November 2023

VBB on Belgian Business Law

Issue Highlights

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

Legal 500, 2019

Topics covered in this issue

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COMMERCIAL LAW

Federal Minister for Economic Affairs Publishes Policy Note

On 27 October 2023, the federal Minister for Economic Affairs, Pierre-Yves Dermagne, submitted his annual policy note regarding economic affairs (*beleidsnota/ note de politique générale* - the ***Policy Note***) to the Chamber of Representatives. The Policy Note summarises the Minister's main achievements and discusses the upcoming reforms and priority areas.

The following contemplated changes are worth noting:

- Book X of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) will be revised to clarify and improve the rules governing the supply of pre-contractual information for commercial cooperation agreements such as franchise agreements. Moreover, the rights and obligations of parties to commercial cooperation agreements will be updated to ensure a better balance between the parties.

- The Minister will make it mandatory for all enterprises to accept in-person cash payments from consumers. This obligation will complement the recently introduced obligation for enterprises to accept electronic payments. However, subject to prior information provided to the consumer at the shop entrance and at the cash register, shop owners can (i) temporarily refuse cash payments for security reasons; and (ii) refuse banknotes whose nominal value is disproportionate to the amount usually paid by consumers.

Both reforms form part of the Bill containing various provisions regarding economic affairs (*Wetsontwerp houdende diverse bepalingen inzake Economie / Projet de loi portant dispositions diverses en matière d'Économie*) which the federal government submitted to the Chamber of Representatives on 9 November 2023.

The Policy Note can be consulted here.

Navigating Black Friday Deals: Economic Inspection Cautions Consumers Against Bad Deals

Economic Inspection Identifies 9,942 Breaches by Webstores

On Friday 24 November 2023, consumers around the world hunted on online marketplaces and webstores to find the best Black Friday deals. In light of this, the Economic Inspection Services of the Federal Public Service Economy (*Federale Overheidsdienst Economie /Service public fédéral Economie*) (*Economische Inspectie / Inspection économique* - the ***Economic Inspection***) warned consumers to exercise caution as it has already identified 9,942 infringements of consumer protection rules by webstores this year.

These infringements were identified through preventive investigations conducted by the Economic Inspection as well as the "point of contact" (*Meldpunt / Point de contact* - the ***PoC***), an online platform launched in 2016 by the Economic Inspection allowing consumers and businesses to submit questions and complaints regarding misleading and/or fraudulent practices (*see also*, this Newsletter, Volume 2021, No. 10). In 2023, the Economic Inspection has already received 6,913 complaints through the PoC. While this marks a significant decrease in comparison with the year 2020 (during the COVID 19 crisis) in which 11,628 complaints were filed, the number of infringements is still increasing. This may result from the fact that over the past five years the number of website inspections conducted by the Economic Inspection increased from 4,742 in 2019 to 10,389 last year. In 2023, 7,184 inspections have already been carried out.

According to the Economic Inspection, fraud and scam practices (*e.g.*, phishing), non-delivery of ordered goods, and unsolicited delivery of goods or services are amongst the most frequently occurring misleading and/or fraudulent practices.

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Price Reductions

In May 2022, Belgium implemented Directive (EU) 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement and modernisation of Union consumer protection rules (the ***Omnibus Directive***), which provides additional protection to consumers against malicious webstores (*see also*, this Newsletter, Volume 2022, No. 5).

Pursuant to the prior price rule of the Omnibus Directive, a supplier advertising a price reduction is obliged to indicate the 'reference price' on which the discount is calculated as well. This reference price should be the lowest price applied in the period of 30 days prior to the application of the price reduction. For new products which have been on the market for less than 30 days, a shortened reference period of seven days applies. The goal of this reference price is to protect consumers from misleading practices involving a price increase right before a promotion.

The obligation to indicate the 'reference price' applies not only to announcements of a specific, measurable discount (*e.g.*, a 10% discount) but also to announcements that give the impression of a discount such as, for example, 'Black Friday sales'.

There are three exceptions to the obligation to indicate a reference price:

1. promotions for perishable goods;

2. progressive price reductions, *i.e.*, discounts which increase during a period not exceeding 30 days, in which case the trader is not required to adjust the reference price with each discount increment but, instead, may retain the initial reference price established before the first price reduction; and

3. general communications which do not refer to a price reduction (*e.g.*, those indicating the 'lowest price' or 'best price', joint offers and conditional offers).

The other rules governing unfair market practices of course remain applicable as well. This includes, for example, the rule that the language used in general communications cannot be misleading to the consumer.

Conclusion

Given the significant increase in inspections by the Economic Inspection, the likelihood of businesses facing penalties for non-compliance has grown significantly. As such, businesses are recommended to ensure their compliance with Belgian law.

Court of Justice of European Union Rules Against Austrian Law on Reporting Mechanisms for Providers of Communication Platforms

On 9 November 2023, the Court of Justice of the European Union (***CJEU***) issued a judgment in which it held that a Member State must not subject a communication platform provider established in another Member State to general and abstract obligations as Article 3(4) of Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (***E-Commerce Directive***) does not cover 'general and abstract measures aimed at a category of given information society services' (CJEU, 9 November 2023, case C-376/22, *Google Ireland and Others*).

Background

Google Ireland, Meta Platforms Ireland and Tik Tok Technology are established in Ireland and provide communication platform services all over the world, including in Austria. In 2021, Austria adopted the federal law on measures for the protection of users of communications platforms (the ***Communications Platform Act***) which targets "illegal content" on digital platforms. As such, domestic and foreign providers of communication platforms are required to set up reporting mechanisms, establish an effective and transparent procedure for handling illegal content notifications and to provide for regular publications of reports of illegal content. Compliance with the

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Communications Platform Act is enforced by the *Kommunikationsbehörde Austria* (***KommAustria***) which can impose fines of up to EUR 10 million.

Google Ireland, Meta Platforms Ireland and Tik Tok Technology challenged the compatibility of the Communications Platform Act with EU law before the Austrian courts, all the way up to the Austrian Administrative Supreme Court (the ***Referring Court***). The Referring Court asked the CJEU whether Article 3 of the E-Commerce Directive allows for derogating measures in respect of a general category of given information society services.

Judgment

The CJEU first noted that to interpret a provision of EU law, it is necessary to consider (i) its wording, (ii) its context and (iii) the objectives pursued by the rules of which it forms part. As regards the wording of Article 3(4) of the E-Commerce Directive, this provision refers to a 'given information society service'. According to the CJEU, this wording must be understood as an individualised service provided by one or more service providers. The CJEU added that, as a result, Member States cannot adopt general and abstract measures under this provision.

The CJEU then highlighted two of the conditions of Article 3(4) of the E-Commerce Directive, namely that (i) the restrictive measure concerned must be necessary and that (ii) before adopting the measure, the Member State must also have notified the European Commission and the other Member State in which the information society service originated. According to the CJEU, these conditions confirm that restricting the freedom to provide information society services from other Member States by adopting measures of a general and abstract nature relating to a category is prohibited.

When looking at the objectives of this Directive, the CJEU noted that applying measures of a general and abstract nature without distinction could jeopardise the objectives outlined in the E-commerce Directive such as applying the country-of-origin principle and maintaining mutual trust between Member States. Allowing a Member State of destination to disrupt the country-of-origin principle by implementing general and abstract measures would compromise the attainment of these objectives.

Based on the above, the CJEU concluded that Article 3(4) of the E-Commerce Directive should be interpreted as indicating that general and abstract measures directed at a broadly described category of information society services, applied universally to any provider in that category, do not constitute measures taken against a specific 'given information society service' as defined in that provision.

CONSUMER LAW

Secretary of State for Consumer Protection Publishes Policy Note

On 27 October 2023, the Secretary of State for the Budget and Consumer Protection, Alexia Bertrand, submitted her policy note on consumer protection (*beleidsnota / note de politique générale* - the ***Policy Note***) to the federal Chamber of Representatives. In the Policy Note, the Secretary of State sets out her priorities for 2024, including the following:

- *Digital portal "ConsumerConnect"* – The Secretary of State is committed to creating a centralised digital portal for consumers, called ConsumerConnect, which should go live in early 2024. This digital portal will serve as the unique digital service desk for assisting consumers in finding information on consumer protection, submitting questions, filing complaints with the Economic Inspection services (*Economische Inspectie / Inspection économique*) and guiding consumers through the qualified entities for the extrajudicial settlement of consumer disputes. On 20 November 2023, the Bill providing for the establishment of ConsumerConnect (*Wetsontwerp houdende oprichting van het digitaal consumentenplatform "ConsumerConnect" / Projet de loi portant création de la plateforme numérique pour les consommateurs "ConsumerConnect"*) was submitted to the Chamber of Representatives.

- *Dispute resolution* – The Secretary of State will take steps to improve aspects of extrajudicial settlement of consumer disputes and will finalise the transposition of Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers. For that purpose, the federal Council of Ministers approved a Draft Bill on 27 October 2023 (see, press release in Dutch here and in French here).

- *Initiatives under Belgian Presidency of Council of European Union* – During the Belgian Presidency, the Secretary of State intends to prioritise the protection of consumers against the dangers of artificial intelligence (***AI***). Concretely, she wishes to ensure that there is an appropriate regulatory framework in place at the European level to protect consumers and users of AI against risks to their fundamental rights, health and safety (*e.g.*, risks associated with generative AI that can create vast amounts of misinformation and inaccuracies, capable of influencing vulnerable consumers).

The Policy Note can be consulted here.

CORPORATE LAW

JustBan Launched to Verify Disqualified Corporate Representatives

On 20 October 2023, the Federal Public Service Justice (***FPS Justice***) launched the new online register for verifying bans of corporate representation. The register was named "JustBan" (the ***JustBan Register***) and is accessible via Just-on-web/JustBan.

Background

The JustBan Register was introduced by the Law of 4 May 2023 implementing the Central Register for Disqualified Directors (*See*, this Newsletter, Volume 2023, No. 5).

Accessible Information

The JustBan Register will be open to the public, notaries and public servants when exercising their mandate (including court clerks, Public Prosecutors and specific police, tax, social security, and Central Commercial Register staff members). It will include information regarding civil and criminal bans imposed on directors, statutory auditors, daily managers, members of the management and supervisory board, liquidators, and branch representatives (the ***Targeted Representatives***).

The JustBan Register currently only publishes bans imposed in criminal proceedings when combined with other criminal sanctions. From 2024 onwards it will also disclose the bans imposed in civil proceedings (*e.g.*, on account of a gross error committed in bankruptcy proceedings).

Practical Consequences for Appointment of New Representatives

The court clerk's office will refuse the appointment of any Targeted Representative who is subject to a pending ban.

Furthermore, the relevant corporate governance body must sign a separate statement for the court clerk's office confirming that no similar ban was imposed by another EEA authority or tribunal. Any failure to supply such a statement will cause the appointment to be suspended until the court clerk's office has received confirmation from the criminal chamber of indictment (*kamer van inbeschuldigingstelling / chambre des mises en accusation*) that no such ban appears on a connected register of another EEA Member State.

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European Data Protection Board Issues Guidelines on ePrivacy Directive

On 14 November 2023, the European Data Protection Board (***EDPB***) adopted new guidelines (the ***Guidelines***) regarding the technical scope of Article 5(3) of the ePrivacy Directive (Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector – the ***Directive***).

Clarification of Concepts

Article 5(3) of the Directive applies to the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a user. It provides that the user must receive clear and comprehensive information regarding the use of his/her data and that he/she must be offered the right to refuse such use. This provision typically also applies to the use of cookies on websites.

As regards the notion of "information", the Guidelines clarify that it applies to the storage of both personal and non-personal data. This is regardless of who stored the data (an external entity, the user, the manufacturer).

The Guidelines broadly interpret the notion of "terminal equipment of the subscriber or user". This concept does not only protect the user's private life, but also the integrity of the terminal equipment itself, regardless of the level of involvement of the user in the communication process.

Regarding the notion of "gaining access", the Guidelines give additional examples of cases falling under the scope of Article 5(3) in addition to the use of cookies, such as the use of an API (application programming interface) endpoint by software and the use of a JavaScript code.

The Guidelines clarify that the notion of "storage" does not depend on the type of medium and could include hard disc or solid state drives but also any medium that can connect internally, externally or through a network protocol (SATA, USB, etc.).

Case Studies

The Guidelines also contain concrete examples which reflect the technologies currently available.

For example, they clarify that tracking links and tracking pixels fall under the scope of Article 5(3) of the Directive provided that these were distributed over a form of public communication. Additionally, the tracking based on IP only could trigger the application of Article 5(3) of the Directive if the information originates from the terminal equipment of the user. "Internet of things" devices would also fall under the scope of that provision if they are connected to a public communications network or if they rely on a relay device which sends information to a remote server.

The Guidelines can be found here.

Court of Justice of European Union Reiterates Relative Nature of 'Personal Data' In Case regarding Access to Vehicle Spare Part Information

On 9 November 2023, the Court of Justice of the European Union (***CJEU***) handed down its judgment in case C 319/22, *Gesamtverband Autoteile-Handel eV v. Scania CV AB*. The judgment highlights the nuanced nature of personal data, particularly in the context of Vehicle Identification Numbers (***VINs***). The decision establishes that a requirement to give access to vehicle repair and maintenance information to independent operators under Regulation 2018/858 on the approval and market surveillance of motor vehicles and their components (the ***Market Surveillance Regulation***) provides a valid legal basis for the processing of personal data pursuant to Article 6(1) of the General Data Protection Regulation (***GDPR***).

Background

The case before the CJEU concerned a dispute between Gesamtverband Autoteile-Handel eV (***Gesamtverband***), a German trade association for

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wholesalers of vehicle parts, and Scania CV AB (***Scania***), a Swedish vehicle manufacturer. The dispute concerned Scania's provision of vehicle on-board diagnostic (***OBD***) information in the context of the Market Surveillance Regulation, which concerns the approval and market surveillance of motor vehicles and their components. The Market Surveillance Regulation aims to raise the quality level and impartiality of vehicle type approval and testing, and to ensure that new types of motor vehicles and their trailers conform to EU-approved requirements on safety and environmental protection.

Under the Market Surveillance Regulation (Article 3(40)), Scania must grant independent operators access to information that is relevant to the maintenance and repair of a vehicle. To find the relevant information, independent operators can search for vehicles by several criteria, including the last seven numbers of the VIN.

Scania only provided this information to repairers, and therefore not to the Gesamtverband and its members. Gesamtverband lodged a complaint before the Regional Court of Cologne (***Referring Court***), claiming that Scania fell short of its obligations under the Market Surveillance Regulation (Articles 61(1)-(2)) to enable such operators to access and download the vehicle maintenance and repair information. The Referring Court stayed the case and referred several questions to the CJEU.

CJEU's Judgment

As regards data protection law, the Referring Court asked whether Article 61(1) of the Market Surveillance Regulation imposes a legal obligation on vehicle manufacturers, within the meaning of the GDPR, to make the VINs of vehicles that they manufacture available to independent operators. The Referring Court thereby considered that these operators act as independent data controllers under Article 4(7) GDPR.

In its answer, the CJEU held that it was necessary to determine if a VIN may be regarded as a form of personal data (as per Article 4(1) GDPR). It observed that information should be considered to be personal data if, by "*reason of its content, purpose and effect, the information in question is linked to a natural person*" (para. 45). The CJEU also referred to its *Breyer* judgment (C-582/14), in which it held that to determine whether information can be linked to an individual, it is necessary to consider all means "*likely reasonably to be used*" by either the data controller or by a third party to identify the data subject.

The CJEU then drew on the Opinion of Advocate General (***AG***) Sánchez-Bordona, in which the AG observed that, as such, an alphanumeric code for vehicle identification cannot be considered as 'personal data' within the meaning of the GDPR. However, once someone reasonably has the means to enable that code to be associated with a specific person, a VIN may then be regarded as personal data. The CJEU noted that the VIN will appear on the registration certificate of the vehicle, alongside other information such as the purchaser's name and address. On this basis, if a party had access to that information, the VIN would constitute personal data.

It followed that since the VIN may constitute personal data for the manufacturer, then the VIN must be processed on one of the grounds provided for by the GDPR.

The CJEU examined the Market Surveillance Regulation requiring vehicle manufacturers to provide repair and maintenance information to independent operators and emphasised the need for an unequivocal vehicle identification and inclusion of VIN in manufacturers' databases (Annex X and Article 61(4), particularly point 6.1). The CJEU considered that together these requirements provide a legal basis for processing VIN data under Article 6(1)(c) GDPR, which permits the processing of personal data that is necessary to comply with a legal obligation. It also considered that this legal obligation pursues a public interest objective of ensuring effective competition on the market for vehicle repair and maintenance information services. Moreover, the CJEU, considering the necessity and proportionality of such an obligation, found that VIN

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searches represent the most effective means of identification, maintaining the delicate balance between the public interest and the constraints of limiting the use of personal data to what is strictly necessary.

Key Takeaways

This case illustrates that a same dataset may be personal data for one party, but not for another. The judgment thereby appears to oppose an expansive interpretation of what information should be considered personal data. For example, in an earlier case, in *SIA 'SS' v. Valsts ieņēmumu dienests* (C-175/20), AG Bobek labelled VINs as personal data (para. 36). By contrast, the AG in the present case suggested narrowing down the scope of VINs as personal data and opted for a more context-specific interpretation stating as follows: "*the VIN is not, in itself and in all cases, a personal datum. At least, it is not 'as a general rule, … with respect to the* [vehicle] *manufacturer*" (para. 34). While a less expansive definition of personal data should be welcomed by business, the CJEU did not provide clear guidance on which criteria should be considered to determine whether a party reasonably has the means to identify a person and, consequently, if the piece of information in question constitutes personal data.

Separately, the CJEU's interpretation of the legal basis for processing in this case is also of note. The CJEU considered that rules requiring a party to share information in its possession for the objective of enabling competition in the market for manufacturing and repairs provides a sufficiently clear legal basis permitting the sharing of personal data. Nevertheless, the CJEU clarified that personal data which is shared should still be limited to what is necessary for the purpose at hand.

European Data Protection Supervisor and UK Information Commissioner's Office Sign Memorandum of Understanding

On 8 November 2023, the European Data Protection Supervisor (***EDPS***) and the UK Information Commissioner's Office (***ICO*** – together the ***Participants***) signed a Memorandum of Understanding (***MoU***), in which they established a framework for cooperation to uphold individuals' data protection and privacy rights. The aim is to ensure consistency in administering their respective data protection systems, while respecting statutory independence, and acknowledging their own diverse laws and regulations.

The key objectives stated in the MoU include delivering regulatory cooperation, enforcing data protection and privacy laws, sharing relevant jurisdictional developments, and prioritising parallel or joint investigations. The Participants may identify areas for cooperation, such as sharing expertise, exchanging best practices, implementing joint research projects, and promoting dialogue among digital regulators. The cooperation may also involve the exchange of non-personal information related to ongoing investigations, secondment of staff, mutual assistance, operational visits, audits, inspections, and bilateral meetings. However, the MoU does not impose an obligation on Participants to share information or to engage in any other form of cooperation.

Whenever Participants intend to share personal data (e.g., cases of cross border personal data incidents involving both jurisdictions), they will be required to comply with their respective applicable laws and they may be required to sign written agreements to govern such data sharing.

Confidentiality and security measures are central to this MoU. The Participants are thus obliged to safeguard shared information through appropriate measures that reflect the sensitivity of the information (e.g. data classification, management of access, use, transfer, erasure, or destruction of the information), and through restricting data sharing to what is necessary for the purposes of the MoU. Accordingly, if one Participant intends to disclose information to third parties or use it in legal proceedings, consultation with and consent from the sender is required, unless prevented by applicable laws or regulations.

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The Participants will jointly monitor the operation of this MoU and review it upon request. This MoU has come into effect upon its signature by the Participants and will remain in effect unless terminated by either Participant upon three months' written notice to the other Participant.

The Memorandum of Understanding can be found here in English.

Court of Justice of European Union Holds that Patient Has Right to Request Free First Copy of Entire Medical Records From Physician

On 26 October 2023, the Court of Justice of the European Union (***CJEU***) held that a patient has the right to obtain a first free copy of his/her medical records, pursuant to Article 15(3) of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (***GDPR***).

Background

A German patient suspected a medical error after receiving dental care from a dentist. He requested a copy of his medical records, free of charge, based on Article 15(3) GDPR.

The dentist refused, based on German law provisions which allow doctors to ask their patients for the reimbursement of costs incurred to provide the electronic copy of their medical records. The patient brought the case before the German courts.

Both in first instance and on appeal, the German courts confirmed the patient's right to obtain a copy of the medical records pursuant to the GDPR. However, the German Federal Court of Justice (*Bundesgerichtshof*) referred a set of questions to the CJEU for a preliminary ruling, asking whether the contested German provisions were compatible with the data subject's right to a free copy of his/her data under Article 15(3) GDPR.

CJEU Judgment

The CJEU first held that a data subject can request a copy of his/her personal data free of charge even if the reasons for that request are not related to the exercise of rights under the GDPR. The CJEU observed that the GDPR does not require the data subject to state the reasons for the request and that the data controller must provide the requested information as long as the request is not abusive.

The CJEU then examined the application of Article 23(1) GDPR, which provides for the possibility for the Member States to restrict the data subject's rights by way of national legislation. The CJEU noted that under the GDPR such restrictions are only acceptable if they are necessary for the protection of the rights and freedoms of others. In this case, the Court observed that the provisions under German law only intend to protect the economic interests of the physicians. This is not sufficient to restrict the data subject's right under the GDPR.

Finally, the Court confirmed that the copy should include a faithful and intelligible reproduction of all the data in the medical records (and not just summaries), including the diagnoses, examination results, assessments by treating physicians and any treatment or interventions.

The judgment can be found here in English.

FOREIGN DIRECT INVESTMENT

Authorities Publish Updates to Belgian and EU Foreign Direct Investment Notification Forms

On 29 November 2023, the European Commission (the ***Commission***) published an updated version of its main notification form for foreign direct investments (***FDI***) into the European Union (the ***EU***).

Separately, the Interfederal Investment Screening Committee (*Interfederale Screeningscommissie / Comité de Filtrage Interfédéral* - the ***ISC***) responsible for coordinating the application of the Belgian mechanism for the screening of FDI (the ***Mechanism***), updated its list of notification forms accordingly. As a result, the completed updated main EU FDI notification form should now be submitted together with the other notification forms to notify FDI under the Mechanism.

As a result, in order to notify FDI under the Mechanism, foreign investors should complete and submit to the ISC (i) the updated main EU FDI notification form, (ii) the Belgian FDI notification form and (iii) a summary form, together with the requested information by way of an annex.

Previously, on 18 October 2023, the ISC had already published an updated version of its Belgian FDI notification form. Since the entry into force of the Mechanism on 1 July 2023, the ISC has regularly published updates to its notification forms, expanding the information that should be submitted when notifying FDI under the Mechanism.

While guidance regarding the interpretation of the law governing the Mechanism remains scarce (*See*, this Newsletter, Volume 2023, No. 5 and this Newsletter, Volume 2023, No. 7, the ISC has since the entry into force of the Mechanism from time to time provided additional insight on an informal and individual basis.

The updated main EU FDI notification form can be found here.

INTELLECTUAL PROPERTY

European Court of Human Rights Rules on Copyright Exceptions and Digital Exhaustion

The European Court of Human Rights (the ***ECtHR***) recently ruled on a copyright issue in the context of an alleged violation of the right of peaceful enjoyment of one's possessions by an Azerbaijani author after his work had been made available for digital download by an NGO (case 885/12, *Safarov v. Azerbaijan*, judgment of 1 September 2022).

Background

The case concerned Mr. Safarov, the author of a book on the history of Azerbaijan, which was published in 2009. One year later, an NGO published Mr. Safarov's work on its website without his consent where it was free for downloading. Mr. Safarov decided to sue the organisation for copyright infringement and damages. His claims were dismissed on all national levels. The national courts held that the exception for personal use and for reprographic reproduction for the preservation of cultural heritage applied. The national courts also ruled that Safarov had exercised his right of communication to the public by publishing a hard copy of his work. Finally, the NGO had already removed the book from its website.

As a last resort, Mr. Safarov filed a complaint before the ECtHR contending that his home country, Azerbaijan, had violated its obligations under Article 1 of Protocol 1 to the European Convention on Human Rights (***ECHR***). According to this provision, states must protect the right to peaceful enjoyment of possessions. Following established case law, copyright falls within the scope of such possessions.

Judgment

The ECtHR gave a judgment siding with Mr. Safarov, holding that the application of the laws by the Azerbaijani courts was not appropriate and that the Azerbaijani state had failed to protect Mr. Safarov's right under Article 1 of Protocol 1 to the ECHR.

Although it was undisputed that Azerbaijan had adopted appropriate copyright laws, Safarov argued that the national courts had applied the law in an arbitrary way by holding that specific exceptions applied and that his rights had been exhausted. The ECtHR noted that copyright falls within the scope of the possessions mentioned in Article 1 of Protocol 1 to the ECHR. The Court of Justice of the European Union (***CJEU***) had previously established the same principle.

The ECtHR then explained that the two statutory exceptions to copyright that had been relied on by the national courts did not apply Mr. Safarov's case. The first exception concerns the private use by natural persons, rather than entire reproductions by a legal entity, while the second exception protecting cultural heritage is generally relied on by libraries and other educational institutions and requires further criteria to be fulfilled before coming into play. Therefore, the publication of the entire book by the NGO was not easily conceivable on the basis of any of these exceptions and would require further reasoning by the national courts.

As regards the digital exhaustion doctrine, the ECtHR noted that pursuant to this principle copyright holders exhaust their rights after putting the work on the market with their consent. This doctrine was developed for tangible objects and its application to digital products is not clearly established. While there is case law of the CJEU on this subject, the Azerbaijani legislator or courts would be competent for determining its application in their country.

Nevertheless, the ECtHR made additional observations. The ECtHR maintained that the rule of exhaustion of the right to distribution as invoked by the national court, read together with the agreed statement concerning Article 6 of the WIPO Copyright Treaty suggests that the rule of exhaustion of the right to its distribution only refers to "*lawfully published and fixed copies of works which were put into circulation by sale as*

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tangible objects". Although the applicant had released his physical book, and physical copies were accessible in the book market, there was no indication that he had authorised the work's reproduction and digital dissemination to the public. The Supreme Court of Azerbaijan had failed to clarify why it deemed the domestic provision relevant to the case's circumstances.

This case was the first one in which the ECtHR applied copyright law, a subject usually dealt with by the CJEU. In this case, no contradiction arose between the case law of the two courts, even though they seem to follow different approaches. The CJEU relies on human rights in a broader sense to allow the use of copyrighted works by third parties, while the ECtHR limits the use of the copyright based on the fundamental rights of its holder. In future cases, this may lead to tensions and will require further elaboration.

Dutch Supreme Court Clarifies Due Cause and its Implications for Honest Practice

On 27 October 2023, the Dutch Supreme Court (the ***Court***) delivered a judgment in which it dismissed the appeal of Jiskefet BV (***Jiskefet***) and clarified that the presence of due cause implies from the outset the absence of a trade mark infringement, thus causing an evaluation of "use in accordance with honest practice" to be unnecessary.

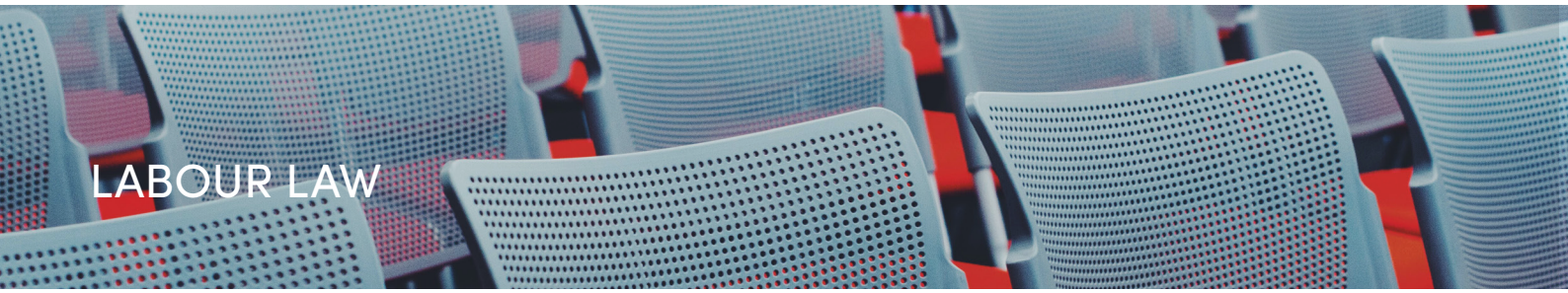
Jiskefet is a well-known Dutch satirical TV show. Following its success in the late nineties, the name "Jiskefet" was registered as a Benelux word mark by Jiskefet. In 2021, Noblesse, a publishing company, published the book "Jiskefet Encyclopedia". The book contains descriptions of the characters, episodes and other parts of the Jiskefet TV Show. Jiskefet argued that the publication of the book infringed its trade mark rights and started infringement proceedings before the District Court of Noord-Holland which held that the book could only be sold with the indication "unauthorised" on the cover.

Noblesse successfully appealed this judgment to the Amsterdam Court of Appeal. The Court of Appeal considered that the title "Jiskefet Encyclopedia" was a clear indication of what the book contains. Moreover, it also noted that although Noblesse had obtained a benefit from using this name, that benefit is not unfair. The Court of Appeal added that the title "Jiskefet Encyclopedia" used by Noblesse is an obvious designation for the book which it publishes. It held that together with the right of freedom of information such designation qualifies as a due cause to use the trade mark.

Jiskefet appealed the judgment arguing that use of a trade mark in a title is a form of identifying a good within the meaning of Article 14(1)(c) and 14(2) of the Trade Mark Directive. In addition, Jiskefet argued that Noblesse had violated fair practices in industrial or commercial matters since the use of the trademark "Jiskefet" on the cover created the impression that the book belongs to Jiskefet BV, or that it has at least an economic link with that firm.

The Dutch Supreme Court disagreed and held that Article 14(1)(c) of the Trade Mark Directive had been correctly applied by Noblesse. It found that if the lower court found that the use of "Jiskefet" does not infringe one of the grounds mentioned in Article 10 of the Trademark Directive (rights conferred by a trade mark), the trade mark proprietor cannot have his infringement claim upheld on the basis of Articles 14(1)(c) and 14(2) of the Trade Mark Directive. The Court further pointed out that Articles 14(1)(c) and 14(2) of the Trademark Directive limit the rights of the trade mark proprietor and do not extend them.

The judgment of the Dutch Supreme Court highlights the necessity of setting limits to trade mark protection and pointed to the balance required between the integrity of trade mark rights and the preservation of the freedom of information.



LABOUR LAW

Mandatory Appointment of Person of Trust Requires Update of Work Rules

On 23 November 2023, the Law of 5 November 2023 containing various labour provisions was published in the Belgian Official Journal (*Wet van 5 november 2023 houdende diverse arbeidsbepalingen / Loi du 5 novembre 2023 portant des dispositions diverse relatives au travail* – the ***Law***). As of 1 December 2023, the Law requires the appointment of a person of trust in legal entities with a minimum of 50 employees or in cases in which the trade union, or in its absence, the employees themselves, made such a request.

The person of trust is given specific duties and tasks related to the prevention of psychosocial risks at work, including violence, harassment, and unwanted sexual behaviour in the workplace. The employer can rely on the person of trust to reduce psychosocial risks.

Before the entry into force of the Law, employers were only required to appoint a person of trust when requested by the employee representatives in the Committee for Prevention and Protection at Work (the ***CPPW***). In the absence of a CPPW, the obligation extended to a request from the trade union or, if none existed in the workplace, directly from the employees.

Following the enactment of the Law, it has become compulsory for employers with at least 50 employees to appoint a person of trust. The appointment is also mandatory for employers with at least 20 employees, if the trade union, or in its absence, the employees make such a request.

If the employer designates one or more persons of trust, at least one such person must be part of the staff in organisations of 20 employees or more when the services of a prevention advisor from an external service for prevention and protection at work are retained. In an organisation with fewer than 20 employees, the person of trust may be an individual external to the organisation.

In organisations with fewer than 50 employees, the responsibilities of the person of trust can be carried out by the prevention advisor of the internal service for prevention and protection at work if no person of trust has been appointed. However, this is not possible in cases in which the trade union, or in its absence, the employees, objected to a specific person of trust. The system also does not apply to organisations with fewer than 20 employees, in which the role of the prevention advisor is undertaken by the organisation itself which, by definition, cannot assume the role of a person of trust.

Failing to appoint a person of trust can lead to criminal or administrative fines of up to EUR 4,000. Additionally, it is mandatory for employers to include the contact details of the person of trust in the work rules. Consequently, the work rules must be amended. This can be done in a simplified procedure which does not require consultations of the works council or the employees. However, the revised work rules still have to be presented to the Social Inspectorate and the employees.

Separately, by 1 January 2024, all employers must also incorporate in the work rules the terms that apply to cases of illness-related work incapacity during a period of holidays (*See*, this Newsletter, Volume 2023, No. 8). It is possible to include both provisions in the work rules in a single simplified procedure.

LITIGATION

New Law Will Allow Judges in Summary Proceedings to Question Parties on Attempts to Settle Dispute Amicably

On 13 September 2023, the federal government submitted to Parliament Bill 55K3552 which contains various provisions governing civil and commercial matters (the ***Bill***). In addition to extending the positive effect of *res judicata*, generalising settlement chambers, widening the general information duty regarding legal remedies and modifying the procedure before the Supreme Court (*See*, this Newsletter, Volume 2023, No. 9), the Bill also seeks to allow judges in summary proceedings to question the parties on the manner in which they have attempted to resolve their dispute amicably.

Article 730/1, §2, Judicial Code currently does not allow the judge in summary proceedings to question the parties regarding possible attempts to resolve their dispute amicably. However, the judge is allowed to postpone the matter to allow the parties to verify whether their matter can be resolved amicably in full or in part. Since the purpose of summary proceedings is to avoid any delays, the Bill intends to amend Article 730/1, §2, Judicial Code to authorise the judge to question the parties on what they have undertaken before the case was filed. This power will also apply to summary proceedings.

The Bill is under review by the federal Chamber of Representatives and is available here (in Dutch and in French).

Supreme Court Rules that Authorities Have Further Period to Take Decisions After Annulment by Council of State

On 19 October 2023, the Supreme Court delivered a judgment regarding administrative decisions and appeals for annulment before the Council of State. It held that following an annulment judgment by the Council of State, authorities should have a further period to take a new decision.

Background

The dispute pitted the Flemish Region (the ***applicant***) against a transport company (the ***defendant***). The applicant had imposed an administrative fine on the defendant, against which the latter had lodged an administrative appeal. Four months later, the applicant confirmed the fine. The defendant then brought an action for annulment before the Council of State, which annulled the administrative fine.

Less than four months after the annulment judgment of the Council of State, the applicant issued a new decision, imposing another administrative fine on the defendant. The defendant also challenged that decision. The Court of First Instance declared the latest decision untimely and unlawful because the applicant did not benefit from a new period for a decision after the Council of State's annulment ruling (the ***contested judgment***). The applicant appealed the contested judgment to the Supreme Court.

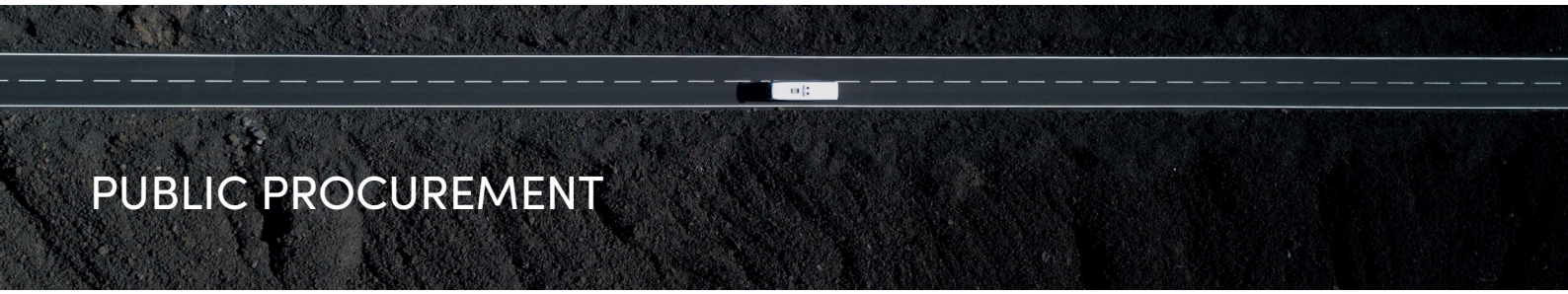
Ruling

The Supreme Court first noted that judgments of the Council of State have *res judicata* (*gezag van gewijsde / autorité de la chose jugée*) with retroactive effect.

The Supreme Court then observed that if a decision which is taken in due course (which was the case for the two administrative decisions taken by the applicant) is subsequently annulled by the Council of State, the authority must rule again on the administrative appeal.

In view of this, the Supreme Court held that the Court of First Instance did not offer proper reasons for the contested judgment and therefore annulled the contested judgment.

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



PUBLIC PROCUREMENT

European Commission Updates Public Procurement Thresholds

The European Commission updated on 15 November 2023 the financial thresholds for the application of the EU public procurement directives for the years 2023-2024 (see, Commission Delegated Regulations (EU) 2023/2495, 2023/2496, 2023/2497 and 2023/2510, OJ, 16 November 2023).

The new thresholds, which will apply from 1 January 2024, are as follows (VAT excluded):

- Directive 2014/24/EU of 26 February 2014 on public procurement ("classical sectors"):

Type of contract	Current threshold (EUR)	New threshold (EUR)
Public works contracts	5,382,000	5,538,000
Public supply and service contracts awarded by central government authorities	140,000	143,000
Public supply and service contracts awarded by sub-central contracting authorities	215,000	221,000
Public service contracts for social and other specific services listed in Annex XIV	750,000	750,000

- Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors ("special sectors"):

Type of contract	Current threshold (EUR)	New threshold (EUR)
Supply and service contracts	431,000	443,000
Works contracts	5,382,000	5,538,000

- Directive 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security:

Type of contract	Current threshold (EUR)	New threshold (EUR)
Supply and service contracts	431,000	443,000
Works contracts	5,382,000	5,538,000

- Directive 2014/23/EU of 26 February 2014 on the award of concession contracts:

Type of contract	Current threshold (EUR)	New threshold (EUR)
Concessions	5,382,000	5,538,000

Contracts whose estimated value reaches or exceeds these thresholds must be published both in the Belgian *Bulletin der Aanbestedingen / Bulletin des Adjudications* (available here) and in the *Supplement to the Official Journal of the EU* (available here).

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