April 2024

# VBB on Belgian Business Law

## Issue Highlights



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

Legal 500, 2019

**Topics covered in this issue**





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# COMMERCIAL LAW

***Federal Chamber of Representatives to Review Book 7 of New Civil Code on Special Contracts***

On 16 April 2024, a private members' bill providing for the insertion of book 7 "Special contracts" in the Civil Code (*Wetsvoorstel houdende invoeging van boek 7 "Bijzondere contracten" in het Burgerlijk Wetboek / Proposition de loi insérant le livre 7 "Les contrats spéciaux" dans le Code civil*) was submitted to the Chamber of Representatives (***Book 7***; available here). This marks a new step in the reform of the Civil Code, following the adoption of Book 6 on tort law on 1 February 2024 (See, this Newsletter, Volume 2024, No. 2).

Book 7 governs a series of specifically regulated agreements and seeks to (i) simplify the current rules; (ii) restructure the Civil Code to improve its readability; (iii) align various rules to increase their coherence; and (iv) draw inspiration from other regimes applicable in other countries and in international conventions. Book 7 complements the general contract law rules contained in Book 5 of the Civil Code, which apply fully to all special contracts unless otherwise provided for in Book 7.

Book 7 covers the following contracts:

- Sale agreements (*koop / vente*) and swaps (*ruil / échange)*;
- Contracts relating to the use of a good: lease agreements (*huur / bail*) and loan for use agreements (*bruikleen / prêt à usage*);
- Contracts relating to a service: contracting agreements (*aannemingscontract / contrat d'entreprise*), proxy agreements (*lastgeving / mandat*); and deposit agreements (*bewaargeving / dépôt*);
- Agreements for the loan of replaceable goods (*lening van een vervangbaar goed / prêt relative à un bien fongible*) – these provisions do not yet form part of Book 7;
- Contracts whose outcome is left to chance (*kanscontracten / contrats aléatoires*): life annuity agreements (*lijfrente / rente viagère*); game and betting agreements (*spel en weddenschap / jeu et pari*) ; and
- Contracts relating to litigation: escrow agreements (*sekwester / séquestre*); and settlement agreements (*dading/transaction*).

While Book 7 does not change the foundations of Belgian contract law, some important developments are nonetheless worth mentioning.

*Alignment of Different Sale Agreements*

Several sets of rules governing the sale of goods currently coexist under Belgian law. The most important categories are (i) the regime applicable to the international sale of goods; (ii) the regime applicable to consumer sales; and (iii) the original – and now default – regime of the old Civil Code. The rules governing the conformity of the goods purchased; the hidden defects; and the time limits to notify the seller and bring an action in case of infringement are not the same.

By contrast, following the reform, there will be a single obligation to deliver a good in conformity with what was agreed. As a result, the sanctions applicable to the various types of defects will be harmonised. Moreover, remedies will no longer be refused for the simple reason that the action was based on an incorrect ground given the challenged defect.

Moreover, the time limits applicable to the different types of sale of goods will be made uniform. Pursuant to Book 7, the buyer will have to notify any conformity defect to the seller within a reasonable time period that reflects the nature of the good sold. The statute of limitations for bringing an action against the seller will be two years from the discovery of the defect.

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Moreover, the guarantee will be limited to defects appearing within ten years from the date of delivery of the goods.

*Common Regime for Contracts Involving Service*

While the old Civil Code differentiated between contracting, proxy and deposit agreements, Book 7 introduces the general concept of a contract involving a service which will be governed by a common set of rules. Accordingly, the specific contract regimes in this area will be abolished for the most part. There will be exceptions for proxy agreements; the liability of hotel keepers concerning the property of their guests; and construction agreements related to immovable assets.

Moreover, the concept of defect and the limits applying to service agreements will be aligned with those applicable to sales agreements.

*Right to Renegotiate Agreement Because of Unexpected Circumstances*

Following the introduction of the general category of hardship in Belgian law (*See*, this Newsletter, Volume 2022, No. 4), which allows contract parties to renegotiate their contract in case of an unexpected change of circumstances, Book 7 proposes to create a specific right to renegotiate the contract due to unexpected circumstances which already existed at the time of the conclusion of the contract but of which the parties were not aware and could not have reasonably been aware. Contrary to hardship, which applies to any type of agreement, this right to renegotiate would apply specifically to contracts involving a service for a fully or partially fixed price.

When applicable, this right will allow the parties to renegotiate the agreement or, in the event that the negotiations fail, to request the court to adapt the agreement, with a view to restoring its equilibrium and reflecting what the parties would have reasonably negotiated had they considered the unexpected circumstances. If appropriate, a court can also terminate the agreement.

Given the dissolution of the federal Parliament and the federal elections scheduled on 9 June 2024, it is unclear when the federal Chamber of Representatives will consider the adoption of Book 7.

# COMPETITION LAW

***Belgian Competition Authority Clears Acquisition by Colruyt Group of 54 Louis Delhaize Group Outlets***

On 17 April 2024, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) authorised the acquisition by retailer The Colruyt Group of 54 outlets run by competitor Louis Delhaize Group under the Louis Delhaize, Match or Smatch logos.

The transaction initially covered 57 outlets. However, buyer and seller decided to remove 3 outlets from the scope of the transaction after it became clear that there were competition problems in the catchment areas of these specific shops (which are located in Galmaarden, Munkzwalm and Nieuwpoort).

According to the BCA, the parties preferred to sacrifice these outlets rather than undergo an in-depth review of their transaction.

***Damien Neven Becomes Deputy President of Belgian Competition Authority***

On 26 April 2024, the federal Council of Ministers appointed Chloé Binet and Damien Neven as new members of the competition college (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***). The competition college is the decision-making body of the BCA which acts in major cases based on an investigation carried out by a competition prosecutor. Mr. Neven was also designated as the deputy President of the BCA which implies that he will preside over the competition college if the President, who was himself appointed to his post only two months ago (*See*, this Newsletter, Volume 2024, No. 2), is unavailable or has to recuse himself because of a conflict of interest. This is expected to happen if and when the alleged cartel regarding the distribution of newspapers, currently under investigation, reaches the competition college.

The new appointments inject a further dose of both governmental experience and competition expertise in the BCA. Mr. Neven has been the Chief Economist of the European Commission's Directorate-General for Competition (DG Comp) between 2006 and 2011 and is a prominent academic, at present Professor of Economics at The Graduate Institute, Geneva. He joins several other former DG Comp officials at the BCA, including chief prosecutor Damien Gerard and fellow competition college member Luc Gyselen.

Ms. Binet is a young but experienced competition lawyer with a PhD in EU competition law earned from the Université Catholique de Louvain.

# CONSUMER LAW

***European Parliament Greenlights Common Rules Promoting Repair of Goods While Belgium Adopts Law of its Own***

On 23 April 2024, the European Parliament formally adopted the proposed Directive on common rules to promote the repair of goods for consumers (the ***Repair Directive***). The Repair Directive is currently awaiting formal approval by the Council of the European Union, after which it will be published in the EU Official Journal. The European Parliament's press release is available here.

Meanwhile, on 2 May 2024, the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) published the Law of 17 March 2024 on promoting the repairability and longevity of goods (*Wet van 17 maart 2024 ter bevordering van de herstelbaarheid en de levensduur van goederen / Loi du 17 mars 2024 sur la promotion de la réparabilité et de la durabilité des biens*; the ***New Law***). The New Law is available here in Dutch and here in French.

For more information on the content and implications of the Repair Directive and the New Law, we refer to the January 2024 edition of this Newsletter (*See*, this Newsletter, Volume 2024, No. 1).

***Supreme Court Affirms Limits of General Tort Liability in Product Liability Cases***

On 14 March 2024, the Supreme Court held that producers and suppliers of defective products can only be held liable under the Law of 25 February 1991 on liability for defective products (*Wet van 25 februari 1991 betreffende de aansprakelijkheid voor producten met gebreken / Loi du 25 février 1991 relative à la responsabilité du fait des produits défectueux*; ***Product Liability Law***) and 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 (***Product Liability Directive***) when the infringement is exclusively related to the Product Liability Law and the Product Liability Directive. This holds true even if general tort law liability offers a higher level of consumer protection.

*Background*

A "Thermomix TM31" cooking appliance (***Product***) caused burns to a child during its use. On 19 August 2019, the parents of the child (the ***Defendants***) brought a claim for damages against the producer and supplier of the product (the ***Applicants***) before the Court of First Instance of West-Flanders, division Kortrijk. By judgment of 8 March 2021, this Court dismissed the claim of the Defendants.

On 29 April 2021, the Defendants appealed the first instance judgment to the Ghent Court of Appeal. On 13 October 2022, the Court of Appeal held the Applicants jointly liable for the damages sought, based on their fault under Articles 1382 and 1383 of the old Civil Code for placing a defective product on the market.

The Applicants then appealed the appellate judgment to the Supreme Court.

*Supreme Court Ruling*

Referring to the recitals and provisions of the Product Liability Directive and to the established case law of the Court of Justice of the European Union, the Supreme Court determined that, when the sole infringement is the act of placing a defective product on the market, the victim can only seek redress from the producer and/or the supplier within the confines of the liability framework offered by the Product Liability Law. This principle stems from the core objective of the Product Liability Directive to harmonise national liability frameworks concerning damage inflicted by defective products, thereby facilitating the internal market and safeguarding fair competition among market participants.

The Product Liability Law does not preclude a tort claim under Articles 1382 and 1383 of the old Civil Code. However, such a claim should be based on a different legal ground, *i.e.*, a fault that extends beyond the mere act of placing a defective product on the market.

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In the case at hand, the Court of Appeal had found the Applicants to be liable for the harm caused by the defective Product, solely relying on Articles 1382 and 1383 of the old Civil Code and without assessing whether the conditions of the Product Liability Law were satisfied. As a result, the Supreme Court quashed the judgment of the Court of Appeal on this point for failure to substantiate its decision in accordance with the law and referred the case to the Antwerp Court of Appeal for a reassessment.

The judgment of the Supreme Court is available here (in Dutch).

# DATA AND TECHNOLOGY

***Federal Parliament Adopts NIS2 Law and Increases Cybersecurity Requirements for Belgian Companies***

On 18 April 2024, the federal Parliament adopted the NIS2 law (the ***NIS2 Law***), transposing Directive (EU) 2022/2555 on measures for a high common level of cybersecurity across the Union (***NIS2***) (*Wet van 26 april 2024 tot vaststelling van een kader voor de cyberbeveiliging van netwerk- en informatiesystemen van algemeen belang voor de openbare veiligheid/ Loi du 26 avril 2024 établissant un cadre pour la cybersécurité des réseaux et des systèmes d'information d'intérêt général pour la sécurité publique*). According to some estimates, more than 2,400 organisations will soon have to comply with stricter cybersecurity rules.

*NIS2 Directive*

On 16 January 2023, NIS2 Directive entered into force and repealed the original Network and Information Systems Directive (***NIS1***). The revised Directive sought to further harmonise network and information security across the Member States. In addition, NIS2 steps up cybersecurity resilience throughout the European Union by:

- *Expanding its scope of application*: NIS2 extends its coverage to 18 sectors, which is significantly more than NIS1 which only applied to "Operators of Essential Services" and "Digital Service Providers". The sectors covered by NIS2 are divided into two categories:
    - Sectors of high criticality - This includes energy, transport, banking, financial market infrastructure, health, drinking water, wastewater, digital infrastructure, ICT service management, public administration, and space. Entities in these sectors are labelled *Essential Entities*.
    - Other critical sectors - This covers postal and courier services, waste management, chemicals, food, manufacturing, digital providers, and research. Entities in these sectors are *Important Entities*.

  Member States can designate specific entities as *Essential* or *Important* based on their criticality, regardless of size. But the classification of an entity as Essential or Important depends first and foremost on its size. Essential Entities are typically large companies with over 250 employees or EUR 50 million in annual turnover. Important Entities are generally medium-sized companies with at least 50 employees and EUR 10 million in turnover.

- *Risk management*: Entities must implement appropriate cybersecurity measures following an "all-hazards" approach tailored to specific risks, size, likelihood of incidents, and potential impact. This covers incident handling, supply chain security, cryptography and more. Management bodies must approve and oversee these measures and can be held personally liable for failures to comply.

- *Reporting obligations*: if a significant incident causes a severe disruption, financial loss or considerable damage, affected entities must submit an early warning within 24 hours, an incident notification within 72 hours, and a final report within one month to the competent authorities. The sectoral Computer Security Incident Response Teams (***CSIRTs***) will handle the reporting process for incidents such as cyberattacks, data breaches, system failures or disruptions to the provision of the entity's services.

*Implementation in Belgium*

The adoption of the NIS2 Law marks a significant evolution in cybersecurity regulation in Belgium. The Law designates the relevant authorities in charge of the implementation and enforcement of the new rules in the country:

- The Centre for Cybersecurity Belgium (***CCB***) will be the central coordination point.

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- Sectoral authorities will oversee each critical sector. For example, the Financial Services and Markets Authority (***FSMA***) will supervise the financial sector.

- The sectoral Computer Security Incident Response Teams (***CSIRTs***) will handle the incident reporting process, referred to above.

The NIS2 Law regulates the supervision of the affected firms by the supervisory authority. Essential entities can face fines of up to EUR 10 million or 2% of their total global annual turnover, while important entities may be subject to fines of up to EUR 7 million or 1.4% of their worldwide turnover.

As part of NIS2, Belgium must establish a national cybersecurity strategy, which may include measures to enhance cybersecurity across sectors, promote awareness, and foster cooperation. This strategy could affect a broader range of organisations beyond those directly subject to the NIS2 Law, and the government is expected to consult with industry stakeholders in developing the strategy.

The implications for companies falling within the scope of the Belgian NIS2 Law are therefore substantial. Non-compliance with the new cybersecurity requirements and incident reporting obligations may result in severe sanctions, not only for the organisations themselves but also for their management. Company directors and senior managers can be held personally liable for failings in their company's cybersecurity measures and, in extreme cases, even face temporary professional bans prohibiting them from holding leadership positions.

The NIS2 Law offers a framework for network and information security that organisations can use to structure their information security policy. At the same time, organisations in critical sectors will face an increased compliance burden and the personal liability for directors is likely to put information security high on their agenda.

The exact date of the entry into force of the NIS2 Law will be determined by Royal Decree which is expected to be adopted in the coming weeks.

***Data Act Enters into Force***

Regulation (EU) 2023/2854 of 13 December 2023 on harmonised rules on fair access to and use of data (the ***Data Act***) entered into force on 11 January 2024. The Data Act seeks to enable a fair distribution of the value of data by establishing clearer rules for individuals and businesses accessing data generated by Internet-of-Things (***IoT***) devices and by banning unfair contractual terms governing the access to and the use of data. The Data Act complements Regulation (EU) 2022/868 of 30 May 2022 on European data governance (the ***Data Governance Act***). While the Data Governance Act regulates processes and structures that facilitate voluntary data sharing, the Data Act clarifies who can create value from data and under which conditions.

*Data Sharing Obligation and Interoperability*

The Data Act will play a pivotal role in enhancing legal certainty for businesses and consumers involved with data generation and the usage of IoT devices. It imposes data sharing obligations on data holders, including the use and the making available of data generated by an IoT device or generated during the provision of services. These obligations aim to provide both individuals and businesses with easy, secure, and free access to product data and related service data, including metadata in various machine-readable formats. Furthermore, the Data Act facilitates interoperability by requiring providers of data processing services to make open interface information available free of charge to their customers and to the concerned destination providers of data processing services. The goal is to facilitate the switching process.

# DATA AND TECHNOLOGY

*Mitigating Contractual Imbalances*

In business-to-business relations, data holders are required to make data available under fair, reasonable and non-discriminatory terms and conditions. The Data Act establishes a list of clauses that are always considered unfair (e.g., terms of such a nature that its use grossly deviates from good commercial practice in data access and use, contrary to good faith and fair dealing) and a list of clauses that are presumed to be unfair (e.g., terms preventing the party upon whom the term has been unilaterally imposed from using the data provided or generated by that party during the period of the contract). The European Commission will develop and recommend non-binding model contractual terms for business-to-business data sharing contracts.

Moreover, to resolve conflicts between users, data holders, and data recipients, the Data Act creates dispute settlement bodies which EU Member States will certify. The bodies will be communicated to the European Commission for publication on a dedicated website.

The European Data Innovation Board, which was established by the Data Governance Act, will oversee the interpretation and enforcement of the Data Act while EU and national authorities responsible for the supervision of and compliance with data protection law will be competent for the application of the Data Act in their areas of competence.

The European Commission's press release which marks the entry into force of the Data Act can be retrieved here. The Data Act is available here.

# DATA PROTECTION

***Advocate General Rantos Answers Question Whether 'Manifestly Public' Data Can Be Used for Personalised Advertising***

On 25 April 2024, Advocate General Rantos (***AG Rantos***) published his opinion in Case C-446/21, *Maximilian Schrems v. Meta Platforms Ireland Limited, formerly Facebook Ireland Limited*. The case addresses the principle of data minimisation concerning Facebook's processing of personal data for personalised advertising. It also examines the principle of purpose limitation, focusing on a scenario in which an individual disclosed his/her sexual orientation during a public event which prompted the question whether such public information can be re-used for targeted advertising purposes.

*Background*

In 2018, Meta Platforms Ireland updated its Facebook terms of service for EU users, requiring their consent for using these services. Maximilian Schrems, a Facebook user and data protection advocate, agreed to these terms but later challenged them. Mr. Schrems claimed that he had received advertisements directed at homosexuals and invitations to corresponding events that were based on an analysis of his interests, not his sexual orientation. Although he had openly talked about his homosexuality during a panel discussion, he maintained that he had not disclosed his sexual orientation on Facebook. Mr. Schrems considered Facebook's practices as illegal and initiated a lawsuit in Austria.

Facing doubts regarding the interpretation of Articles 5(1)(b) and 9(2)(e) of the General Data Protection Regulation (***GDPR***), the Austrian Supreme Court sought the guidance of the Court of Justice of the European Union (***CJEU***) on whether Facebook is allowed to analyse and process all personal data available to it without restriction in time for the purposes of targeted advertising. Moreover, the Austrian Supreme Court asked whether a statement made by a person about his or her sexual orientation during a panel discussion permits the processing of other data in that realm for the purposes of offering that person targeted advertising.

*Opinion of AG Rantos*

In response to the first question, AG Rantos offered the view that the use of personal data for advertising must be limited in time, by type and by source. He specified that the storage limitation principle contained in Article 5(1) GDPR prohibits the indefinite processing of personal data for targeted advertising. According to AG Rantos, national courts must assess whether the duration of data retention and the volume of data processed are reasonable, considering the legitimate objective of using such data for personalised advertising. AG Rantos added that this assessment should be based on the principle of proportionality.

Regarding the second question, AG Rantos considered on the basis of the description of the facts by the Austrian Supreme Court, that Mr. Schrems' deliberate public disclosure of his sexual orientation during a panel discussion may be considered as his having 'manifestly made public' this information under GDPR terms. However, AG Rantos went on to say that this does not, 'in itself', allow for the processing of these data or related information regarding a person's sexual orientation for the purposes of compiling and analysing data for personalised advertising.

The opinion of AG Rantos is not binding for the CJEU which is expected to hand down its judgment later this year. The opinion can be found here.

***European Data Protection Board Publishes Opinion on 'Pay or OK' Models***

On 17 April 2024, the European Data Protection Board (***EDPB***) published an opinion (the ***Opinion***) in response to a joint request under Article 64(2) of the GDPR by the Dutch, Norwegian, and Hamburg Data Protection Authorities (the ***DPAs***). It addresses the question whether it is legitimate for large online platforms to use consent as a legal basis for processing personal data for behavioural advertising in the framework of 'consent or pay' models (also known as "Pay or OK" models).

# DATA PROTECTION

Although the EDPB did not advocate for an outright ban of these models, it established a high bar by indicating that, "in most cases", they will fail to satisfy the GDPR requirements for valid consent.

*Background*

In late 2023, the EDPB issued an urgent binding decision prohibiting Meta from processing personal data for behavioural advertising based on contractual obligations or legitimate interest as possible legal bases. In response to this decision, Meta switched to consent as the legal basis for its behavioural advertising for users in the EEA, introducing a subscription model known as the 'consent or pay' model.

Under this model, users are offered two options for using Meta's services: they should either share their personal data for targeted advertising or they are required to pay a monthly fee. The DPAs had doubts regarding the compatibility of this model with GDPR and, in an effort to ensure a uniform approach throughout the EU, requested an opinion from the EDPB.

*EDPB Opinion*

The EDPB's Opinion assessed three key aspects of 'consent or pay' models.

- *Controllers must ensure validity of data subject's consent*.

When implementing 'consent or pay' models, the EDPB noted that large online platforms should carefully evaluate the following criteria to determine whether consent is "freely given": (i) the existence of alternative choices; (ii) the possible harm to data subjects; (iii) the imbalance of power that results from the position of the platform; and (iv) the granularity of the consent.

First, the EDPB observed that it is the data subject's decision, characterised by an unambiguous indication of his or her wishes and, more importantly, the freedom to make that decision, which ultimately validates the legality of the processing. The EDPB recommended that fees should therefore not be such that they coerce individuals into consenting.

According to the EDPB, controllers must therefore evaluate, on a case-by-case basis, the necessity and amount of the fee in the light of the specific context.

Second, the GDPR noted that data subjects must be able to refuse or withdraw their consent without suffering any harm. Large online platforms should therefore consider whether the failure to consent could have negative consequences for the data subject. The EDPB indicated that such negative consequences could include restricted access to specific services or professional networks, or the loss of content or connections. The Opinion suggested that negative consequences will be probable with 'consent or pay' models.

Third, the EDPB observed that controllers must assess on a case-by-case basis whether there is an imbalance of power between the individual and the controller. This assessment should consider the market position of the large online platforms, the degree of reliance of the data subject on the service, and the primary audience targeted by the service. If there is a significant imbalance between the controller and the data subject, the data subject may feel pressured to make a decision which he or she would not normally have considered and thus compromise freedom of choice.

Finally, the EDPB applied the principle of 'granularity' and noted that, when faced with a 'consent or pay' model, individuals should have the freedom to select the specific processing purposes which they agree to, rather than being forced to consent to a bundle of purposes.

- *Controllers must offer equivalent alternative to data subjects*.

The EDPB posited that offering only "*a paid alternative to the service which includes processing for behavioural advertising purposes should not be the default way forward for controllers*".

# DATA PROTECTION

According to the EDPB, data subjects should be given an 'equivalent alternative' that does not involve payment. The EDPB added that should controllers choose to impose a fee for access to the 'equivalent alternative,' they would also have to provide a further option that is free of charge. This free alternative should exclude behavioural advertising, possibly featuring a form of advertising that requires minimal or no personal data processing.

Interestingly, the EDPB distinguished its Opinion from a judgment of the CJEU in the *Bundeskartellamt* case (*See*, this Newsletter, Volume 2023, No. 8). In that case, the CJEU held that users who refuse to give consent for specific processing activities must be offered an equivalent alternative not accompanied by such processing, "*if necessary for an appropriate fee*". According to the EDPB, the CJEU judgment came down in a different context in which the reference to an "equivalent alternative" related to the conditionality requirement of Article 7(4) GDPR. The EDPB therefore reached the conclusion that the CJEU's judgment is not relevant for determining whether consent is "freely given" which in its view is an additional requirement.

- *Fee must be appropriate and justified.*

Finally, the EDPB noted that controllers should assess on a case-by-case basis whether the fee is justified and determine an appropriate amount. According to the EDPB, the right to data protection should not be reduced to "*a premium feature reserved for the wealthy or the well-off*".

The Opinion is not legally binding, but as the EDPB is composed of data protection authorities of the Member States, it offers a clear indication of how these authorities will assess the 'consent or pay' models employed by major online platforms. In its press release, the EDPB confirmed that it will develop guidelines with a broader scope to assess such models.

The Opinion can be found here.

# FOREIGN DIRECT INVESTMENT

***Belgian Interfederal Investment Screening Committee Publishes New Guidelines on Interpretation of Belgian FDI Screening Mechanism***

On 4 April 2024, the Interfederal Investment Screening Committee (*Interfederale Screeningscommissie / Comité de Filtrage Interfédéral* – the ***ISC***), which is responsible for coordinating the application of the Belgian mechanism for the screening of foreign direct investment (the ***Mechanism***), published new guidelines for the interpretation of the Mechanism (the ***Additional Guidelines***).

While guidance regarding the interpretation of the law governing the Mechanism remains scarce, the ISC has already published two sets of proposed guidelines (*See*, this Newsletter, Volume 2023, No. 5 and this Newsletter, Volume 2023, No. 7) – and occasionally offers additional insight on an informal and individual basis. Interestingly – and contrary to the previously published guidelines – the Additional Guidelines are not labelled as *proposed* guidelines.

The publication of the Additional Guidelines follows a public consultation by the ISC on the evaluation of the ISC's notification forms in February 2024, on which Van Bael & Bellis also provided input.

The Additional Guidelines contain further details on the functioning of the Mechanism and notification requirements. They were incorporated into the existing proposed guidelines, adding 30 further questions and answers (there are now 81 in total) and clarifying specific existing answers.

The Additional Guidelines indicate that:

- no individual exemptions can be granted, or rulings obtained, prior to notification (this was already clear in practice);
- specific asset deals are subject to the Mechanism and notification obligation (this was already clear from the law governing the Mechanism). While the Additional Guidelines provide that the acquisition of a mere physical local presence without any legal structure would not normally fall under the Mechanism, they also add that this assessment remains subject to a case-by-case analysis;
- the standstill-obligation following a notification under the Mechanism only applies to the Belgian aspects of the notified transaction, adding that the non-Belgian aspects may already be implemented prior to the decision under the Mechanism;
- foreign investors can be fined if they fail to provide required information for a notification or if disclosed information is inaccurate (this was already clear from the law governing the Mechanism), adding the recommendation to provide for appropriate solutions in the relevant transaction documentation;
- *ex officio* investigations cannot result in a decision to dissolve a transaction retroactively, but they can result in an order to divest; and
- *ex officio* investigations can be initiated in relation to transactions that were not notifiable (this was already clear from the law governing the Mechanism).

The Additional Guidelines give additional details on the method to calculate specific investment thresholds that trigger a notification obligation. Interestingly, the Additional Guidelines no longer indicate that it is not possible to appeal decisions launching *ex officio* investigations and that an appeal would only be possible after the *ex officio* investigation resulted in a final decision. Finally, the Additional Guidelines stress that the ISC recommends notifying a transaction in case of doubt.

The text of the Additional Guidelines can be found here (Dutch) and here (French).

# INTELLECTUAL PROPERTY

***Court of Justice of European Union Holds Again that Transmission of Television Signal in Hotel Room Constitutes Communication to Public***

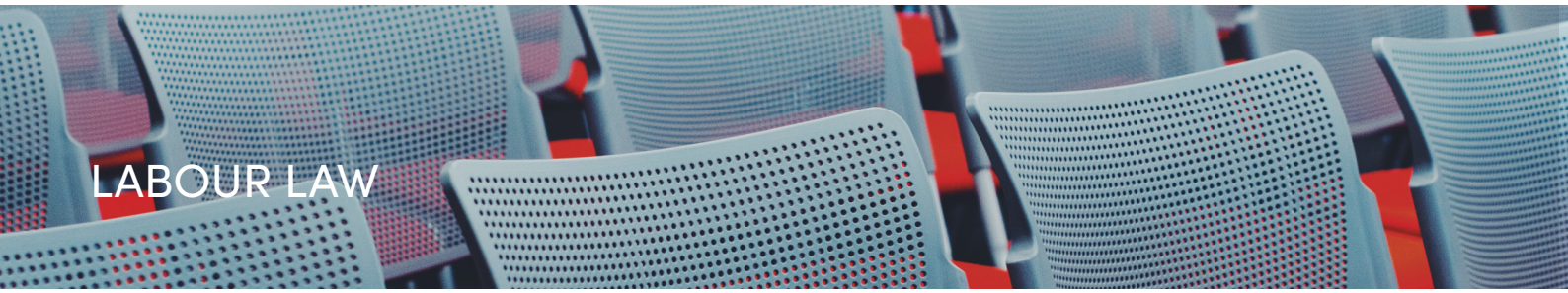
On 11 April 2024, the Court of Justice of the European Union (***CJEU***) delivered its judgment in case C-723/22, *Citadines v MPLC* concerning the interpretation of the concept of "communication to the public" within the meaning of Article 3(1) of Directive 2001/29/EC (the ***InfoSoc Directive***).

The case arose from a dispute between *Citadines*, a hotel operator, and *MPLC*, a copyright management organisation, regarding an alleged infringement of MPLC's exclusive right of communication to the public in relation to a television series episode. Citadines had transmitted the episode via television sets installed in its hotel rooms and fitness area using the hotel's own cable distribution network. Citadines argued that it had obtained, in full, the required licence from the relevant copyright management organisations, for which it pays a flat-rate fee each year for each hotel room. MPLC disagreed and maintained that the licence in question did not cover the direct and indirect retransmission of radio and television programmes by means of a distribution network belonging to a hotel.

This case is very similar to previous copyright infringement cases that ended up before the CJEU. Disputes relating to television sets in hotel rooms have been assessed previously, even in the very first preliminary ruling on communication to the public under the InfoSoc Directive in Case C-306/05 *SGAE v Rafael Hoteles*. The CJEU established that, while the mere provision of physical facilities does not amount to communication to the public, the installation of such facilities and the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, regardless of the technique used to transmit the signal, does constitute a form of communication to the public within the meaning of Article 3(1) InfoSoc Directive. Subsequent CJEU case law clarified the concept of "communication to the public".

In the case at hand, the CJEU noted that the concept of "communication to the public" involves two cumulative criteria: (i) an "act of communication" of a work; and (ii) the communication of that work to a "public". These criteria require an individual assessment. The CJEU went on to observe that this assessment must take into account several complementary criteria, which are not autonomous and are interdependent. Those criteria must, moreover, be applied both individually and in their interaction with each other, in so far as they may, in different situations, be present to widely varying degrees. In the present case, the CJEU emphasised the role of the user (*i.e.*, the hotel) and the deliberate nature of its role. According to the CJEU, that user makes an "act of communication" when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly when, in the absence of that intervention, those customers would not be able to enjoy the broadcast work.

It was therefore no surprise that the CJEU concluded that Article 3(1) of the InfoSoc Directive must be interpreted as meaning that the provision of television sets installed in hotel rooms or in the hotel's fitness area, when a signal is retransmitted to those sets by means of the hotel's own cable distribution network, constitutes a "communication to the public". The judgment illustrates the broad scope of the right of communication to the public as defined by the CJEU.



# LABOUR LAW

***Federal Law Establishes Improved Protection for Employees Undergoing Fertility Treatment or Similar Programmes***

On 18 April 2024, the Law of 24 March 2024 amending the Labour Law of 16 March 1971 and the Law of 10 May 2007 to combat discrimination between women and men, establishing protection for female and male employees absent from work to undergo fertility treatment or a programme of medically assisted reproduction was published in the *Belgian Official Journal* and took effect on 28 April 2024 (*Wet van 24 maart 2024 tot wijziging van de arbeidswet van 16 maart 1971 en van de wet van 10 mei 2007 ter bestrijding van discriminatie tussen vrouwen en mannen, tot instelling van een bescherming voor de werkneemsters en de werknemers die van het werk afwezig zijn om een vruchtbaarheidsbehandeling of een programma van medisch begeleide voortplanting te volgen / Loi du 24 mars 2024 modifiant les lois du 16 mars 1971 sur le travail et du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes en vue d'instituer une protection pour les travailleuses et travailleurs qui s'absentent du travail pour un traitement d'infertilité ou pour une procréation médicalement assistée* - the ***Law***). The Law offers protection against dismissal for employees undergoing fertility treatment or participating in a medically assisted reproduction program and ensures the safeguarding of their employment conditions while they are absent from work as a result.

*Existing Legislation*

Under existing legislation, only pregnant employees are protected from dismissal once their employer becomes aware of their pregnancy until one month following their post-natal maternity leave. By contrast, similar protection does not safeguard the rights of individuals undergoing fertility treatment or medically assisted reproduction programmes who have disclosed this to their employer. However, employees subject to adverse treatment or a dismissal due to these circumstances may still invoke discrimination based on gender and may claim a compensation of six month's gross salary or the actual damages suffered if these are proven to be higher.

*Protection Against Dismissal*

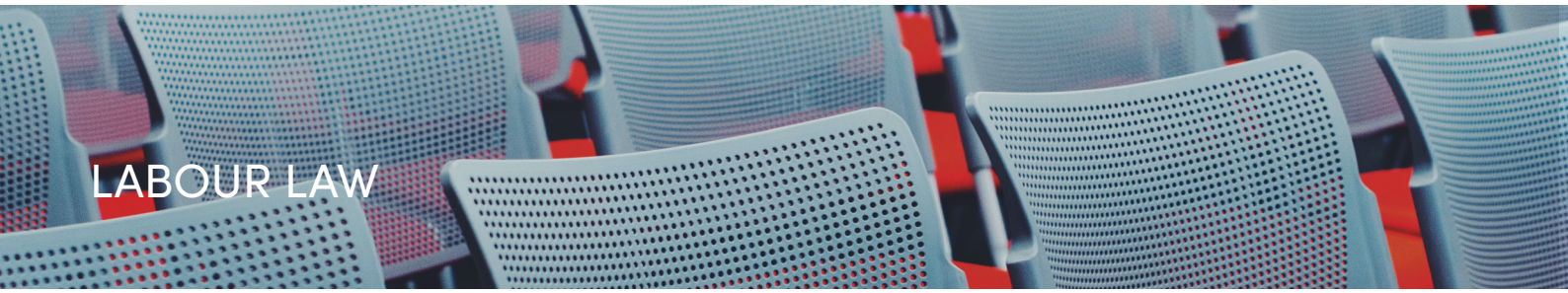
The Law now provides for a specific form of protection against dismissal for employees undergoing fertility treatment or participating in a medically assisted reproduction programme. This implies that the employer cannot unilaterally terminate the employment contract of an employee following fertility treatment or a program of medically assisted reproduction during the protection period, except for reasons unrelated to the employee's absence for such a treatment.

The protection period starts from the moment on which the employer is informed, through a medical certificate, that the employee is undergoing such a treatment and lasts for a period of two months. But the employee has the option to submit multiple certificates if the treatment or programme lasts longer than two months. Each new certificate causes a new protection period to run.

In the event of dismissal during the protection period, it is the employer's responsibility to prove the reason for dismissal, upon request of the employee. If there is no legitimate reason for dismissal, the employer must pay a protection indemnity to the employee equal to six months' gross salary, in addition to any legal severance pay and other compensation due following the termination of the employment contract.

*Protection Against Discrimination*

The Law also introduces a new criterion for protection in the anti-discrimination legislation, ensuring that employees undergoing fertility treatment or participating in a medically assisted reproduction programme must not be made subject to adverse treatment. Consequently, employers will be obligated to reinstate employees in their previous or equivalent positions upon return to work following these treatments. In addition, employees will maintain all accrued rights and are entitled to any improvements in employment conditions which they would normally have received during their absence.



# LABOUR LAW

If an employee faces discrimination due to undergoing fertility treatment or participating in a medically assisted reproduction programme, they may be entitled to compensation of up to six months' gross salary, or the actual damages suffered if proven to be higher.

The Law can be found here (Dutch) and here (French).

***Return-to-Work Fund Prompts Action Points for Employers and Employees***

On 1 April 2024, the federal government implemented the Return-to-Work Fund (*Terug Naar Werk-fonds / Fonds Retour Au Travail* – the ***Fund***), aiming to reform the reintegration process on the job market of long-term sick employees whose employment agreements were terminated on grounds of medical force majeure.

*Legislative Background*

The Fund was introduced by the Programme Law of 26 December 2022 (*Programmawet van 26 december 2022 / Loi-programme du 26 décembre 2022*), as amended by the Law of 16 October 2023 concerning social affairs (*Wet van 16 oktober 2023 houdende diverse bepalingen inzake sociale zaken / Loi du 16 octobre 2023 portant des dispositions diverses en matière sociale*). It replaces the employer's obligation to provide outplacement assistance when relying on medical force majeure to terminate unilaterally an employment agreement. Instead, the employer now must pay a fixed contribution of EUR 1,800 to the Fund.

However, the detailed procedure for reporting and paying the contribution, the criteria for obtaining support from the Fund, the requirements imposed on specialised service providers to provide job coaching, and the date of entry into force had not yet been determined.

These terms have now been defined by the Royal Decree of 28 March 2024 on the Fund (*Koninklijk Besluit van 28 maart 2024 betreffende het "Terug Naar Werk-fonds" / Arrête Royal du 28 mars 2024 relatif au "Fonds Retour au Travail"* – the ***Royal Decree***), which was published in the Belgian Official Journal on 2 April 2024.

*Employer's Action Points*

From 1 April 2024, employers terminating employment agreements because of medical force majeure must take the following steps within 45 calendar days following the day on which the employment agreement was terminated:

- Communicating information (such as personal details of the employee and company details of the employer) to the National Institute for Health and Disability Insurance (*Rijksinstituut voor ziekte- en invaliditeitsverzekering / Institut national d'assurance maladie-invalidité* - the ***NIHDI***); and

- Contributing EUR 1,800 to the Fund in response to a payment request from NIHDI.

Non-compliance with these obligations carry administrative or criminal fines of up to EUR 4,000 per employee.

*Employee Action Points*

Employees whose employment agreement was terminated because of medical force majeure can claim support from the Fund to facilitate their return to the job market. This applies irrespective of whether the medical force majeure was relied on by one party to the employment agreement, or in mutual agreement.

Employees must apply within six months following the termination of their employment agreement. For terminations of employment agreements that occur between 1 April 2024 and 1 July 2024, applications can be submitted until 2 January 2025.

NIHDI will take a decision within 45 calendar days from the day following the application its submission. Upon approval, the individual will receive a voucher worth EUR 1,800 to finance the services of a recognised service provider specialised in providing job coaching. The voucher remains valid for a period of six months.

The Royal Decree can be found here (Dutch) and here (French).

# LITIGATION

***Supreme Court Holds that Registration in Register for Legal Entities Creates Rebuttable Presumption that Registered Entity is Legal Entity***

On 12 March 2024, the Supreme Court held that, according to Article III.49, §3 of the Code of Economic Law, the registration as a legal entity in the Crossroads Bank for Enterprises (*Kruispuntbank van Ondernemingen / Banque-Carrefour des Entreprises*) creates for the registered entity the presumption that it is a legal entity, but that presumption is rebuttable and the court is under a duty to review the evidence produced to refute that presumption.

*Background*

On 5 October 2023, the Court of Appeal of Ghent had declared as inadmissible an appeal brought against a first-instance judgment which had forfeited the capital gains of M.D. which had been held to be a company organised under the laws of Poland and with registered offices in Poland. The inadmissibility was held to follow from the applicant's lack of interest and capacity. The Court of Appeal had considered that the applicant's claim of being a natural person and the sole proprietor of a business, called MD, could not be accepted, because the applicant was registered with the Crossroads Bank for Enterprises as a foreign legal entity with the natural person MD as the legal representative. The applicant brought an appeal against the judgment of the Court of Appeal to the Belgian Supreme Court.

*Supreme Court Judgment*

The applicant argued that the judgment of the Court of Appeal was contrary to Article 49 TFEU and Article 33, §2 of the Law of 16 January 2003 establishing a Crossroads Bank for Enterprises. Based on official Polish documents, the applicant proved being a natural person and as such the sole proprietor of MD under Polish law. The applicant also maintained that the applicant and MD had to be regarded as one person. The applicant added that the Polish qualification must be considered decisive

The Supreme Court held that Article 33, §2 Law of 16 January 2003 had been replaced by Article III.49, §3 of the Belgian Code of Economic Law. The Supreme Court went on to hold that, since the applicant showed, based on concrete proof, that he is the sole proprietor of a business owned by a natural person who is an entrepreneur and that the registration as a legal entity with the Crossroads Bank for Enterprises was done by mistake, the Court of Appeal was wrong to dismiss that defence solely on the basis of the classification of the business in the Crossroads Bank for Enterprises.

The Supreme Court judgment is available here (in Dutch).

***New Law Related to the Digitalisation of Justice Modifies Arbitration Rules***

On 29 March 2024, the Law of 27 March 2024 concerning the digitalisation of justice Ibis was published in the Belgian Official Journal (*Wet van 27 maart 2024 houdende bepalingen inzake digitalisering van justitie en diverse bepalingen Ibis/Loi du 27 mars 2024 portant dispositions en matière de digitalisation de la justice et dispositions diverses I*bis - the ***Law***). Chapter 12 of the Law modifies Section 6 of the Judicial Code on arbitration proceedings and contains an important clarification of the temporal application of the rules governing arbitration proceedings.

As a result of the Covid-19 pandemic, many arbitration proceedings were conducted electronically. The Law reflects this development and brings the Judicial Code in line with national and international arbitration practices. The modifications are mainly intended to improve the technical aspects of the arbitration practice in Belgium and to contribute to the increase of international arbitrations taking place in Belgium.

# LITIGATION

The Law also replaces Article 59 of the Law of 24 June 2013 which provided for an exception to the principle of "the immediate entry into force of new procedural laws" (***Article 59***). According to the old Article 59, legal proceedings before the Belgian courts relating to arbitration proceedings initiated prior to 1 September 2013 were not governed by the Law of 24 June 2013, even if the related legal proceedings were initiated on or after 1 September 2013. In other words, under the old legislation, the reference point for determining the applicable law ratione temporis appeared to be the commencement date of the arbitration proceedings. However, this apparent exception to the principle of the immediate entry into force of new procedural laws generated legal uncertainty and required clarification.

The Law now stipulates that the Law of 24 June 2013 applies to:

- arbitration proceedings which have Belgium as their place of arbitration or are subjected to Belgian arbitration law, and which were initiated after 1 September 2013, regardless of the date of the arbitration agreement; and

- legal proceedings brought before the Belgian courts after 1 September 2013, regardless of the date of the arbitration agreement.

In addition, the Law specifies that arbitral awards and judgments handed down before 1 September 2013 will not be affected by these amendments.

The Law can be consulted here and here.

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