February 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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CIVIL LAW

Federal Chamber of Representatives Adopts Book 6 of Civil Code on Tort Law

On 1 February 2024, the federal Chamber of Representatives adopted Private Member's Bill 55K3213 inserting Book 6 on Tort Law in the Civil Code (*Wetsvoorstel houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek / Proposition de loi portant le livre 6 "La responsabilité extracontractuelle" du Code civil* – the ***Book on Tort Law***).

A noteworthy change effected by the Book on Tort Law is the abolishment of the quasi-immunity of auxiliary agents (*uitvoeringsagenten / agents d'exécution*). While under current rules auxiliary agents can almost never be held liable under tort law by the contracting party of their principal, the Book on Tort Law puts an end to this situation. As a result, auxiliary agents will be liable for non-contractual damage which they cause in performing their obligations under the contact with their principal. This change will affect a wide range of contractual relationships, including employment contracts and contracts between companies and their directors.

Another novelty brought about by the Book on Tort Law is that it provides victims of a contractual breach which also qualifies as a tort the choice between relying on the contractual and the extracontractual liability regimes. Under the current rules, this choice rarely existed because it was subject to very strict conditions. The Book on Tort Law is discussed in greater detail in the March 2023 issue of this Newsletter (*See*, this Newsletter, Volume 2023, No. 3).

The Book on Tort Law will now be published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) and will enter into force on the first day of the sixth month following its publication. It will apply to torts resulting from actions after the entry into force of the Law. The current rules will continue to apply to future consequences of torts resulting from actions that took place prior to the entry into force of the Book on Tort Law.

Federal Chamber of Representatives Starts to Review Proposed Rules Governing Personal Securities

On 7 February 2024, Private Member's Bill 55K3825 inserting Title 1 "Personal securities" of Book 9 "Securities" in the Civil Code (the ***Title on Personal Securities***) was submitted to the federal Chamber of Representatives to become part of the Civil Code (*Wetsvoorstel houdende titel 1 "Persoonlijke zekerheden" van boek 9 "Zekerheden" van het Burgerlijk Wetboek / Proposition de loi portant le titre 1er "Les sûretés personnelles" du livre 9 "Les sûretés" du Code civil*). Once adopted, the Title on Personal Securities will enter into force on the first day of the sixth month following its publication in the Belgian Official Journal.

COMMERCIAL LAW

Chamber of Representatives Updates Precontractual Information Duty in Commercial Partnerships

On 8 February 2024, the federal Chamber of Representatives adopted Bill 55K3665 containing various provisions relating to the economy (*Wetsontwerp houdende diverse bepalingen inzake economie / Projet de loi portant dispositions diverses en matière d'économie* - the ***Bill***) which contains an array of provisions of economic law, including an updated regime governing precontractual information in commercial partnerships.

Articles X.26 through X.34 of the Code of Economic Law (***CEL***) include rules on precontractual information in commercial partnerships which are defined in Article I.11 CEL as agreements between two or more persons granting to one of these persons the right to use, in selling products or providing services, a commercial formula in the form of a common signboard, a common trade name, a transfer of know-how and/or commercial or technical assistance. Article X.27 CEL requires the person who grants such a right to provide the other person with a precontractual information document (***PID***) containing the information listed in Article X.28 CEL prior to entering into the partnership.

The Bill amends the list of Article X.28 to (i) make the PID more precise and concrete; and (ii) remove less useful information from the list. For instance, the PID will no longer have to include the list of each party's obligations or the limits to the use of intellectual property rights granted. This reform was prompted by criticism against the current precontractual information regime. In practice, the PID was often a copy of the entire draft agreement and, thus, did not serve its purpose of drawing the protected party's attention to the most relevant aspects of the proposed commercial partnership.

The Bill still must be published in the Belgian Official Journal. The Bill, as adopted, is available here.

Statutory Interest and Default Commercial Interest Increase Again

On 19 and 23 February 2024, the default interest rate for commercial transactions and the statutory interest rate applicable to civil matters and commercial relations with private individuals/natural persons were published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*).

The bi-annual default interest rate for commercial transactions amounts to 12.5% in the first semester of 2024. This marks an increase over the rate of 12% which applied in the second semester of 2023 (*See*, this Newsletter, Volume 2023, No. 9). Pursuant to the Law of 2 August 2002 on combating late payment in commercial transactions (*Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties / Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales* – the ***Law***), the default commercial interest rate for commercial transactions applies to compensatory payments in commercial transactions (*handelstransacties / transactions commerciales*), *i.e.*, transactions between companies or between companies and public authorities, but may be deviated from by contract. The Law implements in Belgian law Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions. This Directive will be replaced by a Regulation (*See*, this Newsletter, Volume 2023, No. 9).

The statutory interest rate in civil matters amounts to 5.75% in 2024. This marks an increase compared to 2023, when it amounted to 5.25% (*See*, this Newsletter, Volume 2023, No. 1).

COMPETITION LAW

Food Prices Under Close Scrutiny in Belgium

Public authorities in Belgium have exhibited a strong interest in retail prices over the past few months. Following a study published in December 2023 by the Belgian Pricing Observatory (*Prijzenobservatorium / Observatoire des Prix*) that dealt with retail prices of fast moving consumer goods (***FMCG***) in Belgium, France, Germany, and the Netherlands between 2016 and 2022; a report published by the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) at the end of January 2024 (*See*, this Newsletter, Volume 2024, No. 1); and parliamentary questions submitted to the Committee for Economic Affairs, Consumer Protection and Digital Agenda of the federal Chamber of Representatives on 7 February 2024, two further studies were published in February 2024.

The first of these two new studies was published on 9 February 2024 by the Pricing Observatory (available in Dutch and in French) and concerns price and margin trends in the food chain. It analyses what is referred to as the "price transmission mechanism" (*prijstransmissiemechanisme / mécanisme de transmission des prix*) in Belgium and neighbouring countries. It thus focuses on the impact of pricing developments at one level of the supply chain on the other levels. It is an update of an earlier study of December 2022. The Pricing Observatory reached the following conclusions:

1. In the food sector, "t*he 2022 globalised margin fell compared with 2021(-20%) and represents the lowest margin of the 2017-2022 period*".

2. In July 2023, the consumer price index for processed food products (excluding tobacco and alcohol) reached an all-time high of 138 points (with the benchmark year 2015 at 100 points).

3. From January 2022 to July 2023, prices for processed foodstuffs rose by 25%. Inflation has therefore also reached record levels, even though it decreased significantly from 20.5% in the first quarter of 2023 to 16.4% in the second quarter of the same year. This is the result of the record high prices of agricultural raw materials in 2021 and part of 2022, the simultaneous rise in energy prices, and the ensuing increased production costs in the food industry (including higher wages due to automatic indexation).

4. Food prices stabilised in the second half of 2023. The decline in agricultural commodity prices for over a year (-50% between May 2022 and October 2023) has not yet led to a tangible decline in downstream food prices but stopped the upward trend. Certain production costs are not decreasing (e.g., wages), which may partly explain this plateau.

5. Agricultural prices and agricultural costs both rose sharply in 2022. Net income nevertheless improved significantly compared with 2020 and 2021 (two bad years). Given the recent fall in production costs and continued high prices for certain agricultural products, 2023 should be even better (the study does not cover the last couple of months of 2023), although this overall conclusion hides major disparities.

6. At industrial level, the margin in 2023 compared to 2022 improved "*in almost all the sectors studied*", sometimes significantly, such as in the beer production industry.

7. At retail level, in 2022, "*retailers have been able to pass the rise in purchase prices on to their resale prices, but not entirely the rise in other production costs. For 2023, the trends* [...] *are less clear, but the status quo in margins seems to prevail*".

The second document, published on 13 February 2024, is a yearly report prepared by the Institute of National Accounts (*Instituut voor de nationale rekeningen / Institut des comptes nationaux*) (in Dutch and in French). Part III of the report discusses food prices.

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Key takeaways are as follows:

1. Food inflation was historically high in Belgium in 2023, even higher than in 2022. While this is also true for France, Germany and the Netherlands, inflation was the highest in Belgium.

2. Unprocessed food products in particular explain why food inflation is higher in Belgium (e.g., fruits and vegetables); conversely, for processed food products, the inflation gap with the three neighbouring countries is small.

3. This study confirms that the second half 2023 saw a stabilisation of food prices at both retail and supply levels. It also confirms that the fall in agricultural commodity prices observed for over a year (-50% between June 2022 and October 2023) has not yet led to a tangible decline in downstream food industry prices but has only caused a halt in the upward trend.

It is difficult to predict what concrete actions, if any, these multiple reports and studies will prompt. However, in the run-up to a series of elections, high prices and the recent wave of inflation continue to occupy public authorities, political and other, some of which seem bent on finding culprits. The current agricultural storm adds to this pressure. In its January 2024 report on FMCG retail prices, the BCA explicitly stated that it would keep investigating FMCG prices and associated issues such as territorial supply constraints.

Belgian Competition Authority in Fight to Protect its Review Powers over Hospital Mergers

The Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) made a last-ditch effort to protect its turf in reviewing hospital mergers. On 20 February 2024, it took the unusual step of reminding the public of a hospital merger which it had already approved in December 2023. But its apparent goal was not to bring that case under the spotlight for a second time (the merger was uncontroversial from a competition law perspective). The BCA rather sought to remind the general public of the federal government's plan to curtail its merger review powers in the hospital sector (*See*, this Newsletter, Volume 2024, No. 1). The BCA argued that this is a bad idea because its specific task is to make sure that, post transaction, the merging parties will maintain the incentive to offer the best products and services under the best possible conditions. According to the BCA, the specific analysis which it applies risks being ignored if it is stripped of its merger control powers. It added that when reviewing hospital mergers, it always has the interests of the patient, the hospital staff and the budget at heart.

The BCA requested the Committee for Economic Affairs, Consumer Protection and Digital Agenda of the federal Chamber of Representatives to be heard when that Committee discusses bill 55K3813, the proposed statute that contains the amending rules governing hospital mergers which the BCA takes issue with (*See*, this Newsletter, Volume 2024, No. 1). The Committee reviewed bill 55K3813 for a first time on 21 February 2024, but did not take a position on the BCA's request to be heard. It will first analyse the written submission to the Minister for Economic Affairs in which the BCA pleaded to keep its current merger review powers.

Axel Desmedt Becomes President of Belgian Competition Authority

On 1 March 2024, Axel Desmedt became the President of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***). The Royal Decree of 31 January 2024 to that effect (the ***Royal Decree***) was published in Belgian Official Journal of 1 March 2024 and provided for its entry into force on the same day.

Mr. Desmedt's appointment was overdue. His predecessor, Jacques Steenbergen, resigned his post in early 2023 after being required to serve beyond the expiry of his mandate. It took the current federal government years to overcome a political stalemate over the designation of the BCA's new President.

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Mr. Desmedt comes with extensive credentials based on a career in government, business and private practice. For twelve years, he was an influential member of the executive board of the Belgian Institute for Post and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications*). Prior to that, Mr. Desmedt held legal and government affairs positions with France Télécom (now Orange). He started his career in private practice with stints as a lawyer with WilmerHale and Stibbe. As the Royal Decree shows, Mr. Desmedt's rich and varied resume is complemented by solid government and management skills that were ascertained by a review board.

The appointment of Mr. Desmedt follows the designation of two new members to the competition college, the BCA's decision-making body, in October 2023. Separately, following the adoption of bill 55K3813 (expected at the end of March 2024), the federal government should be able to fill the newly created position of chief planning and budget in the board of directors of the BCA (*See*, this Newsletter, Volume 2024, No. 1).

CONSUMER LAW

New Green Transition Directive Amends Existing Consumer Law Directives to Enhance Consumer Protection Against Greenwashing

On 6 March 2024, the Official Journal of the European Union published Directive (EU) 2024/825 of 28 February 2024 amending (i) Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (***Unfair Commercial Practices Directive***); and (ii) Directive 2011/83/EU of 25 October 2011 on consumer rights (***Consumer Rights Directive***), as regards empowering consumers for the green transition through better protection against unfair practices and through better information (***Green Transition Directive***; available here). The Green Transition Directive tackles greenwashing practices and encourages consumers to take informed decisions when purchasing products, thereby promoting greener and more sustainable consumption.

Amendments to Unfair Commercial Practices Directive and Consumer Rights Directive

Under the Unfair Commercial Practices Directive, businesses are already prohibited from using misleading sustainability claims towards consumers. As recently as 22 February 2024, the European Commission announced that Zalando, Europe's largest online retailer, had committed to removing misleading sustainability claims from its platform (*see*, European Commission's press release here).

The Green Transition Directive strengthens the current rules governing unfair commercial practices by:

1. adding greenwashing-related practices to the list of commercial practices that are automatically deemed unfair;

2. including specific greenwashing practices in the list of commercial practices that may be regarded as misleading the average consumer;

3. adding "environmental and social characteristics" and "circularity aspects, such as durability, reparability or recyclability" to the list of product characteristics that can be subject to misleading actions; and

4. updating the list of information to be regarded as material for the purposes of assessing whether an omission is misleading (when a trader provides a service comparing products and provides consumers with information on environmental or social characteristics or on circularity aspects of the products or suppliers of those products, material information will involve indications regarding the method of comparison, the products being compared, their suppliers, and the measures in place to keep that information up to date).

Amendments to the Consumer Rights Directive include:

1. specifying the pre-contractual information which companies must provide to consumers (information on the commercial guarantee of durability, information on commitments to providing software updates, the repairability score, etc.); and

2. implementing harmonised notice and label requirements.

Green Transition Directive vs Green Claims Directive

It is important to distinguish the Green Transition Directive from the proposal for a Directive on substantiation and communication of environmental claims (***Green Claims Directive***), discussed in this Newsletter, Volume 2023, No. 4. While the Green Transition Directive addresses greenwashing by enhancing consumer protection against false or

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misleading environmental claims, the Green Claims Directive aims to combat greenwashing by detailing the restrictions on such claims. Both Directives complement each other in combatting greenwashing practices. The European Parliament approved the Green Claims Directive in first reading on 12 March 2024.

Entry into Force

The EU Member States are required to implement the Green Transition Directive in their national laws by 27 March 2026 and to apply the adopted measures as of 27 September 2026 at the latest.

CORPORATE LAW

Financial Services and Markets Authority Urges Financial Entities to Prepare for Application of Digital Operational Resilience Act

Following an investigation by the Financial Services and Markets Authority (***FSMA***), financial entities are urged to continue preparing for the application of the European Digital Operational Resilience Act (***DORA***) contained in Regulation 2022/2554 on digital operational resilience for the financial sector.

The FSMA conducted a survey designed to enable the entities under its supervision to carry out an initial self-assessment of their degree of preparedness for the requirements of DORA, which came into force on 16 January 2023 and will apply as from 17 January 2025. DORA is the new cornerstone of cyber security in the financial sector. It seeks to enable financial entities to better manage their information and communication technology risks and increase their resilience to cyber threats.

The financial sector is critically dependent on the smooth running of its IT infrastructure and services. Given the increase in IT security risks and the growing incidence of cybercrime, DORA created ambitious targets for digital operational resilience. These are designed to protect financial entities and their customers and complement the rules already in force. The financial entities must familiarise themselves with the provisions of DORA, take the necessary steps in good time and determine the stages for gradual compliance.

DORA covers ICT risk management, ICT third-party risk management, digital operational resilience testing, ICT-related incidents, information sharing and oversight of critical third-party providers.

Law Requiring Disclosure of Income Tax Information Published

On 26 January 2024, the Belgian Official Journal published the Law of 8 January 2024 amending the Code governing companies and associations regarding the disclosure of income tax information by specific companies and branch offices (*Wet van 8 januari 2024 tot wijziging van het Wetboek van vennootschappen en verenigingen wat de openbaarmaking van informatie over de inkomstenbelasting door bepaalde vennootschappen en bijkantoren betreft / Loi du 8 janvier 2024 modifiant le Code des sociétés et des associations en ce qui concerne la publication, par certaines sociétés et succursales, d'informations relatives à l'impôt sur les revenus des sociétés* - the ***Law***). The Law serves to implement Directive 2021/2101 as regards disclosure of income tax information by certain undertakings and branches.

The Law requires the following entities to disclose an income tax information report:

1. Belgian parent companies with a consolidated revenue exceeding EUR 750 million and subject to multiple income tax jurisdictions; and

2. non-EU parent companies with a net turnover exceeding EUR 750 million that are economically active in Belgium through a subsidiary or a branch office (and consequently subject to Belgian income tax).

The Law does not cover Belgian companies that are only subject to the Belgian tax regime. The Dutch and French versions of the Law are here and here.

DATA PROTECTION

Belgian Data Protection Authority Imposes Fines on Data Broker for Various Violations of Data Protection Laws

On 16 January 2024, the Litigation Chamber of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit/Autorité de protection des données* - the ***DPA***) imposed fines on a data broker because of various infringements 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***). The main infringements related to the obligation of transparency and the requirement to have a valid legal basis for the processing of personal data for marketing purposes.

Background

The data broker, Bisnode Belgium, initially managed a consumer database (named "Consu-Matrix") and a database of companies (named "Spectron"), through which it offered "Data Quality" services (to improve the relevance and quality of its customer data) and "Data Delivery" services (to provide and supply data to its customers, notably for enrichment purposes and the implementation of marketing campaigns). These databases contained personal data from various external sources, including partners and public sources, such as the Central Commercial Register (*Kruispuntbank van Ondernemingen / Banque-Carrefour des Entreprises*).

Two claimants exercised their right to access and requested information regarding the processing of their personal data by the data broker. Subsequently, they filed a complaint against the data broker before the DPA based on various grounds. In the meantime, Black Tiger group acquired Bisnode Belgium and renamed it Black Tiger Belgium. After the acquisition, Black Tiger Belgium only maintained the "Data Quality" activities and the Spectron database, but not the consumer database.

Decision of DPA

Regarding the legal basis, the data broker was relying on its and its clients' legitimate interest to conduct marketing campaigns. As regards the companies database, the DPA considered that the Code of Economic Law explicitly prohibits the use of data from the Belgian Central Commercial Register for direct marketing purposes, even if the use is limited to improving the quality of existing data. As regards the consumer data, the DPA found, after a detailed analysis, that the data broker's interest and that of its clients do not override the fundamental rights of consumers. The DPA took into account the nature of the personal data (identification data, contact details, personal information, income, address, personal preferences, etc.); the retention period (up to 15 years); and the lack of information provided to the data subjects.

Regarding the transparency obligation, the data broker argued that their clients had informed the data subjects about the processing of their personal data, including the processing by the data broker. As a result, even if the data broker had not itself informed the data subjects, its clients had, thus making sure that the transparency obligation under the GDPR was complied with. However, the DPA did not agree with this reasoning. Article 14 GDPR requires the data controller to inform the data subjects within specific time limits about the processing of their personal data. As a general rule, the data subject must be informed within a reasonable period after the personal data were obtained, and at the latest within one month. The DPA observed that these time limits could not be complied with if the data broker relied on its clients to inform the data subjects once they had bought the data from the broker.

DATA PROTECTION

The DPA also found that the data broker had not properly answered the claimants' requests to access information regarding the processing of their personal data. The DPA considered that the data broker should not only have communicated the categories of recipients of the personal data, but also the precise identity of each recipient, namely the data broker's clients who had been given access to the claimants' data. The DPA also noted that the data broker had not mentioned all the sources from which it had collected the personal data.

The data broker also argued that it could not be held liable for the activities relating to customer data as it had stopped these activities after the acquisition of Bisnode Belgium. The DPA did not accept this argument either, because all rights and liabilities of Bisnode Belgium had been transferred to Black Tiger Belgium as a result of the acquisition. This also applied to the consumer database. However, the DPA took into account this circumstance in determining the fine imposed on the data broker which amounted to EUR 174,640. The DPA also ordered several corrective measures.

The DPA's decision is available here, currently only in Dutch.

INTELLECTUAL PROPERTY

European Parliament Adopts New Regulation on Geographical Indications

On 29 February 2024, the European Parliament (the ***EP***) adopted the Regulation on European Union geographical indications for wine, spirit drinks and agricultural products, as well as traditional specialities guaranteed and optional quality terms for agricultural products, amending Regulations (EU) No 1308/2013, (EU) 2019/787 and (EU) 2019/1753 (the ***Regulation***). The Regulation strengthens the protection for geographical indications (***GIs***) of wine, spirit drinks and agricultural products.

Until now, the protection of GIs for these products had been effected by separate legal instruments. Now, a single regulatory framework will govern all of these products. Article 27 of the Regulation confirms the four levels of protection for GIs that existed before but will also apply online. Article 27 affords protection against

1. any direct or indirect commercial use of the geographical indication in respect of products not covered by the registration;

2. any misuse, imitation or evocation;

3. any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product on the inner or outer packaging and on advertising material; and

4. any other practice liable to mislead the consumer as to the true origin of the product.

Moreover, the Regulation consolidates case-law of the Court of Justice of the European Union that allows under specific conditions the use of GIs for ingredients.

A novelty is the emphasis on the online protection of GIs. Internet domain names that misuse GIs will now be subject to blocking. To this end, the Intellectual Property Office of the European Union will establish a domain name alert system.

The Regulation also gives added rights to GI producers. If agricultural products are designated by a GI, an indication of the name of the producer or operator will feature in the same field of vision as the GI. Additionally, the Regulation introduces the first definition of sustainability for products protected by GIs and reflects a growing recognition of sustainable practices in viticulture.

The Commission will remain the sole supervisory authority of the GI system. The registration process of GIs will be simpler, and a fixed deadline of six months will apply to the scrutiny of new GIs.

The Regulation will be published in the EU Official Journal after the Council of the European Union formally approves it and will become effective twenty days later.

General Court Highlights Significance of Social Media in Copyright and Design Law Disputes

On 6 March 2024, the General Court (the GC) delivered its judgment in case T 647/22 *Puma v EUIPO - Handelsmaatschappij J. Van Hilst (Chaussures)*. The case concerned a dispute between the Dutch shoe wholesaler Handelsmaatschappij J. Van Hilst BV (***HJVH***) and Puma SE (***Puma***). The dispute mainly concerns the 2014 publication of three posts on the Instagram account of the world-famous pop singer Rihanna. The GC accepted the position of HJVH that the design of the model of shoe featuring on these posts could not be registered, since it was part of the public domain, including Rihanna's Instagram account.

Following Puma's attempt to register the design of the shoes in question with the European Union Intellectual Property Office (***EUIPO***) in 2016, HJVH successfully argued in front of the Board of Appeal of EUIPO that Puma could not obtain the protection for a design which was already in the public domain. Puma then sought to have the decision of the Board of Appeal annulled by the GC.

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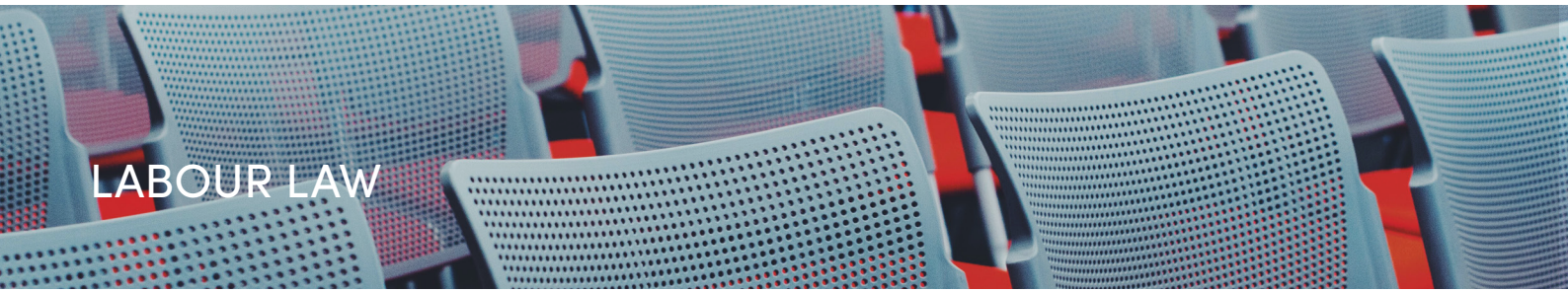
The GC followed a two steps approach to establish whether an earlier design had been disclosed. First, the GC considered whether the evidence concerning the case could show facts constituting the disclosure of a design and whether that disclosure occurred earlier than the date of filing or priority of the design at issue. Second, the GC examined whether these facts could have reasonably become known in the normal course of business to the circles specialised in the sector concerned.

The GC found that the Instagram posts of Rihanna had made it possible to identify all the features of the prior design. This is because the images posted on Instagram were of sufficient quality to allow all the features of the prior design to be recognised. The GC added that the social media photos amounted to solid and objective evidence that proved the effective disclosure of the earlier design on the market.

The GC also rejected Puma's argument that back in 2014 nobody had taken an interest in Rihanna's shoes and that nobody had therefore seen the prior design. The GC noted that Rihanna is a world-famous pop star and that her huge fan base had developed a particular interest in the shoes which she wore in the photos.

The case sheds further light on the delicate interaction between the use of social media for the promotion of products and infringement disputes involving copyright and design rights. It confirms that social media and posts by influencers can give rise to the making available to the public of a prior design. Given the increasing reliance on social media in marketing campaigns, the GC judgment calls for an awareness of the impact of social media campaigns on efforts to protect designs by copyright and design law.



LABOUR LAW

Royal Decree Increases Base Amount of Bicycle Allowance Subject to Overall Annual Cap

On 9 February 2024, the Royal Decree of 31 January 2024 amending Article 19, § 2, of the Royal Decree of 28 November 1969 implementing the Law of 27 June 1969 revising the Law of December 28 December 1944 concerning the social security of employees was published in the Belgian Official Journal and takes retroactive effect on 1 January 2024 (*Koninklijk Besluit van 31 januari 2024 tot wijziging van artikel 19, § 2, van het Koninklijk Besluit van 28 november 1969 tot uitvoering van de Wet van 27 juni 1969 tot herziening van de Besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders / Arrêté royal du 31 janvier 2024 modifiant l'article 19, § 2, de l'arrêté royal du 28 novembre 1969 pris en exécution de la loi du 27 juin 1969 révisant l'arrêté-loi du 28 décembre 1944 concernant la sécurité sociale des travailleurs* – the ***Royal Decree***). The Royal Decree increases the per-kilometre amount of the bicycle allowance which is exempt from social security contributions and introduces a cap on the total yearly amount eligible for exemption.

Mandatory Allowance

A bicycle allowance is a financial compensation provided by employers to employees who regularly (*i.e.*, at least one day per week) use their personal bicycle for home-work commuting. Prior to 1 May 2023, employees were only entitled to such an allowance if this was provided for by a sector collective bargaining agreement (***CBA***) or if the employer voluntarily granted an allowance by means of a company CBA, the work rules, or the employment agreement.

However, this has changed. Since 1 May 2023, all private-sector employers are obliged to offer a bicycle allowance for home-work commuting by CBA No. 164 concerning the employer's contribution for the employee's bicycle travel between his residence and place of work (*CAO Nr. 164 betreffende de tegemoetkoming van de werkgever voor de verplaatsingen per fiets van de werknemer tussen zijn woonplaats en zijn plaats van tewerkstelling / CCT n° 164 concernant l'intervention de l'employeur pour les déplacements effectués à vélo par le travailleur entre son domicile et son lieu de travail* – ***CBA No. 164***).

Base Amount and Annual Cap

Bicycle allowances are exempt from social security contributions up to a specified amount per kilometre. Since calendar year 2024, this amount has been indexed and is currently set at EUR 0.35 per kilometre.

There is in addition an annual cap of EUR 3,500 which corresponds to a distance of 10,000 kilometres compensated at EUR 0.35 per kilometre. This distance equals a daily commute of approximately 48 kilometres over 210 working days. The National Social Security Office (*Rijksdienst voor Sociale Zekerheid / Office national de sécurité sociale*) should still incorporate these amendments in its administrative instructions.

Any amount of the bicycle allowance that exceeds the specified amount per kilometre or the annual cap will be considered as salary and will therefore be subject to social security contributions. The bicycle allowance will also be regarded as salary if it is granted in lieu of, or as conversion of, salary, premiums, benefits in kind, or any other advantage or form of compensation, regardless of whether the substituted advantage is subject to social security contributions.

The Royal Decree is available in Dutch (here) and French (here).

LITIGATION

Court of Justice of European Union Holds that Article 25(1) Brussels Ibis Regulation Covers Agreements Conferring Jurisdiction on Another Member State in Purely Internal Situations

On 8 February 2024, the Court of Justice of the European Union (the ***CJEU***) handed down its judgment in case C-566/22, *Inkreal s.r.o. v Dúha reality s.r.o.*, following a request for a preliminary ruling made by the Czech Supreme Court regarding the interpretation of Article 25(1) of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels Ibis Regulation***). The CJEU held that the choice of another EU Member State's court in an otherwise purely domestic contractual situation is sufficient to fall under the scope of Article 25(1) of the Brussels I*bis* Regulation.

Background

Two pecuniary loan contracts were signed by FD, an individual residing in Slovakia (the creditor), and Dúha reality, a company governed by Slovak law and domiciled in Slovakia (the debtor). Each contract contained a clause conferring jurisdiction on a court of the Czech Republic if a dispute arose that could not be resolved by negotiation. When FD assigned the receivables arising from these contracts to Inkreal (a company governed by Slovak law and domiciled in Slovakia) and Dúha reality failed to repay the loans, Inkreal brought an action before the Czech Supreme Court seeking (i) the payment of debts owed by Dúha reality; and (ii) the declaration that Czech courts have territorial jurisdiction based on the jurisdiction clause contained in the contracts.

However, when considering the relevant case-law of the CJEU, the Czech Supreme Court had doubts as to whether the Brussels Ibis Regulation applied to this factual situation, as the international element at stake was limited to an agreement conferring jurisdiction on the courts of an EU Member State other than that in which the contracting parties were established. The Czech Supreme Court hence referred a question to the CJEU, asking whether the sole fact that parties with their seat in one EU Member State agree on the jurisdiction of another EU Member State is enough for an international element to exist so that the Brussels Ibis Regulation can apply.

CJEU Judgment

In accordance with its case-law, the CJEU interpreted Article 25(1) of the Brussels Ibis Regulation based on its wording, its context as well as the objectives and purpose which it pursued.

- From the *wording* of the provision, the CJEU first derived that the court which has jurisdiction is that identified in the agreement conferring jurisdiction, unless the agreement is null and void in terms of its substantive validity under the law of the EU Member State, and second, that the jurisdiction is to be exclusive, unless otherwise agreed by the parties.

- As regards the *context* of the provision, the CJEU considered its case-law which confirms that for the Brussels Ibis Regulation jurisdictional rules to apply, there must be an international element. It then referred to the definition of "cross-border litigation" under Regulation (EC) No 1896/2006 of 12 December 2006 creating a European order for payment procedure as "*one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised*" to consider that the dispute in the main proceedings demonstrated cross-border implications satisfying this definition.

- Regarding the *objectives* of the Brussels I*bis* Regulation, the CJEU identified these as being party autonomy and enhanced effectiveness of exclusive choice-of-court agreements.

LITIGATION

- Based on the *purpose* of the provision and of the Brussels I*bis* Regulation, the CJEU identified the overall aim pursued to be that of legal certainty, achieved by unifying the rules on conflict of jurisdiction in civil and commercial matters, and that of making these rules predictable. The CJEU held that an interpretation of Article 25(1) so as to include the agreement conferring jurisdiction at hand in its scope is in accordance with this aim of legal certainty by allowing the applicant to easily identify the court before which it may bring proceedings, the defendant to foresee the court before which it may be sued, and the national court seised to be able to decide jurisdiction without having to consider the merits of the case.

  The CJEU also looked at Article 1(2) of the Hague Convention of 30 June 2005 on Choice of Court Agreements which precludes choice-of-court agreements in purely internal cases from the scope of application, highlighting that the EU legislator had deliberately decided against adopting such a provision in the Brussels I*bis* Regulation, and preferred promoting judicial cooperation in civil matters insofar as there is a cross-border element.

The CJEU thus found that Article 25(1) of the Brussels I*bis* Regulation must be interpreted as meaning that an agreement conferring jurisdiction by which parties to a contract established in one EU Member State agree on the jurisdiction of the courts of another EU Member State to settle disputes arising from that contract falls within its scope, even if the contract has no other connection with the other EU Member State. In so doing, the CJEU strengthened both the predictability of international civil procedure and party autonomy, thereby enhancing the Brussels I*bis* Regulation's objectives.

The full judgment is available here.

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