICIAL INTELLIGENCE

Second Draft of General-Purpose Artificial Intelligence Code of Practice Published

On 19 December 2024, the European AI Office (the ***AI Office***), an entity in the European Commission as part of the administrative structure of the Directorate-General for Communication Networks, Content and Technology, published a second draft of the General-Purpose AI Code of Practice (***GPAI COP***). This follows the entry into force of the EU's Artificial Intelligence Act (***AI Act***) on 1 August 2024 (*See*, this Newsletter, Volume 2023, No. 12). A first draft of the GPAI COP was published on 14 November 2024. Each draft reflects the views of around 1,000 stakeholders participating in the Code of Practice Working Groups and Provider Workshops, which include Member State representatives and international observers.

One of the tasks of the AI Office is to facilitate the creation of codes of practice which reflect international developments (Article 56, AI Act). A final version of the GPAI COP is expected to be ready by May 2025 and to come into force in August 2025. Before all this, a third draft GPAI COP is scheduled to be made available in the week of 17 February 2025.

The second draft of the GPAI COP relied on contributions from providers of general-purpose AI models (***GPAI Models***) and addresses the systemic risks posed by such GPAI Models. The AI Act defined rules to ensure that these models are safe and trustworthy. The draft GPAI COP is intended to be a central tool for providers to demonstrate compliance with the AI Act and addresses key issues such as transparency, copyright compliance, and technical and governance-related risk mitigation for systemic risks, as summarised below.

- **Transparency**: Transparency is a central principle of the draft GPAI COP which details the type of information records which providers of GPAI models must keep (and be prepared to provide to the AI Office and/or to downstream providers on request) in order to comply with their transparency obligations under Articles 53(1)(a) and (b) of the AI Act.
- **Rules related to copyright**: Providers of GPAI Models are required to draw up and implement an internal policy to comply with Union law on copyright and related rights in line with the GPAI COP which sets outs proposals on how GPAI model providers may comply with their obligations under Article 53(1)(c) of the AI Act in relation to copyright laws.
- **Taxonomy of systemic risks**: The draft GPAI COP includes a taxonomy of systemic risks such as: (i) cyber offence; (ii) chemical, biological, radiological, and nuclear risks; (iii) loss of control; (iv) automated use of models for AI research and development; (v) facilitation of large-scale persuasion and manipulation; and (vi) large-scale discrimination.
- **Rules for providers of GPAI Models**: For GPAI Models for which systemic risks have been identified, the draft GPAI COP sets out a framework to assess and mitigate them.

COMMERCIAL LAW

Book VI of Belgian Civil Code Entered into Force

On 1 January 2025, Book VI of the Civil Code (*Burgerlijk Wetboek / Code civil*) on extra-contractual/tort liability entered into force. This (re)codification of extra-contractual liability/tort law forms part of the broader modernisation of the Civil Code (*See*, this Newsletter, Volume 2024, No. 6-7 and Volume 2023, No. 3). Book VI applies to harmful events giving rise to liability occurring on 1 January 2025 or later. By contrast, Book VI does not apply to the consequences of acts that occurred before the entry into force of this law.

COMPETITION LAW

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

As already reported (*See*, this Newsletter, Volume 2024, No. 11), the European Commission (the ***Commission***) suffered a new defeat in its protracted effort to obtain damages for the harm which it and other European institutions supposedly suffered as customers of products and services in relation to elevators and escalators installed on their premises. The Brussels Court of Appeal (the ***CA***) dismissed its action on 18 November 2024.

Background

In 2007, the Commission fined Kone, Otis, Schindler, and ThyssenKrupp (the ***elevator suppliers***) for anticompetitive practices involving elevators and escalators (***cartel infringements***) in several countries, including Belgium, where the cartel infringements took the form of market sharing, bid-rigging, and the exchange of business-sensitive information in relation to the supply of elevators and escalators, as well as associated servicing and maintenance contracts. The cartel infringements occurred between 1996 and 2004 (the ***Commission Decision of 21 February 2007***).

In 2008, several European institutions, represented by the Commission, brought an action for damages to seek compensation for harm allegedly incurred in connection with a series of servicing and maintenance contracts before what was then the Brussels commercial court.

On 6 November 2012, in response to a reference for a preliminary ruling from the Brussels commercial court, the Court of Justice of the European Union held that the Commission was entitled to bring an action for damages as a private entity, provided that it would not use for that purpose the confidential information which it had obtained during the public enforcement effort against the cartel.

On 24 November 2014, the Brussels commercial court ruled in favour of the elevator suppliers, dismissing the action brought by the Commission. It found that the Commission had failed to prove the alleged fault, as well as any concrete damages and loss of opportunity.

In 2015, the Commission appealed the ruling of the Brussels commercial court to the CA, again seeking damages. The Commission argued that the cartel infringements established by the Commission Decision of 21 February 2007 constituted fraud and asserted that the EU institutions would not have contracted, or at least would have done so under more favourable terms, had there been no cartel infringements. It also maintained that the cartel infringements constituted a fault pursuant to Articles 1382 and 1383 of the old Belgian Civil Code which resulted in the alleged harm.

As noted, on 18 November 2024, the CA delivered its judgment dismissing the action of the Commission and ruling in favour of the elevator suppliers.

CA Judgment

The CA judgment contains the following noteworthy points:

- The CA considered that the burden of proof lies with the party seeking compensation, *i.e.*, the Commission. The CA required the Commission to demonstrate that it suffered harm causally related to the fault of the elevator suppliers, in accordance with Articles 1382 and 1383 of the old Belgian Civil Code. The CA added that this burden could not be shifted to the elevator suppliers (p. 21, § 4.2.3.1). Additionally, the CA declined to appoint an expert to investigate fault or harm, emphasising that an inquiry by a court-appointed expert could not substitute for the Commission's obligation to provide evidence (pp. 44–45, § 4.2.8).

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- The CA observed that even though the Commission Decision of 21 February 2007 had established infringements of competition law that are tantamount to a fault within the meaning of Articles 1382 and 1383 of the old Belgian Civil Code, these did not necessarily constitute a fault that harmed specific economic operators. The CA went on to state that the Commission had to adduce concrete evidence that, for each of the 20 servicing and maintenance agreements in question (the ***relevant agreements***), the respondents had deceived the EU institutions or had otherwise engaged in pre-contractual misconduct under the umbrella of the cartel (p.32, § 4.2.5.3). According to the CA, the fact that the cartel infringements had an impact on the market does not mean that they also influenced the specific agreements or projects at issue (p.33, §4.2.5.4).

- The Commission relied on a unilateral expert report to prove that the cartel had had a genuine impact on the relevant agreements. The report supposedly showed that the EU institutions had to pay significant surcharges for the servicing and maintenance contracts and presumed that these higher prices had been caused by the cartel infringements. However, the CA held that the figures submitted by the expert did not in themselves prove a concrete link between the general fault (*i.e.*, the cartel) and any specific damage. Other potential causes for possible harm, such as cost structure changes or technological advancements, had not been accounted for. Consequently, the CA considered that the expert report was unable to substantiate the claim (pp. 34–36, § 4.2.5.6).

- As to proof of the damage and the causal link, the CA considered that cartel participants may act with the intention of gaining an advantage but that this does not mean that they were able to achieve such a benefit, and certainly not that this happened at the expense of specific economic operators. The CA noted that the public enforcement of the competition rules against cartels must be distinguished from a private law action for damages. For assessing the infringement in public enforcement and determining fines, criteria such as the duration, size, and nature of the cartel can be decisive. By contrast, private actions require proof of concrete harm to the claimant in the market in which the cartel operated. According to the CA, serious and long-term cartel behaviour is indicative of market distortion but does not amount to proof of concrete harm to a specific economic operator (pp. 37-38, § 4.2.5.7).

    - The fact that the elevator suppliers together had a significant market share on the relevant market and that this combined market share remained stable during the infringement period does not allow for any consequences to be drawn about pricing on the market, let alone prices of individual contracts with the EU Institutions. The CA differentiated price cartels (which directly affect prices) and market-sharing cartels, noting that the latter may not have a direct impact on price formation. In other words, according to the CA, it is possible for a market-sharing cartel to confer benefits on the cartel members, without those benefits entailing any disadvantage for the customers (p. 40, § 4.2.5.7). It added that even the theoretical consideration that a cartel is likely to have an adverse effect on prices cannot lead to a reversal of the burden of proof: it was not for the elevator suppliers to prove that the cartel caused no effect on the prices of the relevant agreements (p. 37, § 4.2.5.7).

    - In the same vein, the CA did not see a possibility to presume the existence of a causal link. The CA held that public claims may presume that the exchange of sensitive data affected the market, but this does not equate to harm to individual customers (p. 40, § 4.2.5.7).

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Assessment

The CA judgment, which is still subject to a possible appeal to the Supreme Court, establishes stringent evidentiary requirements for a party claiming damages as compensation for harm resulting from a competition law infringement. Directive 2014/104 governing actions for damages for infringements of competition law (the ***Directive***) did not apply to this action for damages which had been brought long before the Directive was implemented in Belgian law.

Still, it is not clear whether the Commission would have been helped by the rebuttable presumption provided for by Article 17 (2) of the Directive (which provides that cartel infringements cause harm) or by the requirement imposed on Member States by Article 17 (1) of the Directive that they should not apply a burden or standard of proof that "renders the exercise of the right to damages practically impossible or excessively difficult". Ironically, even the Commission, which should not suffer from the information asymmetry which the Directive sought to combat (recitals 15 and 47 of the Directive), was unable to overcome the CA's high bar.

Belgian Competition Authority Rejects Appeal Over Dismissal of Wide-Ranging Complaint in Vehicle Insurance and Repair Sectors

On 19 November 2024, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – ***BCA***) rejected an appeal by ASBL Carrossiers réunis against the decision of the BCA's prosecution service (*Auditoraat / Auditorat*) to dismiss its complaint against all Belgian motor insurance companies, three professional associations (Assuralia, Brocom and ACAM-VMVM), and Informex, a platform helping insurance companies and experts manage vehicle appraisal processes.

In its complaint, Carrossiers Réunis had accused the insurance sector and Informex of infringing Article IV.1 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* – the ***CEL***) and Article 101 TFEU and alleged that Informex abused its dominant position contrary to Article IV.2 CEL and Article 102 TFEU. This complaint was dismissed on 27 October 2023 (*See*, this Newsletter, Volume 2023, No. 10).

Carrossiers Réunis limited its appeal to one plea, under which it alleged that appraisal contracts concluded between insurance companies and experts restricted competition by object, contrary to Article IV.1 CEL and Article 101 TFEU.

More specifically, Carrossiers Réunis argued that the existence of control and sanction procedures vis-à-vis experts leads to an undervaluation of claims to align with average repair costs, which deprives consumers of full contract benefits. This allegedly distorts competition, as consumers cannot identify the undervaluation or attribute it to the insurer, preventing them from contacting to competitors. Carrossiers Réunis likened the clause to an agreement aimed at limiting output or service quality, amounting to a restriction by object.

The Competition College dismissed the position of Carrossiers Réunis. First, it noted that the applicant's claim relied on the unproven assumption that insurers exert undue pressure on experts to reduce damage assessments, an issue that pertains to the possible anti-competitive effects of the agreement rather than its object. The Competition College was not convinced by the claim that clauses limiting compensation inherently distort competition, as no evidence was provided to show that using an average repair cost systematically undervalues claims or harms consumers, who typically do not bear repair costs directly. The Competition College also dismissed the argument equating the contested clause to agreements restricting production or fixing prices, noting that such issues arise in horizontal agreements. By contrast, the contested clause forms part of a vertical agreement, which invalidates the comparison.

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Secondly, Carrossiers Réunis contended that imposing an average cost target on experts with a monitoring system is unnecessary for insurers to control costs, as less harmful measures can achieve the same result. Carrossiers Réunis added that the contested clause generates no procompetitive effects that would warrant an effects-based analysis. The Competition College dismissed this view, holding that the absence of such procompetitive effects does not automatically cause the agreement to be anti-competitive by object.

Lastly, Carrossiers Réunis attempted to demonstrate that the prosecutor's analysis of the effects of the agreement showed, contrary to the prosecutor's own conclusion, that the agreements are harmful, which should have led the to the classification of the agreement as a restriction of competition by object. However, the Competition College rejected this position and stated that the decision to conduct an effects analysis is based on the assessment that the agreement is not anti-competitive by object.

The decision of the Competition College cannot be appealed.

Belgian Competition Authority Publishes Digital Markets Act Guide for Technology Challengers

On 18 December 2024, the Belgian Competition Authority (***BCA***) published what it calls a "short guide for tech challengers" (the Guide) which discusses the Digital Markets Act (***DMA***) and the benefits which the DMA is intended to bring in terms of innovation and competition in the digital sector by reducing entry and expansion barriers and improving fairness in the dealings of third parties with gatekeepers, the largest digital platforms in Europe. These were designated by the European Commission (the ***Commission***) and form a group which currently includes Alphabet, Amazon, Apple, Booking, ByteDance, Meta, and Microsoft. The DMA regulates several digital services of these platforms earmarked as core platform services.

On 24 June 2024, the BCA had already published a draft of its Guide for comments (*See*, VBB Belgian Antitrust Watch of 25 June 2024). The final version of the Guide largely mirrors this earlier published version and continues to reflect the BCA's desire to become one of the parties that play an active role in its enforcement. This is evidenced by the section dealing with the application and enforcement of the DMA by national competition authorities (***NCAs***) (at p. 15) which is longer than before. When describing the possible functions of NCAs after making a preliminary assessment and/or investigation of indications or complaints received, the Guide distinguishes between three levels of involvement of the NCA: (i) the NCA may transmit relevant information to the Commission; (ii) it may support the Commission in monitoring compliance and supporting market investigations by carrying out inspections, conducting interviews, and collecting information; or (iii) it may pursue its own enforcement actions before referring the file to the Commission for a final decision under the DMA.

The BCA welcomes feedback and inquiries at DMA@bma-abc.be.

CONSUMER LAW

Court of Justice of European Union Clarifies Concept of Producer under 1985 Product Liability Directive

On 19 December 2024, the Court of Justice of the European Union (***CJEU***) held that the concept of "producer" as defined in Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (***1985 Product Liability Directive***) may also include a supplier if the supplier's name, or a distinctive element of the name, corresponds to the name, trademark or other distinguishing feature used by the producer on the product. This implies that a supplier who shares the same or a similar name as the producer may be held liable for defective products in the same way as the product's actual producer (CJEU, 19 December 2024, Case C-157/23, *Ford Italia*, ECLI:EU:C:2024:1045).

Background

An Italian consumer had purchased a Ford vehicle from a dealer supplied by Ford Italia SpA (***Ford Italia***). Ford Italia belongs to the same group of companies as the manufacturer of the vehicle in question, Ford WAG, a company established under German law.

Shortly after purchasing the vehicle, the consumer was involved in an accident during which the airbag of the vehicle had malfunctioned.

The consumer brought an action for damages under the 1985 Product Liability Directive before the District Court of Bologna (***first judge***) against both the dealer and the supplier of the vehicle, *i.e.*, Ford Italia.

Ford Italia argued that it had not produced the vehicle in question and could not, therefore, be held liable as a producer. However, both the first judge and the Bologna Court of Appeal ruled in favour of the consumer, holding Ford Italia liable for the defective product. Ford Italia subsequently appealed to the Italian Supreme Court (the ***referring court***), which decided to stay the proceedings and refer a preliminary question to the CJEU regarding the scope of Article 3(1) of the 1985 Product Liability Directive. This provision reads as follows:

> "'*Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and a****ny person who, by putting his name, trade mark or other distinguishing feature on the product*** *presents himself as its producer*" (emphasis added).

Concretely, the referring court inquired whether the extension of the producer's liability also applies to a supplier which does not physically put its own name, trade mark or other distinguishing feature on the product, but which simply happens to share the same name as the producer whose name was affixed to the product.

CJEU Judgment

In its judgment, the CJEU held that the concept of "producer" in Article 3(1) of the 1985 Product Liability Directive extends to suppliers whose name matches or resembles the name, trademark, or other distinguishing feature displayed on the product, even if the supplier has not physically placed its name, trade mark or other distinguishing feature on it. The CJEU considered that the decisive factor should be the impression given to consumers. In the case at hand, Ford Italia used the similarity between its company name and the name displayed on the product by Ford WAG to present itself to the consumer. This created a level of confidence on the part of that consumer comparable to that inspired by a direct sale from Ford WAG. As such, Ford Italia "*present*[ed] [it]*self as* [the vehicle's] *producer*" within the meaning of Article 3(1) of the 1985 Product Liability Directive.

Accordingly, even though it was Ford WAG that put the "Ford" trademark on the defective vehicle, and not Ford Italia, both Ford WAG and Ford Italia qualify as "producers" under the 1985 Product Liability Directive, and they can be held jointly and severally liable by the injured consumer.

The judgment can be consulted here.

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On 18 November 2024, the *Official Journal of the EU* published a new Product Liability Directive (Directive (EU) 2024/2853 of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC; available here - ***New Product Liability Directive***), which the EU Member States should transpose into their national laws by 9 December 2026. For more information, *see*, this Newsletter, Volume 2024, No. 10).

The CJEU's judgment and its interpretation of the concept of "producer" will remain relevant under the New Product Liability Directive which includes a new definition of a "producer", now called "manufacturer", to align the term with the terminology used in the EU legislative framework for product safety created by Decision No 768/2008/EC of 9 July 2008 on a common framework for the marketing of products. The new definition refers, just as that in the 1985 Product Liability Directive, to persons "*who, by putting their name, trade mark or other distinguishing features on that product, present* [...] *themselves as its manufacturer*" (Article 4(10)(b), New Product Liability Directive).

CORPORATE LAW

New VAT Exemption Regime for Small Businesses Entered into Force

Royal Decree No. 19 of 15 December 2024 (*Koninklijk Besluit nr. 19 van 15 december 2024 met betrekking tot de vrijstellingsregeling van belasting over de toegevoegde waarde in het voordeel van kleine ondernemingen / Arrêté royal n° 19 du 15 décembre 2024 relatif au régime de la franchise de taxe sur la valeur ajoutée en faveur des petites entreprises* - the ***Royal Decree***) replaces the Royal Decree of 29 June 2014 bearing the same title and entered into force on 1 January 2025.

The Royal Decree implements the Law of 21 March 2024 (*Wet van 21 maart 2024 tot wijziging van het Wetboek van de belasting over de toegevoegde waarde betreffende de bijzondere vrijstellingsregeling van belasting voor kleine ondernemingen / Loi du 21 mars 2024 modifiant le Code de la taxe sur la valeur ajoutée en ce qui concerne le régime particulier de la franchise de taxe applicable aux petites entreprises*), amending the VAT Code regarding the special exemption scheme for small businesses and partially transposes Council Directive (EU) 2020/285 of 18 February 2020 (which modified Directive 2006/112/EC of 28 November 2006) on VAT systems for small businesses, and Regulation (EU) No. 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax.

Businesses qualify for this VAT exemption if (i) their annual turnover in Belgium does not exceed EUR 25,000; and (ii) their total annual turnover in the EU does not exceed EUR 100,000.

Directive 2020/285 requires VAT exemption schemes to apply to businesses established in other EU Member States. The Law of 21 March 2024 incorporates this exemption scheme into Articles 56*bis* to 56*undecies* of the VAT Code.

Belgian VAT payers may opt for the exemption scheme in another Member State (even if they are not established in that Member State), and foreign businesses can similarly apply to be made subject to the Belgian scheme.

Specific activities are excluded from the scope of the exemption, such as works related to immovable property and the supply of recovered materials and products.

DATA PROTECTION

Belgian Data Protection Authority Fines Hospital for Security Failures, Lack of Data Protection Impact Assessment

On 17 December 2024, the Litigation Chamber of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) imposed a EUR 200,000 fine on a Belgian hospital for security failures. The DPA opened an investigation after the hospital had notified a ransomware attack and found that the hospital had not implemented adequate security measures and had failed to conduct a Data Protection Impact Assessment (***DPIA***).

Background

In 2021, the hospital notified the DPA of a data breach that resulted from a ransomware attack which compromised the personal data of about 300,000 patients. The hacker, based in Asia, had exploited a vulnerability in the hospital's Microsoft Exchange e-mail server, disabling antivirus software and installing a malicious program to create an "administrator" account with full system privileges. As a result, the hacker gained access to roughly 5 gigabytes of patient data. The attack caused major disruptions, including a three-day closure of the emergency department, and took nearly 12 days to resolve, including restoring staff email accounts.

The DPA's Inspection Service considered the breach to constitute a high risk for patients and launched an investigation. It found that the hospital had failed to conduct a DPIA and had lacked adequate technical and organisational measures at the time of the incident. The Inspection Service transferred the file to the DPA's Litigation Chamber which had to decide whether or not to sanction the hospital for the infringement.

Hospital's Position

In its defence, the hospital argued that the processing operations affected by the breach related to communications between hospital staff and that a DPIA was not required for such communications, as they did not involve sensitive data. It further claimed that a DPIA does not require a specific format and that the DPA erred in concluding that no DPIA had been conducted, as the implemented safety measures were based on risk analyses.

The hospital further argued that its information security policy should be considered part of a broader framework of documents and procedures, collectively representing the organisational and technical measures which it had in place. For instance, it referred to its policy for updating IT security which involved consulting contracts that provides for the monthly monitoring of its systems. Additionally, it emphasised that several measures had been implemented post-breach and that all required security measures were now in place.

DPA Decision

The DPA did not follow the hospital's view that a DPIA was not required because the attack had targeted staff e-mails, rather than patient medical records. Considering that staff would have access to patient data and that the hospital treated over 300,000 patients, the DPA took the position that a DPIA should have been conducted for these processing activities, regardless of whether the data is encrypted during electronic transmission. The DPA furthermore noted that it is for the hospital to decide whether it should conduct several distinct DPIAs for each processing operation, or a single DPIA that covers various connected processing operations.

In addition, the DPA held that a DPIA must include (i) a systematic description of the processing operations and their purposes; (ii) an evaluation of the necessity and proportionality of the processing; (iii) an analysis of the risks to the rights and freedoms of data subjects; and (iv) the measures proposed to address those risks and ensure compliance with the General Data

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Protection Regulation (***GDPR***). According to the DPA, the hospital's documentation did not include these elements and thus failed to meet the requirements of a formal DPIA.

With regard to the security measures (Article 32 GDPR), the DPA noted that the hospital had failed to clarify, in its responses to the Inspection Service or in its submissions before the Litigation Chamber, the specific policy or procedure for updating software security at the time of the breach. The investigation revealed that the vulnerability exploited by the hacker qualified as "critical" due to its ease of exploitation. Consequently, the hospital did not demonstrate effective measures to meet its accountability obligations under Articles 5(2) and 24, GDPR. Furthermore, the DPA observed that Article 32 GDPR requires data controllers to implement technical and organisational measures proportionate to the risks. The hospital fell short in this regard, as it failed to provide adequate employee training and relied on weak passwords to secure patient records, which contain sensitive categories of personal data. While the hospital made post-breach improvements, these came too late to prevent the incident, resulting in a breach of its security obligations.

Assessment

This case serves as a reminder that compliance with GDPR goes beyond theoretical obligations but requires practical and demonstrable measures. Conducting a DPIA is essential when processing large-scale sensitive data. Merely relying on general risk assessments or fragmented policies will not suffice. Organisations must ensure that the DPIA meets all the specified content requirements of Article 35 GDPR, including risk evaluation and mitigation strategies.

The decision can be found here (in French).

Details on conducting a DPIA can be found here: "Data protection impact assessment: more than just a compliance tool".

Belgian Data Protection Authority Clarifies Conditions for Processing Biometric Data at Work

On 6 September 2024, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de Protection des Données* - the ***DPA***) imposed a fine of EUR 45,000 on an employer for unlawfully processing employees' biometric data. The case concerned the use of a biometric time registration system that collected employees' fingerprints without complying with the requirements of the General Data Protection Regulation (***GDPR***).

Background

On 16 March 2020, the employer introduced a biometric time registration system to track employee attendance by collecting fingerprints. One employee lodged a complaint with the DPA, asserting that the data collection was neither voluntary nor sufficiently transparent. The employer argued that the biometric system was necessary for "operational needs," such as workplace safety and fraud prevention. It claimed that employees implicitly consented by not objecting to the system's introduction or requesting alternatives. The employer also noted that the work rules had been amended to include a "GDPR and privacy policy for employees" and added that the system had been discontinued following a report of the Inspection Service of the DPA.

DPA Decision

The DPA found multiple GDPR violations. First, the DPA confirmed that fingerprints qualify as biometric data, which are classified as a special category of personal data under Article 9(1) GDPR. The processing of such data is generally prohibited because of its high risk to the fundamental rights and freedoms of data subjects. Lawful processing must satisfy two cumulative requirements: it must be based on a legal basis under Article 6 GDPR and it must fall under one of the exceptions provided for by Article 9(2) GDPR.

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The employer relied on the (implicit) consent of the employees for the processing, but this consent was considered to be invalid because it had not been freely given. According to the DPA, in an employer-employee relationship, the inherent power imbalance undermines the voluntariness of consent, as employees may fear negative repercussions if they refuse. Even when the goal of processing sensitive information was to ease the burden for employees when registering their time, it is still insufficient to show that consent was freely given.

In addition, the DPA found that the employer had failed to inform employees of all processing purposes. The brochure provided to employees mentioned only time recording and site security and omitted key information required under Article 13 GDPR, including the legal basis for the processing. The DPA also considered the use of fingerprints for time registration disproportionate, because it was of the opinion that there were less intrusive methods, such as time clocks or personal cards, which could have achieved the same objective.

Moreover, the DPA determined that the employer had breached Article 28 GDPR by failing to conduct due diligence on the supplier of the biometric verification software. The employer relied solely on a brochure and verbal assurances, which were regarded as insufficient to meet GDPR standards under Article 28 GDPR. Finally, the DPA found that the employer had violated Article 35 GDPR by failing to conduct a Data Protection Impact Assessment (***DPIA***) despite processing special categories of data for approximately 200 employees.

Assessment

Processing special categories of personal data should be avoided unless truly necessary. More often than not, the DPA will find that less intrusive alternatives can achieve the same goals.

A copy of the decision can be found here (in Dutch).

European Data Protection Board Publishes Opinion on Artificial Intelligence Models

On 17 December 2024, the European Data Protection Board (the ***EDPB***) adopted Opinion 28/2024 on "*certain data protection aspects related to the processing of personal data in the context of AI models*" (the ***Opinion***). This non-binding guidance addresses several issues raised by the Irish Data Protection Authority (***DPA***) and explains (i) when and how an AI model can be considered as 'anonymous'; (ii) how controllers can demonstrate the appropriateness of a legitimate interest as a legal basis for the development and deployment of AI models; and (iii) the impact of the unlawful processing of personal data during the development stage of the model on the later use of such a model.

Anonymous AI Models

The Opinion notes that AI models trained on personal data are not inherently anonymous. For models to be considered anonymous, the DPAs must assess on a case-by-case basis whether the following two conditions are satisfied:

- The likelihood of extracting personal data regarding individuals whose information was used to develop the model should be insignificant.
- The possibility of retrieving such personal data from queries, whether intentionally or not, should also be insignificant.

The burden of proof rests on controllers to demonstrate a model's anonymity through detailed documentation. The Opinion provides a non-prescriptive list of methods that controllers may employ to demonstrate anonymity with regard to several aspects of the AI model:

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- **AI model design**: DPAs should evaluate the approaches taken by the controllers during the development phase, specifically regarding their (i) selection of sources to train the model (for example, the appropriateness of the selection and the relevance of the chosen sources); (ii) data preparation (for example, the data minimisation measures taken); (iii) methodological choices regarding training; and (iv) measures regarding outputs of the model.

- **AI model analysis**: DPAs should assess the robustness of the model regarding anonymisation, for example by ensuring that the design has been developed as planned and is subject to effective engineering governance.

- **AI model testing and resistance to attacks**: DPAs should consider the scope, frequency, quantity, and quality of tests conducted by the controller on the model. This includes testing against known attacks such as attribute and membership inference, exfiltration, regurgitation of training data, model inversion, and reconstruction attacks.

- **Documentation**: The Opinion observes that the general obligation of documentation under the GDPR also applies to any processing that would include the training of an AI model. If there is a high risk to the rights and freedoms of data subjects, this obligation also entails the conducting of a data protection impact assessment.

Legitimate Interest as Legal Basis

The Opinion notes that there is no hierarchy between the legal bases provided for by the GDPR, and controllers must identify the appropriate legal basis for their processing activities. If a controller wishes to rely on legitimate interests to develop and deploy an AI model, it must apply the standard three-step test to confirm the validity of this basis:

- Identifying the legitimate interest pursued by the controller or a third party: the interest may be regarded as legitimate if it is lawful, clearly and precisely articulated, and real and present (not speculative). Examples of such interests include developing a conversational agent to assist users or using AI to enhance cybersecurity.

- Demonstrating the necessity of the processing for the legitimate interest pursued: This step involves assessing whether the processing activity is necessary for the purpose of the legitimate interest pursued and whether there is no less intrusive way of pursuing it. DPAs should pay particular attention to the amount of personal data processed and whether it is proportionate to pursue the interest at stake.

- Balancing the interest against data subjects' rights and freedoms: the Opinion requires evaluating, on the one hand, the interests, fundamental rights, and freedoms of the data subjects, and, on the other, the interests of the controller or a third party. The specific circumstances of the case must then be carefully examined to demonstrate that the legitimate interest is an appropriate legal basis for the processing activities in question. The Opinion highlights that the development and deployment of AI models may raise serious risks to rights protected by the EU Charter of Fundamental Rights, such as the right to protection of personal data. For example, risks could emerge when personal data are scraped without the data subjects' knowledge or against their wishes. Large-scale and indiscriminate data collection by AI models during the development phase may foster a sense of surveillance among data subjects. The Opinion also emphasises the importance of data subjects' reasonable expectations in the balancing test. Relevant factors include whether the personal data was publicly available, the relationship between the data subject and the controller, the context in

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which the data was collected, and the potential future uses of the model. The Opinion also recommends that organisations take additional measures when they collect training data through web scraping. For instance, they should consider excluding data content from publications that might include personal data entailing risks for particular persons or groups.

If the balancing test reveals that the processing should not occur because of the negative impact on individuals, controllers may nonetheless implement mitigating measures to address these shortcomings. Technical safeguards include pseudonymisation, masking, or substituting real data with synthetic data in the training set.

Controllers could also implement measures facilitating the exercise of individual rights, for example, by observing a reasonable period between data collection and use, proposing an unconditional 'opt-out', or allowing data subjects to exercise their right to erasure beyond legal requirements.

Impact of Unlawful Processing

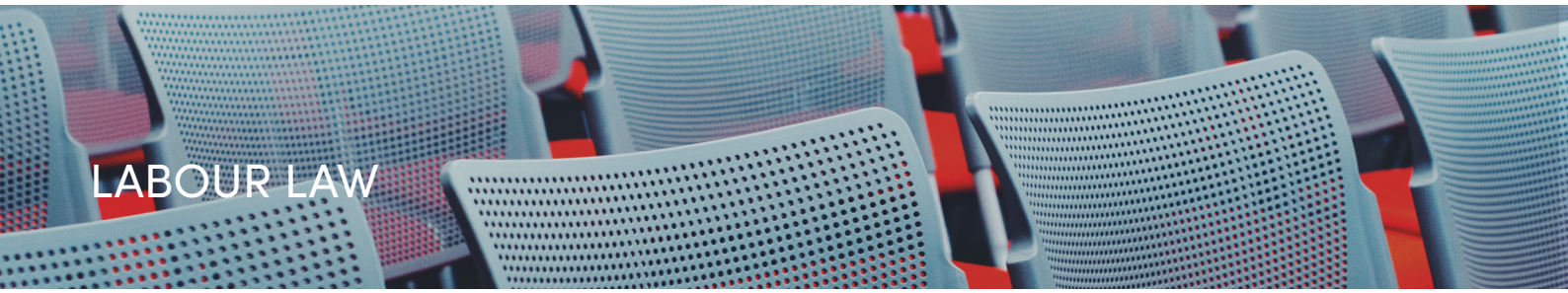
The Opinion notes that DPAs enjoy discretionary powers when assessing a potential infringement and choosing appropriate, necessary and proportionate measures. Nonetheless, the EDPB considers three scenarios involving the development and deployment of AI models to guide the DPAs.

In the first scenario, *a controller unlawfully processes personal data to develop the model, the personal data is retained in the model, and it is subsequently processed by the same controller* (for instance in the context of the deployment of the model). In such a case, the DPA's corrective measures on the initial processing could affect subsequent use. Whether the development and deployment phases serve separate purposes, and how the initial illegality impacts the lawfulness of subsequent processing, must be assessed case by case.

In the second scenario, *a controller unlawfully processes personal data to develop the model, the personal data is retained in the model and is processed by another controller in the context of the deployment of the model*. Here, the EDPB indicates that DPAs should consider whether the second controller conducted an appropriate assessment to ensure that the AI model was not developed by unlawfully processing personal data. The depth of the assessment depends on the risks posed to data subjects by the deployment phase.

In the third scenario, *a controller unlawfully processes personal data to develop the model, then ensures that the model is anonymised, before the same or another controller initiates another processing of personal data in the context of the deployment*. In that case, the GDPR would apply in relation to the deployment activities. Accordingly, the lawfulness of the processing carried out in the deployment phase should not be impacted by the unlawfulness of the initial processing.

The EDPB's opinion can be consulted here.



LABOUR LAW

Changes in Information and Consultation Procedure towards Employees in case of Transfer of Undertaking

On 17 December 2024, the social stakeholders concluded Collective Bargaining Agreement (*Collectieve Arbeidsovereenkomst / Convention Collective de Travail*) No. 32/8 (CBA No. 32/8) adding a new chapter "V" to CBA No. 32bis which aims to actively involve the identified transferee (the new employer) in the information and consultation procedure that applies to a transfer of an undertaking (*overgang van onderneming / transfert d'entreprise*).

The changes formalise Recommendation No. 2,395 of 19 December 2023 of the National Labour Council (*Nationale Arbeidsraad / Conseil National du Travail*) and enter into force on 1 February 2025 for an indefinite duration.

Information Shared with Transferee

In the case of a transfer of undertaking (*i.e.*, a transfer of an economic grouping or a set of organised resources that retains its identity after the transfer and with the objective of pursuing an economic activity), CBA No. 32/8 introduces the right for employee representatives or individual employees to request that the transferor (the former employer) should communicate the content of the information and consultation procedure to the transferee.[1]

For the employee representative bodies that may exist on the part of the transferor, the relevant content is that created pursuant to the information and consultation obligations under CBA No. 9, CBA No. 5, and the Law on the well-being of workers of 4 August 1996. This concerns the mandatory information about the economic, financial and technical factors at the origin of the transfer, along with the transfer's economic, financial and social consequences, as well as the consultation of the employee representatives on the impact of the transfer on employment, the work organisation and the general employment policy.

In practice, this means that available information and documentation must be shared by the transferor with the transferee (*e.g.*, minutes of meetings, presentations, changes to the employment conditions and the like).

If employee representative bodies were established on the part of the transferor, the individual employees can take the initiative to request that the following information should be shared with the transferee:

- the date of the envisaged transfer;
- the reasons for the transfer;
- the legal, economic and social consequences of the transfer for the employees; and
- the measures taken in relation to the employees.

The transferee must receive this information in a timely manner prior to the transfer.

Presentation of Transferee to Employees

In addition, the employee representatives or individual employees can request that the transferee should present itself to the employees during the information and consultation procedure. This will give staff the opportunity to raise questions regarding future employment (*e.g.* in relation to the harmonisation of employment conditions or practical questions).

Once requested by the employee representatives or individual employees, the transferor must invite the transferee to oblige prior to the transfer. Even if the transferee does not react to the invitation to present itself or refuses to do so, this does not free the transferor from its obligation to share the content of the information and consultation procedure with the transferee.

1 A consultation procedure only applies if employee representative bodies were established.

LITIGATION

Court of Justice of European Union Holds that EU Law Does Not Preclude National Courts from Hearing Cases at Last Instance In Which They Also Act as Defendant

On 19 December 2024, the Court of Justice of the European Union (the ***CJEU***) delivered a judgment in case C-369/23, *Vivacom Bulgaria EAD v. Varhoven administrativen sad, Natsionalna agentsia za prihodite*, confirming that the second subparagraph of Article 19(1) of the Treaty of the European Union (***TEU***) and the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (the ***Charter***) do not preclude a national court from hearing, at last instance, a case in which the same court acts as a defendant. The CJEU added that necessary measures should be taken to dispel any reasonable doubt regarding the independence and impartiality of the court concerned.

Background

Between 2007 and 2008, ***Vivacom*** Bulgaria EAD (Vivacom; previously, BTK Mobile EOOD) issued invoices to two Romanian companies for telecommunications services, treating them as supplies of services located in Romania, and therefore not subject to VAT. In 2012, the Bulgarian tax authorities (the ***NAP***) issued a tax adjustment notice, reclassifying these as supplies of goods located in Bulgaria and therefore imposing the payment of VAT on these supplies. The Bulgarian Supreme Administrative Court (the ***Supreme Administrative Court***) eventually held that the transactions were supplies of goods located, and therefore taxable, in Bulgaria.

Vicacom later brought an action seeking damages from the NAP and the Supreme Administrative Court for breaching EU Directive 2006/112/EC, as interpreted by the CJEU in case *Lebara* (C-520/10). The first-instance court requalified the operation underlying the case as a supply of services instead of a supply of goods, but dismissed Vivacom's claim for damages, finding no significant EU law breach and no change to the outcome even if the transactions had been classified differently.

Vivacom appealed that judgment to the Supreme Administrative Court, the competent judicial body according to Bulgarian law. In this context, Vicacom raised concerns about the impartiality of the Supreme Administrative Court which was also the defendant in that instance.

At Vivacom's request, the Supreme Administrative Court referred the case to the CJEU for a preliminary ruling, inquiring whether EU law stands in the way of national legislation under which an action for damages caused by an infringement of EU law by a court must be examined by that same court at last instance.

CJEU Judgment

In its judgment, the CJEU first established that, in a case in which the presence of the same court both as a defendant of which the liability must be assessed and as the competent court, only the question of the impartiality of the court, and not its independence, was relevant.

Under the "external" requirement of independence, the court concerned should exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever. Separately, the "internal" requirement of impartiality refers to the need for the court to maintain an equal distance from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings.

The CJEU went on to state that, since the case related to the liability of the State and not that of the individual judges, the fact that the competent court also acted as a defendant in the same instance did not, as such, suffice to violate the requirement of impartiality.

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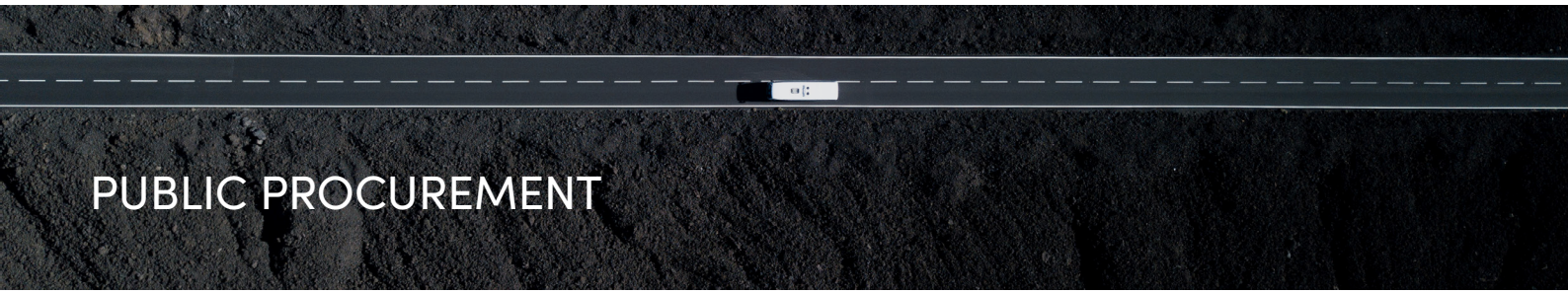
In addition, the CJEU held that it could not observe, in the case at hand, elements showing that the judges of the Supreme Administrative Court did not enjoy guarantees capable of ensuring their impartiality and independence. When deciding on this question, the CJEU observed in particular that the remuneration and conditions of employment of the judges of the Supreme Administrative Court were not dependent on the payment of damages by that court.

The CJEU added that, in accordance with the case-law of the European Court of Human Rights, the impartiality of a court could not be guaranteed when the same judges were to rule on whether they made errors of interpretation or application of the law in an earlier judgment. However, in the case at hand, the CJEU noted that the panel of judges appointed to decide on the liability of the Supreme Administrative Court was different from those who delivered the original judgment.

On that basis, the CJEU held that Article 19(1) TEU and the second paragraph of Article 47 of the Charter do not preclude a national court from hearing, at last instance, in the context of an appeal on a point of law, a case in which that court has the status of defendant and relates to the liability of the State for an alleged infringement of EU law on account of a judgment delivered by that court. The CJEU added the condition that the national legislation and the measures taken to deal with that case are such as to dispel any reasonable doubt in the minds of individuals as to the independence and impartiality of the court concerned.

The full judgment is available here.



PUBLIC PROCUREMENT

New Rules On Suspension Proceedings Before Council Of State Enter into Force

As part of the overall and long-running reform of the Council of State, the suspension proceedings have now been amended by the Royal Decree of 19 November 2024 on suspension proceedings and amending various Decrees on proceedings before the administrative litigation section of the Council of State (*Koninklijk Besluit van 19 november 2024 tot bepaling van de rechtspleging in kort geding en tot wijziging van diverse besluiten betreffende de procedure voor de afdeling bestuursrechtspraak van de Raad van State/ Arrêté royal du 19 novembre 2024 déterminant la procédure en référé et modifiant divers arrêtés relatifs à la procédure devant la section du contentieux administratif du Conseil d'Etat*). The Royal Decree of 19 November 2024 was published in the Belgian Official Journal of 2 December 2024 and entered into force on 1 January 2025.

At the same time, the Royal Decree of 5 December 1991 governing the same matter was abolished. However, applications for suspension or for provisional measures submitted before 1 January 2025 will continue to be governed by the Royal Decree of 5 December 1991.

Mandatory Use Of Electronic Procedure

Applications for suspension or for provisional measures must be submitted and processed via the electronic procedure when the parties are represented or assisted by a lawyer or when they are administrative authorities (Article 14(1), 1, of the Coordinated Laws on the Council of State). For other parties, the use of the electronic procedure remains optional. For outside counsel, the use of the secured electronic platform e-ProAdmin of the Council of State therefore becomes mandatory.

Submitting Application For Suspension Or For Provisional Measures Prior To Application For Annulment

An application for suspension or for provisional measures may now be submitted prior to submitting an application for annulment (Article 4 of the Royal Decree of 19 November 2024).

Before 1 January 2025, an applicant party could only ask for a temporary suspension of a challenged decision or for provisional measures either in its application for annulment against the challenged decision or in a later application, before the Auditor (a court advisor) had submitted his/her report.

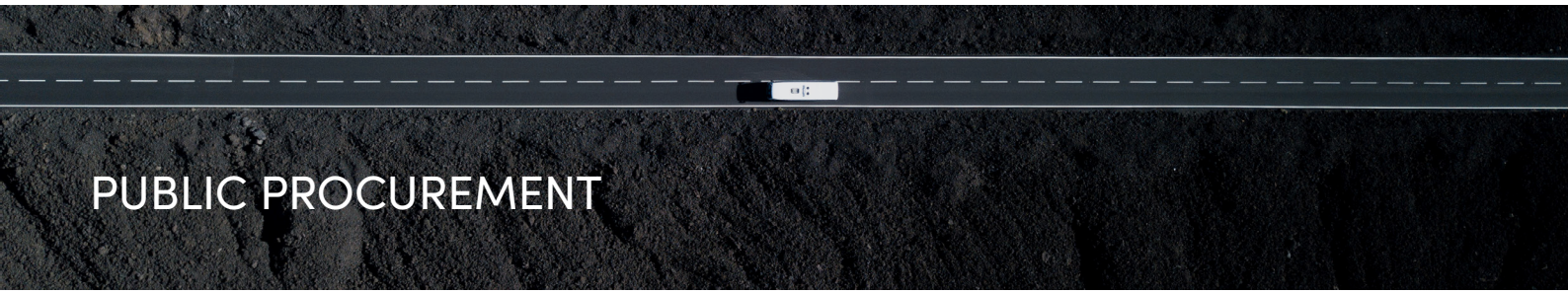
Furthermore, applications for suspension or for provisional measures must now also explicitly include a telephone number or e-mail address to allow the Council of State to contact the applying party quickly. This requirement is particularly important for parties who are not represented by a lawyer, as practice has shown that it may prove difficult to reach such parties promptly, for example to ask for clarifications or to schedule a hearing.

Procedural Calendar Suspension Proceedings

Suspension proceedings will now be conducted in accordance with a procedural calendar which will be adopted within 7 working days from payment by the applicant of the registry fees.

The procedural calendar specifies:

- the latest date for the submission of the complete administrative file;
- the latest date for the submission of the note containing observations of the opposing party;
- the third parties concerned and the latest date for the submission of their application to intervene; and
- the date and time of the hearing, which must be held within 60 days of the date of the order determining the procedural calendar.



PUBLIC PROCUREMENT

Clarification Term "Working Day"

It has now been clarified that in all types of proceedings, the term "working day" is "*any day that is not a Saturday, a Sunday or a public holiday*".

This brings the definition used by the Council of State in line with the definition of "working day" in Article 1.7(3) of the new Belgian Civil Code.

"Public holidays" are the 10 days referred to in Article 1 of the Royal Decree of 18 April 1974 implementing the Law of 4 January 1974 on public holidays, *i.e.*, 1st January, Easter Monday, 1st May, Ascension, Pentecost Monday, 21st July, Assumption, All Saints' Day, 11th November and Christmas.

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