January 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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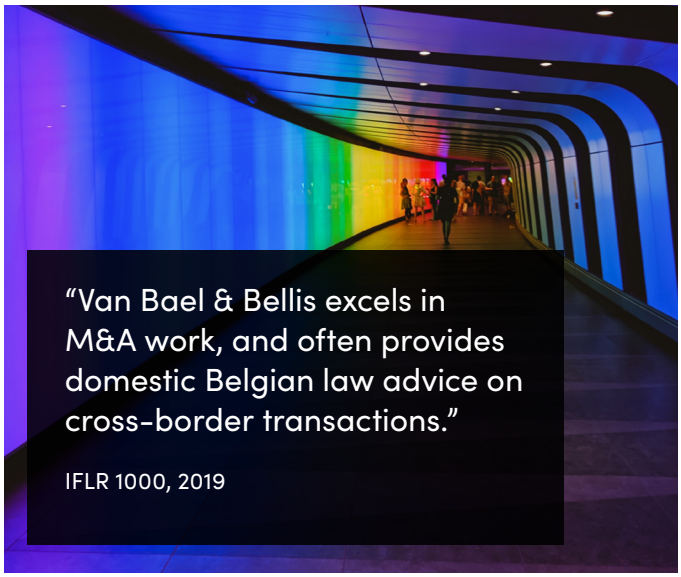

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ARTIFICIAL INTELLIGENCE AND DIGITAL

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. However, in order to allow the stakeholders to make the necessary technical arrangements, it will apply only from 12 September 2025 onwards.

The Data Act aims to establish clearer rules for individuals and businesses regarding the use of data (both personal and non-personal) generated by connected objects (also referred to as the "internet of things"). It also facilitates switching between online cloud providers. Furthermore, the Data Act makes it easier to share data in B2B relations and give public sector bodies access to specific data.

Connected Products, Cloud Providers and Interoperability

The users of connected products and related services have the right to access the data generated in that context. They can also request data holders to make the data available to them in order to share it with third parties, and the third parties can process the data only for the purposes and under the conditions agreed with the users. These provisions apply both in B2B and B2C relationships, the term "user" being defined in general terms to include both individuals and legal persons.

The providers of cloud services (referred to as data processing services) must also take the necessary measures to allow customers to switch to another service provider.

In order to ensure the implementation of these rights, the Data Act imposes several information obligations on service providers and data holders, as well as mandatory clauses to be included in user contracts.

The Data Act also sets out requirements ensuring the interoperability of different data processing services. In accordance with the European Union's (***EU***) standardisation strategy, the Data Act creates the framework which will lead to the establishment of technical standards facilitating data-sharing within the EU.

Unfair Contractual Terms in B2B Relations

In B2B relations, the Data Act prohibits unfair contractual terms regarding the access to or the use of data, as well as liability and remedies in that respect. The Data Act establishes a list of clauses that are always considered unfair (*e.g.*, limitation of liability for intentional acts or gross negligence, exclusive right to interpret contractual terms) and a list of clauses that are presumed to be unfair (*e.g.*, limitation of a party's right to obtain a copy of the data it generated, possibility to terminate the contract at unreasonably short notice). To increase legal certainty, the European Commission will establish non-binding model contractual terms for B2B data sharing contracts.

Access to Data by Public Sector Bodies and specific EU Institutions

The Data Act sets out the conditions under which public sector bodies and specific EU institutions such as the European Commission can request data holders to give them access to data which they need to carry out their statutory duties in the public interest. This provision applies only to cases of exceptional need (*e.g.*, in order to respond to a public emergency) and the use of the data must be limited in time and in scope to what is necessary. Data holders which receive a request must answer it without delay and are entitled to fair compensation to cover the costs for making the data available.

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

COMPETITION LAW

Belgian Competition Authority Welcomes Fast-Moving Consumer Goods Pricing Trends but Warns About Territorial Supply Constraints

The Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) published on 25 January 2024 a report analysing pricing trends for fast-moving consumer goods in Belgium compared to similar pricing developments in France, Germany and the Netherlands.

The report is based on "Euromonitor Passport" data from 2013 to 2022 in eight categories: (i) alcoholic drinks; (ii) soft drinks; (iii) hot drinks; (iv) staple food (such as pasta, rice and canned food); (v) dairy products and substitutes; (vi) snacks; (vii) cooking ingredients and meals; and (viii) beauty and personal care products.

Belgian Consumer Prices Are Higher but Evolve More Favourably than in Neighbouring Countries

The BCA found that average retail prices are overall higher in Belgium than in Germany and the Netherlands. The report offers a mixed picture for France, which has higher average prices in five categories (alcoholic drinks; hot drinks; staple food; snacks; and beauty and personal care) and lower average prices in the remaining three categories (soft drinks; dairy products and substitutes; and cooking ingredients and meals).

Importantly, the BCA notes that the price trends are more favourable to Belgian consumers than to their Dutch, French, and German counterparts: for almost all categories analysed, the average consumer prices have been decreasing faster (or increasing less rapidly) in Belgium between 2018 and 2022.

BCA Takes Issue with Supplier Prices, Especially in Beverage Sector

Conversely, the BCA appears to consider supplier prices to be problematic. The BCA notes that these prices generally represent a lower share of consumer prices in the Netherlands than in Belgium, and that the positive price trend observed in Belgium is explained "at least in part, by the recent increase in competition in the Belgian retail sector".

The BCA's concerns seem to focus on the beverage industry. The BCA notes that the share of supplier (or manufacturer) selling prices (MSP) in retailer selling prices (RSP) for alcoholic and soft drinks is "substantially lower" in Germany than in Belgium, while it is generally the opposite (or equivalent) in other industries. The share of MSPs in RSPs are also lower for alcoholic and soft drinks in France, albeit to a lesser extent.

The BCA states that "for the alcoholic and soft drinks industries, the differences in average MSPs are more pronounced than differences in RSPs to the disadvantage of Belgium compared to all three neighbouring countries." The findings regarding other industries are less straightforward.

Increasing Focus on Territorial Supply Constraints in Benelux and France

Based on these findings, the BCA considers that territorial supply constraints (***TSCs***) should be investigated, in particular in the alcoholic and soft drinks industries.

Interestingly, the BCA defines TSCs as "multinational firms supplying identical or very similar products at different prices to retailers across countries, typically in [sic] the disadvantage of relatively small countries like Belgium". The BCA thus takes issue with TSCs based on a questionable definition which amounts to saying that applying varying prices in different countries for the same product is per se an infringement of the competition rules.

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BCA Intends to Continue Investigating Pricing in Belgium

The BCA considers that price patterns compared to prices prevailing in France and Germany and varying results across underlying product categories require "more detailed investigation". It adds that TSCs "remain an important topic to keep on the (Belgian and EU) policy agenda".

The BCA refers to a recent study of the Belgian Pricing Observatory of December 2023 which also analysed prices in Belgium and neighbouring countries but on the basis of other datasets. In that study, the Pricing Observatory referred to another study of November 2023 which Ecorys conducted for the Dutch Ministry of Economic Affairs and Climate. In the Ecorys study, more than half of the professional buyers questioned claimed to have been faced with one or more TSCs. The study maintains that the main obstacle which buyers have to contend with is "a compulsory referral to the supplier's Dutch branch".

New President for Belgian Competition Authority Finally Designated Following Years of Political Deadlock

On 26 January 2024, following a political stalemate of several years, the federal Council of Ministers finally managed to appoint a new President of the Belgian Competition Authority (***BCA***).

The new President is Axel Desmedt, a seasoned operator who for many years has been a member of the Council of the Belgian Institute for Post and Telecommunications. Mr. Desmedt is a lawyer who had also stints with France Telecom and in private practice. He replaces Jacques Steenbergen, who had been President of the BCA since its inception as an independent competition authority in 2013. Mr. Steenbergen remained in his post after his regular term of office had ended because the government was unable to designate a successor. Mr. Steenbergen finally retired in January 2023 without being replaced immediately.

As President, Mr. Desmedt will chair the BCA's decision-making body, the Competition College (*Mededingingscollege / Collège de la Concurrence*).

Belgian Competition Authority to Secure New Board Member and Amended Procedures

On 6 February 2024, the federal Council of Ministers submitted to the Chamber of Representatives of the federal Parliament bill 55K3813 (the ***Bill***) that will modify the procedures of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) while taking away parts of its merger review powers. The Bill will also implement Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (***Digital Markets Act*** or ***DMA***).

(*Wetsontwerp tot uitvoering van Verordening (EU) 2022/1925 van het Europees Parlement en de Raad van 14 september 2022 over betwistbare en eerlijke markten in de digitale sector, en tot wijziging van Richtlijnen (EU) 2019/1937 en (EU) 2020/1828 en tot wijziging van diverse bepalingen houdende de organisatie en de bevoegdheden van de Belgische Mededingingsautoriteit / Projet de loi exécutant le règlement (UE) 2022/1925 du Parlement européen et du Conseil du 14 septembre 2022 relatif aux marchés contestables et équitables dans le secteur numérique et modifiant les directives (UE) 2019/1937 et (UE) 2020/1828 et modifiant diverses dispositions relatives à l'organisation et aux pouvoirs de l'Autorité belge de la Concurrence* – Bill available on the website of the Chamber of Representatives of the federal Parliament).

New Board Member and Amended Procedures

The Bill will create a fifth position on the board of directors (*directiecomité / comité de direction*) of the BCA: that of chief planning and budget (*directeur planning en budget / directeur du planning et du budget*). This new role involves responsibility for organisational strategy and for support services, including financial and accounting management, purchasing, human resources management, communications, logistics, IT,

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and document management. This change takes its cue from the structure of the French Competition Authority and was made necessary by the recent expansion of the BCA's budget. The new role is also designed to "increase cohesion" among the BCA's various sections. However, the future chief planning and budget will have no direct say in applying the competition rules.

The Bill also seeks to improve the efficiency of the antitrust procedures followed by the BCA:

- The leniency rules currently distinguish between the immunity granted to individuals who contributed to a company's leniency application and the immunity granted to individuals who submitted an autonomous request for immunity not linked to a leniency application. The current rules do not provide for an obligation to cooperate imposed on the second category of immunity applicants. The Bill will change this.

- The Bill will also resolve an apparent inconsistency in the existing rules and strengthen the parties' right to access the BCA's file by specifying that the preexisting evidence on which a leniency statement relies can be copied, even though the statement itself can only be consulted.

- Under the current rules, prosecuted companies are given a month to respond in writing to the draft decision that the prosecution service submits to the decision-making body of the BCA (*Mededingingscollege / Collège de la concurrence*). That period starts on the day the company receives access to the investigation and procedural files. According to the Bill, this starting point is sometimes uncertain because of practical problems regarding access to specific documents. The Bill therefore proposes to have this period start on the day the company receives the draft decision (rather than the files). In a somewhat circular manner, the Bill justifies this change by pointing to the rule which provides that the investigation and procedural files are made available to the parties on the day of transmission of the proposed decision.

Implementation of Digital Markets Act

The Bill furthermore implements the DMA. This leads to a restructuring of Book IV of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*), which includes the competition rules, although the DMA rules are said to pursue a "complementary but different" objective from the competition rules.

While the European Commission (the ***Commission***) has exclusive competence to apply the DMA, the BCA is granted a few competences to support the Commission's work. This includes the power to start investigations into possible breaches of gatekeepers' obligations (although the Commission is the only authority which can sanction such breaches) and the power to receive complaints filed under the DMA. The chief prosecutor of the BCA can also request the Commission to conduct a DMA market inquiry.

No Competence to Review Hospital Mergers below EUR 900 Million

The Bill curtails the powers of the BCA in the field of merger control. Following the adoption of the Bill, the BCA will no longer have the power to review mergers between "authorised hospitals" within the meaning of the Coordinated Law of 10 July 2008 on hospitals and other care centres (*Gecoördineerde Wet van 10 juli 2008 op de ziekenhuizen en andere verzorgingsinrichtingen / Loi coordonnée du 10 juillet 2008 sur les hôpitaux et autres établissements de soins*), unless the parties achieve high turnover thresholds: at least EUR 250 million per party and at least EUR 900 million collectively.

The Bill extensively justifies this exclusion based on several considerations:

- The Bill explains that "certain concentrations of hospitals should be encouraged as a matter of health policy, as they will make it possible to provide more efficient, higher quality care by optimising the resources deployed". The Bill also refers to

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hospitals' "critical financial situation" and to the necessity to guarantee "high-quality, accessible care that is affordable in the long term".

- The Bill also emphasises that the efficiency gains generated by mergers are particularly important in the hospital sector, as higher volumes of services have proved to result in higher quality care because of increased expertise.

- The Bill points to the "important administrative burden" of merger control filings.

- The Bill adds that the hospital sector "is not comparable to commercial sectors", as competition is "not a driver for price dynamics or quality of care". Since hospitals are almost entirely funded with public money, there is "no real competitive market at this level".

- Even if mergers were to have undesirable effects, other regulatory instruments would suit better to resolve these issues, as hospitals are already heavily regulated.

This is without prejudice to the possible application of the EU merger control rules.

The Bill should put an end to years of uncertainty regarding the application of the merger control rules to hospital mergers (*See*, this Newsletter, Volume 2023, No. 7). As recently as October 2023, the BCA published an analytical framework for the examination of hospital mergers and reminded stakeholders that "insofar as [mergers and acquisitions in the hospital sector] involve a change of control over the establishments in question and meet the statutory notification thresholds [of EUR 40 million of turnover for at least two parties and EUR 100 million collectively], they are subject to prior authorisation by the Belgian Competition Authority" (*See*, this Newsletter, Volume 2023, No. 10). This framework followed a note of 14 July 2023, in which the BCA had also confirmed its power to review mergers between hospitals under the Belgian merger control regime (provided such transactions do not create local hospital networks). The note of July 2023 had in turn been issued in response to a Law of 29 March 2021 which had excluded the constitution of local hospital networks from the scope of the merger control rules (*See*, this Newsletter, Volume 2021, No. 2). The 2021 Law itself had been adopted following the BCA announcement on 22 July 2020 that the creation of local hospital networks may fall under the scope of the Belgian merger control rules (*See*, this Newsletter, Volume 2020, No. 7).

Interestingly, the Competition College (*Mededingingscollege / Collège de la Concurrence*) of the BCA very recently cleared a hospital merger which will fall outside its competence once the Bill is adopted and enters into force. In a decision adopted on 21 December 2023 and recently published, the Competition College unconditionally cleared the merger between Pôle Hospitalier Jolimont ASBL and Centre Hospitalier Universitaire et Psychiatrique de Mons Borinage SCRL under the standard procedure. The BCA notes that it learned of this merger on 31 May 2023 "through a lawyers' note" and started investigating the matter. The deal was officially notified on 20 October 2023, after the parties obtained a derogation from the standstill obligation from the BCA (which prohibits the parties to a notifiable concentration from implementing their transaction before notifying it and obtaining formal clearance from the relevant competition authority) (*See*, this Newsletter, Volume 2023, No. 7).

On 20 February 2024, the BCA published a press release referring to the *Jolimont* merger, explaining the importance of the merger review process for patients, hospital staff and the public purse, and announcing that it had asked to be heard by the parliamentary committee which is reviewing the Bill.

CONSUMER LAW

European Institutions Reach Provisional Agreement on Common Rules Promoting Repair of Goods While Federal Parliament Adopts Law of its Own

On 1 February 2024, the European Parliament and the Council of the European Union (***Council***) reached a provisional agreement on the European Commission's Proposal for a Directive on common rules to promote the repair of goods for consumers (the ***Prospective Directive***). Almost simultaneously, the Chamber of Representatives of the federal Parliament adopted on 8 February 2024 Bill 55K3766 to promote the repairability and longevity of goods (*Wetsontwerp van 8 februari 2024 ter bevordering van de herstelbaarheid en de levensduur van goederen / Projet de loi sur la promotion de la réparabilité et de la durabilité des biens* - the ***New Law***). The text adopted by the Chamber of Representatives' plenary is available here.

Prospective Directive

The Prospective Directive introduces a general right to repair for consumers, both within and outside the statutory guarantee. If the request to repair is made during the period of the statutory guarantee, that guarantee will be extended by one year. If such a request is submitted after the statutory guarantee expired, the Prospective Directive will facilitate this (*See*, this Newsletter, Volume 2023, No. 4). In addition to the measures already discussed in 2023, the Prospective Directive provides for:

- the requirement for manufacturers to provide spare parts at a reasonable price;
- the prohibition on manufacturers to use contractual, hardware or software related barriers to repair; and
- the requirement for EU Member States to take at least one measure to promote the repair of goods (*e.g.*, through repair vouchers, a repair fund or by supporting local repair initiatives).

New Law

The New Law creates a repairability index and a longevity index which indicate, based on objective criteria, how easily a product can be repaired and the expected lifespan of the product. These indices should (i) encourage manufacturers to be more attentive to these aspects of their products; (ii) allow distributors and retailers to better differentiate the repairability and longevity of products in their sales channels; and (iii) enable consumers to opt for products with a reduced environmental impact.

A Royal Decree will determine the methodology for calculating and publishing the indices and will define their scope of application.

Manufacturers and importers placing the goods on the market for the first time will be responsible for calculating the indices and communicating them to distributors and retailers who, in turn, will have to communicate them to consumers.

Additionally, an online platform will offer information on the repairability, means of repair and longevity of consumer goods, covering the entire value chain from manufacturer to repairer. The platform will ensure maximum coordination with the measures imposed at the European level.

DATA PROTECTION

Court of Justice of European Union Sets Out Conditions for Lawful Health Data Processing by Medical Control Services

On 21 December 2023, the Court of Justice of the European Union (***CJEU***) defined the conditions for processing sensitive personal health data under Article 9 of Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (***GDPR***) and clarified the conditions for a data subject to claim compensation in the event of a breach of the GDPR.

Background

The applicant is a former employee of a medical control service (the ***MDK***) in Germany, which provides services to a public health insurer. Upon the public health insurer's request, MDK establishes reports on people's capacity to work based on their health condition.

The applicant had been on sick leave for several months. The public health insurance requested MDK to establish a report on the applicant's capacity to work. MDK accepted despite the fact that the applicant was also an employee of MDK. To justify the processing of this data, MDK relied on Article 9(2)(h) of the GDPR which allows the processing of sensitive data (including health related data) for the purposes of preventive or occupational medicine, for the assessment of the working capacity of an employee.

The applicant disputed this reasoning and claimed damages from MDK in court. The case ended up before the Federal Labour Court of Germany (the ***referring court***), which referred several questions for a preliminary judgment to the CJEU.

CJEU Judgment

The referring court first asked whether Article 9(2)(h) of the GDPR implies that the health professional who conducts the assessment must be a neutral third party, and hence cannot be the employee's employer. The CJEU noted that the GDPR does not provide such a prohibition. The referring court should hence assess in which capacity MDK acted when processing the applicant's personal data. If MDK validly acted as an assessment body, it can rely on Article 9(2)(h) of the GDPR to process health related personal data, including those of its own employees. The CJEU also clarified that the GDPR does not prohibit other colleagues of the applicant within MDK from accessing his personal data based on the mere fact that they work for the same company. However, the referring court should assess whether there are appropriate security safeguards and whether all other requirements under the GDPR are complied with.

The referring court's other questions related to Article 82 GDPR, which provides for the right to compensation of harm resulting from a violation of the GDPR.

The CJEU held that the conditions to claim damages under that provision are (i) a fault consisting in a breach of the GDPR; (ii) harm; and (iii) a causal link between the breach and the harm. Article 82 GDPR has only a compensatory function. National courts should therefore not consider the seriousness of the breach when assessing the amount of damages due, but only the harm actually suffered. The CJEU added that the data controller is presumed to be liable for the breach of the GDPR if it participated in the processing activity that led to the breach. To escape liability, the data controller should prove that the fact that caused the harm is not imputable to it.

The CJEU judgment is available here in Dutch and in French.

DATA PROTECTION

Court of Justice of European Union Holds that Belgian Official Journal Can Be Data Controller

On 11 January 2024, the Court of Justice of the European Union (the ***CJEU***) held in case C-231/22, that, when publishing acts and documents of legal persons, the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge* – ***BOJ***) could be considered to be a data controller within the meaning of Article 4(7) of Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (***GDPR***).

Background

The applicant is the shareholder of a company that decided to reduce its capital. A notary public prepared the necessary documents, including the decision of the competent corporate body, and sent them to the public registry of the competent court in accordance with the relevant requirements. The court sent an extract of the decision to the BOJ for publication. The BOJ, in turn, published the extract without checking its content, in accordance with applicable rules. However, due to an error of the notary public, the published extract contained information which the applicant had not wished to be published.

The applicant requested the BOJ to delete this information by exercising his right to erasure under Article 17 GDPR. The Belgian Federal Public Service Justice, which manages the BOJ, refused. The applicant disputed that decision and the case ended up before the Markets Court of Brussels (the ***referring court***) which referred several questions to the CJEU.

Judgment

The referring court asked whether the BOJ qualifies as a data controller within the meaning of the GDPR, despite the fact that it does not have a separate legal personality and publishes documents prepared by third parties without reviewing their content. The CJEU observed that the data controller is the entity which determines the purposes and the means of the data processing. According to Article 4, (7) GDPR, national law can also determine these purposes and means and designate the data controller.

In this case, the CJEU noted that the collection, storage and publication of extracts of corporate acts containing personal data qualify as a form of data processing under the GDPR. Belgian law entrusts the BOJ with this task. As a result, the law determines, at least implicitly, the purposes and means of processing by the BOJ, and designates the BOJ as the data controller. The CJEU then considered the fact that the BOJ does not have a separate legal personality to be irrelevant for determining whether a given entity is the controller. The CJEU added that even though the BOJ does not verify the content of the extracts which it publishes, this does not prevent it from qualifying as the data controller. The CJEU referred, by analogy, to *Google Spain* (CJEU judgment of 13 May 2014, C-131/12) in which it had earmarked Google as the data controller despite the fact that Google does not exercise control over the personal data contained in the search results.

The CJEU also observed that the situation under review constitutes a chain of processing operations by different entities over the same personal data. National law may in such a case define as controllers the different entities responsible for successive processing activities. They may hence be considered as joint controllers pursuant to Article 26 GDPR, and national law should define the responsibilities of each of the joint controllers.

For its part, the BOJ would be responsible for compliance with the obligations incumbent on the data controller solely for the data processing operations that it is required to perform under national law, *i.e.*, the publication of the extracts. National law can still establish joint responsibility of several entities, which it is up to the referring court to verify.

DATA PROTECTION

Finally, the CJEU clarified that its judgment does not prejudge the question whether exceptions to the right of erasure provided for in Article 17, (b) and (d) GDPR apply in this case.

The judgment is available here in English.

FOREIGN DIRECT INVESTMENT

European Commission Proposes New Regulation for Screening of Foreign Direct Investment

On 24 January 2024, the European Commission (the ***Commission***), published its Proposal for a Regulation on the screening of foreign investments in the Union (the ***Proposal***). The Proposal is part of the Commission's "Economic Security Package" which contains five initiatives to promote the European Union's economic security and gives effect to the European Economic Security Strategy adopted in June 2023 (*See*, our Client Alert of 14 February 2024).

The Proposal will (i) require EU Member States to screen specific foreign direct investments (***FDIs***) and implement a series of minimum requirements in their national screening mechanisms; (ii) enhance the cooperation mechanism between the EU Member States and the Commission; and (iii) broaden the scope of the existing EU regime for the screening of FDIs. The Proposal contains the following innovations:

Mandatory Screening for all EU Member States

The Proposal will require all EU Member States to establish an FDI screening mechanism that satisfies specific minimum requirements. Most EU Member States, including Belgium, already have an FDI screening mechanism in place. Under the Proposal, the EU Member States that do not yet have such a system (*i.e.*, Bulgaria, Croatia, Cyprus, Greece and Ireland) will be required to set up their own FDI screening mechanism no later than 15 months after the entry into force of the Regulation.

Minimum Sectoral Scope

The new FDI screening mechanism will be required to tackle at least the situations in which the EU target:

- participates in programmes of EU interest, as detailed in Annex I to the Proposal (*e.g.*, Horizon Europe, European Defence Fund, Euratom); or
- is economically active in the sectors listed in Annex II to the Proposal (*e.g.*, critical infrastructure and inputs such as semiconductors, artificial intelligence, critical medicines, dual-use and military items).

The Commission will have the power to amend these Annexes by way of delegated acts. EU Member States will still be free to go beyond this minimum scope and screen FDI in other sectors as well.

Interestingly, under the Proposal the new FDI screening mechanism will cover greenfield investments which do not fall under the scope of the current Belgian FDI screening mechanism.

In addition, the Proposal does not provide for any target turnover thresholds. The current turnover thresholds of the Belgian FDI screening mechanism will not be compatible with the Proposal to the extent they overlap with the Proposal's minimum sectoral scope.

The Proposal also clarifies that purely financial investments or internal restructurings will not be included in its scope of application. Under the current Belgian FDI screening mechanism, such financial investments or internal restructurings are not excluded from its scope of application and may be subject to notification. However, other than the definition of FDI, the Proposal does not specify which financial investments will escape FDI scrutiny.

Significantly, the Proposal seeks to include investments made by an EU investor which are (in)directly controlled by a foreign entity if the target is based in another EU Member State. The inclusion of such intra-EU investments forms a reaction to the recent Xella judgment (C-106/22) of the Court of Justice of the European Union (***CJEU***), in which the CJEU held that the existing FDI Screening Regulation does not apply to such investments (*See*, VBB on Competition Law, Volume 2023, Nos. 7 & 8).

FOREIGN DIRECT INVESTMENT

Enhanced Cooperation Mechanism

The Proposal seeks to strengthen and improve the existing cooperation mechanism between the Commission and the EU Member State authorities. Under the Proposal, the EU Member States will be required to report the following investments:

- foreign investments in EU targets that participate in EU programmes listed in Annex I to the Proposal;
- foreign investments in EU targets economically active in the sectors listed in Annex II to the Proposal, if the foreign investor (i) is directly or indirectly controlled by a third country (including its EU subsidiary); (ii) is subject to EU sanctions (including any of the investor's subsidiaries and other related third parties); or (iii) was involved in a foreign investment previously screened by an EU Member State (including any of its subsidiaries) which was blocked or only authorised with conditions;
- foreign investments in EU targets when the EU Member State in which the target is established initiates an in-depth investigation under its FDI screening procedures, and exceptionally, when it intends to impose mitigating measures or block the transaction without an in-depth investigation.

There are further changes to streamline the cooperation mechanism as follows:

- in case of a foreign investment involving several EU Member States, investors will be required to notify all competent authorities on the same day to harmonise the time limits of the different notification procedures;
- reporting EU Member States will be required (i) to give "utmost consideration" to the views of other Member States and the opinion of the Commission (as opposed to "due consideration"); and (ii) to explain to the commenting EU Member States and to the Commission the extent to which "utmost consideration" was given or the reason for their failure to do so; and
- Member States will be required to include more detailed information in their notifications.

Own Initiative Procedures

Finally, the Proposal will introduce the possibility for EU Member States or the Commission to initiate a screening procedure of their own motion when they consider that FDI in the territory of a (different) EU Member State which was not notified under the cooperation mechanism is likely to affect its security or public order or participates in programmes of EU interest as detailed in Annex I to the Proposal.

Both the Commission and EU Member States will have the possibility to open such a procedure until at least 15 months after closing, unless the FDI has in the meantime been notified under the cooperation mechanism.

The Proposal is available here.

INTELLECTUAL PROPERTY

Court of Justice of European Union Delivers Judgment on Burden of Proof for Demonstrating Exhaustion of Trade Mark Rights

On 18 January 2024, the Court of Justice of the European Union (***CJEU***) handed down a judgment in response to a request for a preliminary ruling addressed by the Regional Tribunal of Warsaw (the ***Court***) regarding the burden of proof for the exhaustion of trade mark rights (case C-367/21, *Hewlett Packard Development Company v. Senetic S.A.*).

The case involved a dispute between Hewlett Packard Development Company LP (***HP***), a computer hardware manufacturer, and Senetic S.A. (***Senetic***), a company selling computer hardware. HP owns all trade mark rights in its computer hardware products and employs a selective distribution system for their sale. As a result, authorised representatives in the distribution network are permitted to purchase products solely from HP or other authorised representatives. Additionally, each HP product is assigned a unique serial number, enabling HP to ascertain the intended geographical market for its sale. However, this serial number is not accessible to third parties who therefore are unable to verify whether a product was designated for the European Economic Area (***EEA***).

Senetic acquired original HP computer hardware from vendors located in the EEA who were not affiliated with HP's selective distribution system and imported them into Poland. These vendors assured Senetic that this would not involve any violation of HP's trade mark rights. Moreover, Senetic sought confirmation from authorised representatives of HP that marketing these products in the EEA would not constitute a trade mark infringement, but the representatives refused to give such a confirmation. Subsequently, HP brought a legal action before the Court against Senetic for trade mark infringement. The Court sent a request for a preliminary ruling to the CJEU seeking to learn whether Articles 34, 35, and 36 of the Treaty on the Functioning of the European Union (***TFEU***) could prevent HP from enforcing its trade mark rights, as Senetic contended that these had already been exhausted within the meaning of Article 15 of the EU Trade Mark Regulation (***EUTMR***). According to this provision, a trade mark owner cannot prevent the use of its trade mark in relation to goods which have been put on the market in the EEA by the owner or with his consent.

The CJEU observed that (i) EU law does not have specific provisions regarding the burden of proof concerning exhaustion; (ii) national laws imposing the burden of proof regarding exhaustion on the defendant do not contravene EU law as long as the fundamental principle of free movement is not limited; (iii) the burden of proof should therefore be shifted if there is a danger of segmentation of national markets by the trade mark owner that could cause price disparities between Member States to persist; and (iv) the burden of proof for the proposition that the trade mark right is not exhausted should rest with the trade mark owner if the defendant can demonstrate a genuine risk of market segmentation.

In the present case, the CJEU noted that HP operates a selective distribution system and that this system does not allow third parties to ascertain on which market the products are to be sold while HP refused to give that information to third parties. Furthermore, the CJEU found that vendors prefer not to disclose their supply sources to avoid a potential loss of sales. Thus, according to the CJEU, the burden of proof of the exhaustion should fall on the trade mark owner to prevent the loss of legitimate sales. Otherwise, the defendant may face challenges in demonstrating exhaustion.

The CJEU thus concluded that HP must demonstrate that the hardware products were placed on the market outside the EEA. Upon establishing this, Senetic would then have to prove that the goods were imported into the EEA either by, or with the consent of, HP.

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Comment

The judgment appears to be in line with earlier case-law on the burden of proof for the conditions of exhaustion which the CJEU summarised as follows in *Harman International Industries* (case C-175/21, *Harman International Industries Inc. v. AB S.A.*) at para. 50:

"[T]*he trader alleging exhaustion of trade mark rights bears, in principle, the burden of proving that the applicable conditions are satisfied. However, that burden must be reversed where it is liable to allow the proprietor to partition national markets and thus help to maintain price differences between Member States* [...]".

In *Harman*, the CJEU also held that the mere difficulties which the defendant may face in obtaining information about the original supplier of the goods are not sufficient to reverse the burden of proof (para. 54). Still, in *HP*, the CJEU listed a series of such difficulties, even pointing to efforts made by Senetic to obtain "assurances" from its vendors regarding the legitimacy of onward sales of the products in Poland as well as attempts at verifying with HP authorised representatives that the trade mark rights in the goods were exhausted.

Court of Justice of European Union Allows Strict Liability Compensation Regime in Preliminary Injunction Proceedings

On 11 January 2024, the Court of Justice of the European Union (***CJEU***) handed down its judgment in case C-473/22, *Mylan AB v Gilead and Others*, in which it offered an important clarification to its previous ruling in case C-688/17, *Bayer v Richter*, when interpreting Article 9(7) of Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (***IP Enforcement Directive***). The Court held that a regime for compensation claims following an unjustified preliminary injunction (***PI***) can be based on strict liability, but that all the circumstances of the particular case must still be considered.

Background

The judgment results from a request for a preliminary ruling by the Finnish Market Court which had to adjudicate in a dispute between Gilead and Mylan AB. In 2009, Gilead had been granted a Supplementary Protection Certification (***SPC***) by the Finnish Patent and Registration Office for a medicine indicated for the treatment of HIV. In 2017, the Finnish Market Court imposed a PI on Mylan for infringing the SPC, following an action brought by Gilead. Mylan subsequently brought an action seeking a declaration of invalidity of the SPC. The Finnish Market Court upheld Gilead's action, resulting in a fine of EUR 500,000 for Mylan and provisional measures prohibiting Mylan from offering, placing on the market, using, importing, manufacturing or possessing its generic medicine at issue during the period of validity of the SPC.

In 2019, the Finnish Supreme Court revoked these measures, and the Finnish Market Court ultimately found the SPC to be invalid. Mylan then requested the Finnish Market Court to order Gilead to pay EUR 2.3 million as compensation for losses arising from the unjustified PI, relying on Paragraph 11 of Chapter 7 of the Code of Judicial Procedure (which transposed Article 9(7) of the IP Enforcement Directive into Finnish law). Under this provision and Finnish case-law, a party that has sought a preliminary injunction, subsequently deemed invalid, is required to compensate the other party for any losses incurred due to that action. It prescribes a strict liability regime, which implies that liability is attributed without the need to demonstrate fault.

Gilead argued that the strict liability compensation regime is contrary to the IP Enforcement Directive, particularly in the light of the CJEU's judgment in *Bayer v Richter* in which the CJEU had held that even when the conditions for the application of Article 9(7) of the IP Enforcement Directive are satisfied, this does not mean that a court must automatically order the applicant to pay compensation for any damage suffered by the defendant, but rather that all the circumstances of the

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case must be considered. The Finnish Market Court decided to stay the proceedings in order to ask the CJEU for a preliminary ruling on whether the Finnish compensation regime based on strict liability can be considered compatible with Article 9(7) of the IP Enforcement Directive.

CJEU Judgment

The CJEU interpreted Article 9(7) of the IP Enforcement Directive in the light of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the ***TRIPS Agreement***), in particular Article 50(7). That provision, read together with Article 1(1) of the TRIPS Agreement, sets out a minimum standard for the enforcement of IP rights, allowing EU Member States the freedom to determine the appropriate rules governing the applicant's liability. The CJEU then considered Article 3 of the IP Enforcement Directive to find that an EU Member State is free to choose the applicable IP enforcement measures as long as these are equitable, proportionate, dissuasive and avoid the creation of barriers to legitimate trade.

The CJEU concluded that a strict liability regime satisfies these requirements since the relevant court may take into account all the circumstances of the case, including any participation by the defendant in creating the harm, thereby allowing for the possibility to adjust the amount of damages correspondingly. The CJEU considered that the fact that the defendant is not required to demonstrate fault on the part of the applicant acts as a counterweight to the fact that the applicant obtained the measures without needing to demonstrate evidence of any infringement. In the CJEU's view, the rights of the applicant and the defendant are thus balanced.

The CJEU clarified that its judgment in *Bayer v Richter* dealt with a specific situation and does not exclude strict liability. It should not be inferred from this ruling that Article 9(7) of the IP Enforcement Directive only allows for liability based on the applicant's fault. Rather, the CJEU confirmed that this judgment should be understood as meaning that there can be no automatic liability. It is required that all the circumstances of the individual case are considered, including the conduct of the parties, so that the compensation is appropriate and justified in the light of these particular circumstances. The CJEU added that the court can thus adjust the amount of the damages, particularly if the defendant played a part in the occurrence of the injury or failed to take reasonable measures to avoid or mitigate it.

The judgment can be found here in English.

CJEU Clarifies Scope of Referential Use Exception

On 11 January 2024, the Court of Justice of the European Union (***CJEU***) delivered its preliminary ruling in the procedure brought by Industria de Diseño Textil SA (***Inditex***) against mobile service provider Buongiorno Myalert SA (***Buongiorno***) concerning the use of the ZARA trade mark. At the request of the Spanish Supreme Court, the CJEU held that Directive 2015/2436 of 16 December 2015 to approximate the laws of the Member States relating to trade marks (the ***2015 TM Directive***) expanded the scope of the referential use defence in trade mark infringement cases.

Background

In 2010, Buongiorno sponsored a competition that offered a EUR 1,000 gift card issued by clothing retailer ZARA. To identify the gift card issuer, Buongiorno replicated the ZARA sign within a rectangular shape featuring a gift card. Consequently, ZARA's trade mark portfolio owner, Inditex, brought actions against Buongiorno for trade mark infringement on the grounds of likelihood of confusion and unfair competitive behaviour. Buongiorno argued in defence that there was no infringement of the trade mark since it only made referential use of it. As such, the use was justified under Article 37 of the Spanish Trade Mark Law, which transposed Article 6(1)(c) of the EU Trade Mark Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (the ***First TM Directive***) and which was applicable at the time of the alleged infringement.

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The court of first instance and the appeals court dismissed the infringement action of Inditex on the ground that Buongiorno's use of the trade mark did not harm the reputation of the ZARA trade mark and did not take unfair advantage of that reputation. Inditex challenged the appeals judgment before the Spanish Supreme Court (the ***referring rourt***), which then referred a question to the CJEU with regards to the scope of the referential use exception.

Judgment of CJEU

The CJEU observed that, according to established case-law, the interpretation of a provision of EU law requires that account should be taken not only of its wording, but also of the context in which it finds itself, as well as of the objectives and purpose pursued by the act of which it forms part. The CJEU added that the legislative history of a provision of EU law may also reveal elements that are relevant to its interpretation (*see*, CJEU judgment of 16 March 2023, *Towercast*, C 449/21, paragraph 31).

Having compared the wording of the referential use exception in the 2015 TM Directive and the First TM Directive, the CJEU then noted that the scope of the original version was necessarily more limited since it only mentioned the use of a mark when necessary to indicate the intended purpose of a product or service.

The CJEU found that this more restrictive interpretation was consistent with the object of the First TM Directive. In line with the Opinion of Advocate-General Szpunar, the CJEU noted that the legislator originally intended the exception as a limitation of trade mark rights to allow providers of goods or services, supplementary to those offered by another trade mark owner, to sufficiently inform the public of their intended purpose. However, whether the use of the ZARA trade mark by Buongiorno was needed to indicate the intended purpose of the offered service in accordance with Article 6(1)(c), remained up to the national courts to decide.

Finally, the CJEU confirmed that Article 14(1)(c) of the 2015 TM Directive reflected an enhanced approach to the referential use exception by referring to the legislative history of the provision. Since the preparatory works for the 2015 TM Directive mentioned the need for an explicit restriction of trade mark rights that would cover "*referential use in general*", the CJEU concluded that the amended version was not merely a clarification of the original exception but intended to expand it.

The CJEU judgment is available here in Dutch, English and French.

LITIGATION

Supreme Court Allows Entry into Business Premises to Seize Documents in Civil Proceedings

On 4 January 2024, the Supreme Court ruled, in a matter related to evidence in civil proceedings, that, upon unilateral petition (*eenzijdig verzoekschrift / requête unilatérale*), the President of the Court has the authority to (i) order the seizure of specific documents but also to (ii) grant permission to enter the business premises where these specific documents are located.

Background

Both the applicant and the defendant are companies active in the manufacture, purchase and sale of agricultural construction machinery. The defendant alleged that the plaintiffs had committed unfair competition practices by using internal documentation and knowledge which belonged exclusively to the defendant.

On 16 December 2020, the defendant filed a unilateral petition with the President of the Court of First Instance of West-Flanders, division Kortrijk (the ***Court***) seeking to obtain (i) the appointment of a bailiff as a custodian to visit the production facilities and registered offices of the applicant, as well as the domicile and car of the applicant's founder and former employee; (ii) the production of specific documents for the benefit of the custodian; and (iii) access to the business premises of the applicant.

By order of 21 December 2020, the Court declared the request to be well-founded, provided that a claim on the merits was also filed against the applicant. This happened on 20 January 2021. On 12 February 2021, the applicant filed third-party proceedings before the Court which declared, in a judgment of 19 October 2021, the authorisation for the sequester and the coercive measures to be incompatible with the principle of the inviolability of the home.

On 20 December 2021, the defendant filed an appeal before the Court of Appeal of Ghent, which largely upheld the measures imposed by the President of the Court but excluded the access to the domicile and car of the founder and former employee.

The applicant then turned to the Supreme Court.

Supreme Court Judgment

The applicant first argued that there was no legal basis, other than Articles 1369bis/1 to 1369/10, Judicial Code (related to seizure against counterfeiting), for the seizure of evidence that may imply a violation of the respect for private life and inviolability of the home.

On that point, the Supreme Court held that the principles laid down in Articles 584, 871, 877, 878 and 1462, Judicial Code were consistent to allow the President of a court, upon unilateral petition, and with a view to securing evidence, to order the production to a custodian of well-defined documents held by a third party and to grant permission to the custodian to enter the domicile or business premises where the documents are located and to seize these documents.

The applicant also maintained that the Court of Appeal had disregarded Article 15 of the Constitution on the inviolability of the home and Article 8 of the European Convention on Human Rights (***ECHR***) on the respect for private and family life.

On that point, the Supreme Court noted that Article 8.2, ECHR allows the interference by a public authority with the exercise of this right provided that (i) it is in accordance with the law, (ii) it is necessary in a democratic society, and (iii) it is proportionate and adequate. The Supreme Court further held that the reference to "law" within the meaning of this provision must be understood in its substantive meaning, hence including the law interpreted by domestic courts. The Supreme Court therefore held that Articles 584, 871, 877, 878 and 1462, Judicial Code provide the legal basis for a seizure of evidence with access to the home and that the condition of legality laid down in Article 8.2, ECHR was therefore satisfied.

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Accordingly, the Supreme Court confirmed the judgment on appeal.

Comment

This judgment settles a controversial dispute among legal commentators regarding the seizure of evidence. While part of the commentators argued that the cited provisions suffice as a legal basis for a generalised seizure of evidence, many commentators held the contrary view. For them, a seizure of such a nature requires a change in the statute by act of Parliament, not a pronouncement by a court. The Supreme Court clearly thought otherwise.

The full judgment is available here (in Dutch).

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