March 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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Federal Chamber of Representatives Will Review Bill Governing Personal Security Interests (Book 9 of New Civil Code)

Private Members' Bill 55K3825 was recently submitted to the federal Chamber of Representatives to modify and update the statutory provisions governing personal security interests (*Wetsvoorstel houdende titel 5 "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* - the ***Bill***). The Bill forms part of the broader reform of the Civil Code and constitutes the first part of Book 9 regarding "Securities". The titles on pledge, mortgage, retention of title, lien and privileges will be addressed later.

Focus on Contractual Freedom

The Bill prioritises the contractual freedom which means that its provisions are mostly supplementary in nature as they will apply if the contract remains silent on a given issue.

Codification of Existing Legal Forms

Currently, only surety (*borgtocht / cautionnement*) is specifically regulated under the old Belgian Civil Code. Various other forms of personal security, such as guarantees, letters of comfort and joint and several liability as a security were not codified. The Bill changes this and establishes a statutory basis for these additional forms of security that is in line with established case-law and practices.

The Bill updates "accessory personal security" (*i.e.*, a security dependent on a principal obligation) while maintaining the legal framework. Important changes include the presumption of surety and recognition of surety for "all claims" (previously known as surety for "all sums"), with clarified rules on the guarantor's right of recourse.

Autonomous Personal Security

Chapter 3 establishes a statutory basis for guarantees, laying down the guarantor's right of recourse and the non-transferability of the guarantee as a personal right.

Personal Security Granted by Consumer

The provisions concerning personal guarantees granted by consumers (Chapter 4) replace the current regime of "free suretyship" (*cautionnement à titre gratuit / kosteloze borgtocht*) enhancing consumer protection with provisions prohibiting consumers from providing an autonomous guarantee and establishing pre-contractual information obligations.

The Bill is available in Dutch and in French (here).

COMPETITION LAW

Federal Chamber of Representatives Approves Bill Modifying Competition Rules

The federal Chamber of Representatives (*Kamer van volksvertegenwoordigers / Chambre des représentants* – the ***Chamber***) approved bill 55K3813 (the ***Bill***) on 28 March 2024 that will modify the procedures of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) and implement Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (***Digital Markets Act*** or ***DMA***). As discussed in an earlier issue of this Newsletter (*See*, this Newsletter, Volume 2024, No. 1), the Bill creates the position of chief planning and budget within the BCA's board of directors and also seeks to improve the efficiency of the procedures in antitrust matters followed by the BCA. Additionally, the Bill confers powers on the BCA to support the work of the European Commission in applying the DMA.

Pursuant to the most controversial policy choice of the Bill, the powers of the BCA to review mergers between "authorised hospitals" will be severely curtailed. The BCA's jurisdiction will be limited to transactions among parties that achieve a turnover of at least EUR 250 million individually and EUR 900 million collectively. While modifications to the competition rules rarely give rise to genuine parliamentary debate, the rule pertaining to hospital mergers (Article 57 of the Bill) formed the subject of animated discussions at committee level. In addition, in an attempt to protect its turf, the BCA asked the committee for economic affairs, consumer protection and digital agenda of the Chamber to be heard (*See*, this Newsletter, Volume 2024, No. 2), but that request was unceremoniously turned down.

Coincidentally, the BCA published a notice on 10 April 2024 announcing the review under the merger control rules of the proposed merger of GastHuisZusters Antwerpen vzw and Ziekenhuisnetwerk Antwerpen vzw, two hospitals based in Antwerp.

The Bill will enter into force 10 days after its publication in the Belgian Official Journal. The approved text can be retrieved here.

Belgian Competition Authority Submits Amicus Curiae Letter in Proximus / EDPnet Case

On 29 March 2024, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) published on its website an opinion (*amicus curiae* letter) which its Prosecution Service (*Auditoraat / Auditorat*) had submitted on 1 September 2023 to the Court of Appeal of Ghent (*Hof van Beroep te Gent*) in the *Proximus / EDPnet* case (the ***Opinion***) as a complement to an earlier opinion which the BCA had provided to the same court on 2 June 2023.

In March 2023, the BCA began a review of the acquisition of EDPnet by Proximus. The enterprise court of Ghent, Dendermonde section (*Ondernemingsrechtbank te Gent, afdeling Dendermonde* – the ***Enterprise Court***), had sanctioned this acquisition on 21 March 2023, but this did not prevent the BCA from opening an inquiry into a possible abuse of dominance, in the wake of the *Towercast* judgment which the Court of Justice of the European Union (***CJEU***) delivered on 16 March 2023. In that case, the CJEU held that a concentration that does not reach the thresholds for review under EU or national merger control rules may still be investigated under Article 102 Treaty on the Functioning of the European Union, which prohibits the abuse by a company of its dominant position (*See*, this Newsletter, Volume 2023, No. 3).

The BCA alleged that the acquisition by Proximus, the incumbent telecommunications operator, of EDPnet, which competes with Proximus on copper and fibre-optic networks, amounted to an abuse of dominant position contrary to Article 102 of the TFEU and Article VI.2 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* – the ***CEL***). In June 2023, the competition college (*Mededingingscollege / Collège de la concurrence*) of the BCA even imposed interim measures preventing Proximus from completing its acquisition of EDPnet pending the outcome of the investigation on the merits (*See*, this Newsletter, Volume 2023, No. 6).

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This investigation was closed on 6 November 2023, following the Proximus decision to divest EDPnet and sell it to Citymesh, the aspiring fourth mobile telecommunications operator in Belgium (*See*, this Newsletter, Volume 2023, No. 12).

The BCA delivered the Opinion in the appeal filed by Citymesh against the judgment of the Enterprise Court sanctioning the sale of EDPnet to Proximus. The BCA took issue with the finding of the Enterprise Court that, while competition law is a matter of public policy, this does not mean that, in the case of a transfer under judicial authority, the court could assume the powers of the BCA in its assessment. According to the Enterprise Court, "n*owhere does it appear that the acquisition in itself would constitute a prima facie infringement of competition law*" and "*it has not been made plausible to the court that once the court will have granted Proximus the authorisation to* [acquire EDPnet], *the BCA will intervene through interim measures and thus make the acquisition of EDPnet by Proximus impossible*".

In the Opinion, the BCA observed that Article XX.79 CEL expressly provides that, when approving a reorganisation plan in the context of a judicial reorganisation by collective agreement, the court must verify whether there is a risk of violation of public order. The BCA posited that the same obligation "*obviously also exists in the context of a judicial reorganisation by transfer under judicial authority, even though this is not expressly provided for in Articles XX.84 to XX.97 CEL*". The BCA added that it is established case law that the competition rules belong to the realm of public policy.

The BCA also pointed out that, in its view, the fact that a merger results from a judicial reorganisation does not preclude the application of the *Towercast* ruling. It referred to the decision by which the Competition College of the BCA had imposed interim measures on Proximus in June 2023. In that decision, the Competition College noted that *Towercast* does not distinguish between concentrations according to the way they came about, as part of a judicial reorganisation or otherwise.

The Opinion will not have any practical impact because CityMesh withdrew its appeal once it had acquired EDPnet following that firm's divestment by Proximus. However, the Opinion signals the BCA's tough approach to concentrations that do not meet the thresholds for merger control review but may seem problematic from a competition viewpoint. At the same time, the Opinion seems oblivious to other public policy objectives that play a significant role in judicial organisations and may be in contradiction with pure competition considerations. It will be for the courts to resolve these tensions.

CONSUMER LAW

Federal Parliament Reviews Bill Transposing Directive on Representative Actions

On 27 March 2024, the Committee for Economic Affairs, Consumer Protection and Digital Agenda of the federal Chamber of Representatives adopted government Bill 55K3895 (the ***Bill***) amending Books I, XV and XVII of the Code of Economic Law (***CEL***), and transposing Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (***Representative Actions Directive***). The Bill seeks to align the existing Belgian rules governing actions for collective redress with the Representative Actions Directive.

Existing Mechanisms for Collective Court Action in Belgium

Belgian law provides for three types of collective court action mechanisms:

- The *action for collective redress* (*rechtsvordering tot collectief herstel / action en réparation collective*) is brought by a group representative meeting the criteria provided for in Article XVII.39, CEL on behalf of an open group of individuals who have either explicitly opted in or not opted out of the procedure. The most notable group representative recognised in Belgium is consumer organization *Test-Aankoop / Test-Achats*. Only the group representative and the defendant(s) are parties to the proceedings, not the individuals being represented by the group representative. The action for collective redress was originally only available for the purpose of consumer protection. Since July 2018, it has also been possible for groups representing small and medium-sized enterprises to bring actions for collective redress. This mechanism is often referred to as a "class action". Its statutory basis is found in Title 2 of Book XVII, CEL.

- Actions can be brought on behalf of *several individuals*. Additionally, several individual actions can be treated as *connected actions* (*samenhangende vorderingen / actions connexes*) because they are so closely related that it is desirable to treat and adjudicate them together to avoid contradicting judiciary decisions. Such connected actions remain individual actions but are examined and disposed of by the court jointly. The legal basis for this approach is set forth in Articles 30 and 701, Judicial Code.

- The *action of collective interest* (*rechtsvordering ter bescherming van collectieve belangen / action d'intérêt collectif*) is initiated by a legal person in view of defending a "collective interest", *i.e.*, an interest related to the protection of human rights or fundamental freedoms recognised in the Constitution and in international conventions to which Belgium is a party. The statutory basis is provided for by Article 17, paragraph 2, Judicial Code.

The Bill addresses only the action for collective redress. The existing statutory framework already satisfies most requirements of the Representative Actions Directive, but amendments were considered necessary to implement the Representative Actions Directive fully.

Amendments by Bill

The most notable changes introduced by the Bill are the following:

- *Expansion of legal grounds* – The Bill extends the range of permissible grounds for initiating actions for collective redress to include violations of data protection rules and of investor protection regulations;

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- *Suspension of limitation period* – The Bill suspends the statutory limitation period for bringing individual actions when the individual falls within the scope of the group description of the action for collective redress;

- *Default opt-in regime* – The Bill provides that parties to the proceedings may agree on either the opt-in or the opt-out system (unless the action pertains to moral damage or physical injury or to plaintiffs living abroad, in which case the opt-in system will apply automatically as is currently the case). If the parties are unable to reach an agreement, the action for collective redress will be an opt-in action by law. In addition, the consumers represented will only have to choose whether to opt-in after the decision on the merits is issued; and

- *Cross-border actions* – The Bill entitles qualified group representative entities from other EU Member States to bring actions for collective redress in Belgium, and *vice versa*.

It is doubtful whether the new provisions of the Bill will result in a substantial increase in the number of actions for collective redress brought before Belgian courts. Since the introduction of the actions for collective redress in 2014, there have been only eleven such actions.

The federal Chamber of Representatives is scheduled to approve the Bill on 18 April 2024.

The Bill is available in Dutch here and in French here.

DATA PROTECTION

Court of Justice of European Union Responds to Brussels Court of Appeal in IAB Case, Designates IAB as Joint Controller, and Confirms that File Storing Ad Preferences Constitutes Personal Data

On 7 March 2024, the Court of Justice of the European Union (the ***CJEU***) handed down its judgment in case C-604/22, *IAB Europe*, in response to a reference for a preliminary ruling by the Brussels Court of Appeal (the ***Referring Court***). In its judgment, the CJEU held that the file created by IAB to store users' ad preferences should be considered to constitute personal data. In addition, the court provided guidance to the ad tech sector to determine the data controllers for targeted online advertising.

Background

The case before the CJEU concerns a dispute between the Belgian Data Protection Authority (the ***DPA***) and the Interactive Advertising Bureau Europe (***IAB Europe***), which developed the Transparency & Consent Framework (***TCF***), a tool designed to align data processing operations during Real-Time Bidding (***RTB***) with GDPR requirements.

RTB is the process that occurs whenever a user visits a website which has a placeholder for targeted advertisement. In this process, entities such as brokers and advertising platforms enter into an ultra-short competitive bidding process to allocate the advertising space to the highest bidder. The objective of the process is to allow bidding advertisers to display advertisements that are tailored to the user's interests and profile.

In the TCF system developed by IAB Europe, users' preferences regarding online advertising are encoded in a so-called Transparency and Consent String (***TC String***). This string of information is shared with data brokers and advertising platforms through the RTB protocol, enabling them to know which types of personal data processing the user has consented or objected to. At the same time, a cookie is placed on the user's device. Together, the cookie and the TC String can be linked to the user's IP address.

Several complaints against IAB Europe questioned the compatibility of the TCF with the GDPR. In 2022, the Belgian DPA held that the TC String constituted personal data, and found that IAB Europe, as controller of the processing operation, fell short of its requirements under the GDPR (*see* VBB client alert of 14 February 2022).

IAB Europe challenged this decision and brought an action before the Brussels Court of Appeal (the Referring Court), which stayed the case and referred two questions to the CJEU: (i) whether the TCF String should be considered as personal data; and (ii) whether IAB Europe acted as 'controller' for the processing of personal data associated with the TCF.

CJEU Judgment

In response to the first question, the CJEU confirmed that the TC String includes information relating to an identifiable user and therefore constitutes personal data under the GDPR. The CJEU relied on cases C-487/21, *Österreichische Datenschutzbehörde and CRIF*; C-579/21, *Pankki S*; C-683/21, *Nacionalinis visuomenės sveikatos centras* and by analogy C-582/14, *Breyer*). The CJEU held that when a TC String is linked to an identifying marker, such as the IP address of a user's device, this data can be used to construct a user profile, thereby allowing the identi¬fication of the individual.

Regarding the second question in relation to IAB Europe's role, the CJEU considered that, pending further examination by the Referring Court, IAB Europe significantly influences the processing of personal data related to the TC String and defines, jointly with its members, the purposes of such processing operations. The CJEU further noted that, subject to additional verifications by the Referring Court, it appears that IAB Europe also defined the means of the processing operations, as it imposed specific rules and technical standards on its members and had the authority to

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suspend or exclude them in case of non-com¬pliance. On that basis, the CJEU held that IAB Europe should be considered as a joint controller (and referred to cases C-683/21, *Nacionalinis visuomenės sveikatos centras;* by analogy C-40/17, *Fashion ID*; C-210/16, *Wirtschaftsakademie Schleswig-Holstein*; C-25/17, *Jehovan todistajat*). However, the CJEU added that IAB Europe should not be considered as a joint controller for subsequent processing of personal data conducted by other entities, such as data brokers and advertising platforms, following the distribution of user preferences via the TCF String. The CJEU considered that such further processing includes "the transmission of those data to third parties or the offering of personalised advertising to those users". For these processing operations, IAB does not act as a (joint) controller.

The full CJEU judgment can be consulted here.

European Data Protection Board Adopts Opinion on Main Establishment Concept

On 13 February 2024, the European Data Protection Board (***EDPB***) adopted an Opinion (the ***Opinion***) on the concept of a controller's main establishment in the EU under Article 4(16)(a) 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 French Data Protection Authority (***DPA***) made a request to the EDPB under Article 64(2) GDPR to issue an Opinion regarding the concept of a controller's main establishment and the criteria for the application of the one-stop-shop mechanism. In its Opinion, the EDPB offered additional guidance regarding the situation of controllers operating in more than one EU Member State. This should help to determine which EU Member State's DPA the controller mainly engages with.

Clarification of Main Establishment and Application of One-stop-shop Mechanism

The French DPA's request was for clarification of the concept of a controller's main establishment in the EU as per Article 4(16)(a) GDPR. This provision offers a definition of "main establishment" in situations in which a controller has establishments in more than one EU Member State. In these cases, the main establishment will be the place of central administration (***PoCA***) in the EU, unless the decisions on the purposes and means of the processing of personal data are taken in another of the controller's establishments in the EU and this establishment has the power to have such decisions implemented. The French DPA wanted to clarify whether, in order to consider the PoCA of the controller as a main establishment under Article 4(16)(a) GDPR, the supervisory authorities (***SAs***) have to collect evidence that this PoCA takes the decisions on the purposes and means of the processing and has the power to have these decisions implemented.

The EDPB examined the wording of Article 4(16)(a) GDPR, its context, and the objectives of the GDPR before concluding that a controller's PoCA in the EU can be considered as a main establishment under Article 4(16)(a) GDPR only if it takes the decisions on the purpose and means of the processing of personal data and if it has the power to have these decisions implemented. The EDPB further noted that the notion of PoCA is used in the context of freedom of establishment for companies or firms under Article 54 of the Treaty on the Functioning of the European Union (hereinafter, ***TFEU***), and is a well-established notion in civil and commercial law.

The EDPB also clarified that the burden of proof in relation to the place where the processing decisions are taken and where there is power to implement these decisions falls on the controllers, who have a duty to cooperate with the SAs. The SAs can then challenge the controller's claim based on an objective examination of the relevant facts and request further information if necessary.

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The EDPB guidance is key in determining which DPA is to be the Lead Supervisory Authority (***LSA***) in cross-border data protection cases. The one-stop-shop mechanism enables a controller operating in several EU Member States to benefit from an LSA that will act as the single point of contact for its cross-border activities. However, the EDPB clarified that the one-stop-shop mechanism can only apply if there is evidence that one of the controller's establishments in the EU takes the decisions on the purposes and means for the relevant processing operations and has the power to have such decisions implemented. Importantly, this means that when decisions on the purpose and means of the processing and the power to have such decisions implemented are exercised outside of the EU, there is no main establishment of the controller in the EU under Article 4(16)(a) GDPR, and the one-stop-shop does not apply.

The Opinion can be found here.

INTELLECTUAL PROPERTY

Court of Justice of European Union Finds Legislation Excluding Independent Companies Established in Another Member State from Copyright Management Activities To Be Incompatible with Freedom To Provide Services

On 21 March 2024, the Court of Justice of the European Union (***CJEU***) delivered its judgment in the case C-10/22 – *LEA*. The case concerned LEA, a collective management organisation governed by Italian law and authorised to operate in the field of copyright intermediation, and Jamendo, a Luxembourgish management company also operating in Italy.

LEA applied for an injunction against Jamendo before the Tribunale ordinario di Roma (the ***Referring Court***) seeking an order that Jamendo should cease its activity of copyright intermediation in Italy, arguing that Jamendo is carrying out its activity in Italy unlawfully. Italian legislation had exclusively reserved this activity for specific Italian organisations. Jamendo responded that Italy had failed to transpose Directive 2014/26 of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (***Directive 2014/26***).

The Referring Court decided to stay the proceedings and refer a question for a preliminary ruling concerning the interpretation of the Directive to the CJEU.

The CJEU observed that Directive 2014/26 does not harmonise the conditions for access to the copyright management activity. However, the CJEU crucially added that this does not imply that national regulations fall outside the scope of EU law and are lawful. It therefore examined whether the activity of copyright management that is carried out by independent management entities is governed by Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market or Directive 2006/123 on services in the internal market. On both counts, the CJEU held that the Directives do not apply.

The CJEU then went on to assess the Italian rule in the light of Article 56, Treaty on the Functioning of the EU (***TFEU***) which enshrines the freedom to provide services across borders. The CJEU then analysed the proportionality of the Italian measures. Despite acknowledging that the protection of intellectual property rights constitutes an overriding reason in the public interest that may justify restrictions on the freedom to provide services, the CJEU still wanted to ascertain whether the Italian approach would be suitable for achieving the public interest objective of copyright protection.

According to established case-law, national legislation is appropriate for ensuring the attainment of the objective sought only if it genuinely meets that objective in a consistent and systematic manner. Applied to this case, the CJEU held that the different treatment of independent management entities, as compared to collective management organisations, attains the objective of copyright protection.

Nevertheless, the CJEU added that a less restrictive measure on the freedom to provide services could involve imposing specific regulatory requirements on the provision of copyright intermediation services in the relevant Member State. The CJEU concluded that as long as the national legislation at issue in the main proceedings fully prevents an independent management entity from exercising a fundamental freedom that is guaranteed by the FEU Treaty, the national rule appears to go beyond what is necessary for the protection of copyright.

The CJEU thus concluded that the Italian legislation infringed EU law, favouring the principle of free movement of services and once again emphasising that the Member States' discretion in transposing directives is not unlimited.

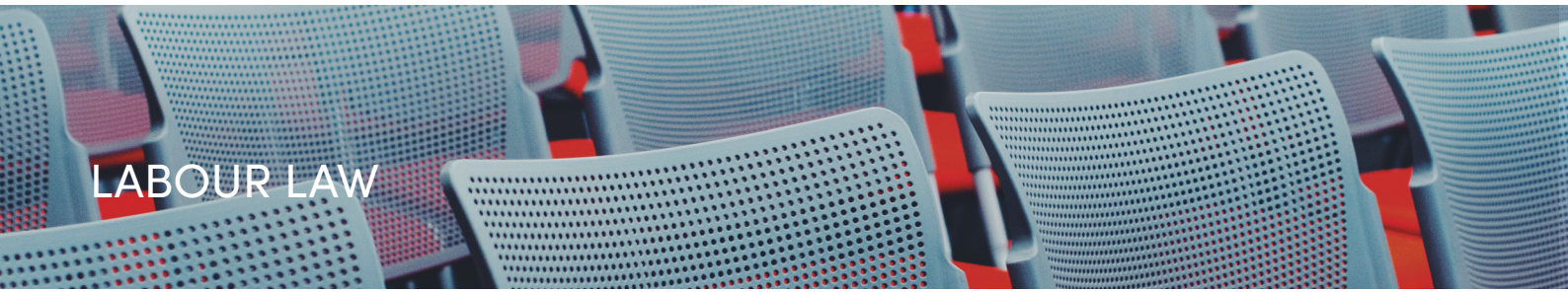
INTELLECTUAL PROPERTY

European Commission Recommends Measures to Combat Counterfeiting and Enhance Enforcement of Intellectual Property Rights

The European Commission (***Commission***) published on 19 March 2023 a Recommendation encouraging Member States to take effective measures to combat online and offline activities that infringe intellectual property rights (***IPR***). The Recommendation focuses on various acts that involve either counterfeit or pirated goods. Counterfeit goods infringe trade mark rights, patents and/or geographical indications, while pirated goods run afoul of copyright or design rights.

The Commission's principal suggestions to Member States are as follows:

- Designating a single point of contact for IPR enforcement matters.
- Promoting information sharing among all members of the value chain, including Member State authorities, EU bodies and businesses.
- Encouraging signatories to the Memorandum of Understanding on the sale of counterfeit goods on the internet to seek 'trusted flagger status' under the Digital Services Act to ensure that they are given priority when submitting notices of illegal content.
- Adapting procedures to counter new counterfeiting practices, for example by addressing mirror websites with what are referred to as dynamic injunctions. According to the Recommendation, dynamic injunctions are still only available in a few Member States and exist under different guises. They allow for the extension of a given injunction to infringing activities that had not yet been identified at the time the injunction was applied for but concern very similar facts which also give rise to a breach of IPR.
- Optimising information sharing in court proceedings.
- Ensuring appropriate compensation for damages, including both material and moral damages.
- Promoting the use of alternative dispute resolution techniques for all IP disputes, especially cross-border disputes and SMEs.
- Reassessing and possibly increasing the maximum penalties imposed on serious IPR offences of a criminal nature.
- Empowering market surveillance authorities to combat counterfeiting.
- Developing practices to allow for the faster, cheaper, and more ecological storage and disposal of counterfeit and pirated goods.
- Adapting IP practices to artificial intelligence and virtual worlds, using blockchain for supply chain traceability and content recognition systems.
- Integrating IP content in training and education curricula, especially for law enforcement and business education purposes.



LABOUR LAW

New Dismissal Formalities for Contractual Employees in Public Sector

On 20 March 2024, the Law of 13 March 2024 on the justification for dismissal and manifestly unfair dismissal of contractual employees in the public sector was published in the Belgian Official Journal. It will take effect on 1 May 2024 (*Wet van 13 maart 2024 tot motivering van ontslag en kennelijk onredelijk ontslag van contractuele werknemers in de overheidssector / Loi du 13 mars 2024 sur la motivation des licenciements et des licenciements manifestement déraisonnables des travailleurs contractuels du secteur public* – the ***Law***). The Law introduces (i) the right of employees to be heard prior to dismissal; (ii) the obligation of the employer to justify the reason(s) for dismissal; and (iii) the concept of manifestly unfair dismissal. All these principles will apply to contractual employees in the public sector.

Rules in Private Sector

Collective Bargaining Agreement No. 109 (*Collectieve Arbeidsovereenkomst nr. 109 van 12 februari 2014 betreffende de motivering van het ontslag / Convention collective de travail n° 109 du 12 février 2014 concernant la motivation du licenciement* – ***CBA No. 109***) implemented the regulatory framework for the justification of dismissals and the concept of manifestly unfair dismissal for private sector employees in March 2014. The Supreme Court later held that CBA No. 109 should be applied by analogy in cases of dismissal of a contractual employee in the public sector pending a specific regulatory framework for such employees. The Law now finally provides for such a framework.

Prior Hearing and Reasons for Dismissal

The employee has the right to be heard prior to his dismissal. A public sector employer who envisages dismissing a contractual employee for personal or behavioural reasons must conduct a prior hearing of the employee to obtain the employee's view on the circumstances and reasons for the envisaged dismissal.

The employer must provide the facts and reasons justifying the envisaged dismissal well in advance to the employee, allowing the employee adequate time for the preparation of the hearing and the submission of written comments.

If, after the hearing, the employer decides to proceed with the dismissal, he must notify the employee in writing and furnish the specific reasons for the dismissal. This is different from the private sector, where the obligation to provide the reasons for dismissal only applies when requested by the employee.

If the employer fails to conduct a prior hearing with the employee or fails to communicate the specific reasons for the dismissal, the employee will be entitled to damages of two weeks' gross salary in addition to the statutory severance pay.

Manifestly Unfair Dismissal

The principles of manifestly unfair dismissal as provided for by CBA No. 109 form the basis for those in the Law. A dismissal is considered as manifestly unfair if the grounds for dismissal are not based on (i) the capabilities or the behaviour of the employee; and/or (ii) the economic or operational needs of the employer. In addition, a dismissal can only qualify as manifestly unfair if it would not have been carried out by a normal and reasonable employer. In case of a manifestly unfair dismissal, the employer is liable to pay a compensation from three to 17 weeks' gross salary in addition to the statutory severance pay, of which the exact amount is determined by the Labour Courts. Moreover, this compensation is cumulative with the two weeks' gross salary compensation in cases where the employer did not comply with the obligation to conduct a prior hearing of the employee or failed to communicate the specific reasons for dismissal.

The Law is available in Dutch (here) and French (here).

LITIGATION

Federal Parliament Reviews Bill Transposing Directive on Representative Actions

See section "Consumer law".

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