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VBB on Belgian Business Law

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> "Van Bael & Bellis' Belgian competition law practice [...] is a well-established force in high-stakes, reputationally-sensitive antitrust investigations."
>
> Legal 500, 2019

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ARTIFICIAL INTELLIGENCE

European Commission Publishes Q&A following Political Agreement on Artificial Intelligence Act

On 8 December 2023, the European Parliament (the ***EP***), the Council of the European Union (the ***Council***) and the European Commission (the ***Commission***) finally reached a political agreement on the much-anticipated Artificial Intelligence Act (***AI Act***) following trilogue negotiations. The Commission had already introduced a [Proposal for a Regulation on AI] back in 2021.

Over the past year, the advancements in AI large language models required significant amendments to the Commission's proposal. In addition, the compromise text is designed to find a balance between business interests, fundamental rights and national security.

While the final text of the AI Act resulting from this agreement is still being prepared, the European Commission published on 12 December 2024 a Q&A document which provides useful insights into its expected provisions (full text available [here]).

Risk-Based Approach

The AI Act regulates the development and use of AI through a tiered approach, imposing stricter obligations on AI which is deemed to present a higher risk, and banning altogether AI that carries an "unacceptable risk":

- **Prohibited AI systems**: The Act categorically prohibits AI applications that pose significant risks to fundamental rights. These prohibited applications include biometric categorisation systems processing sensitive characteristics or social scoring systems predicated on social behaviour or personal traits. The untargeted scraping of facial images from the internet or CCTV for facial recognition databases is also prohibited, with specific exceptions allowing such use for law enforcement purposes under defined conditions.

- **High-risk AI systems**: AI systems will be designated as high-risk owing to their substantial potential to harm health, safety, fundamental rights, the environment, democracy, and the rule of law. The EP thus earmarks AI systems that are liable to influence the outcome of elections or voters' behaviour as falling within this high-risk category.

- **Limited and minimal or no risk AI systems**: Limited risks AI systems must adhere to specific transparency obligations. For example, when using chatbots, it will be mandatory to inform users that they are interacting with an AI-driven system. Minimal risk AI systems include most AI systems currently used in the EU, such as spam filters, AI-enabled video games, and inventory-management systems.

In addition, the AI Act creates specific rules for general-purpose AI models, with heightened regulation for those posing systemic risks. Conversely, the AI Act excludes particular AI applications from its scope, specifically those designed solely for military, defence, research, and innovation, as well as systems used for non-professional purposes.

Foundation Models and General-Purpose AI

The original draft of the AI Act overlooked AI systems without a specific, predefined purpose. However, in the light of the growing prominence of Generative AI systems like ChatGPT, the political agreement regulates "general-purpose AI" (***GPAI***) models as follows:

- **All GPAI**: All GPAI models are subject to horizontal requirements, including the obligation to prepare technical documentation and to comply with EU copyright law through detailed training content summaries. Lower risk GPAI models are exempt from these requirements during their R&D phase or if they are open source.

- **High impact and systemic risk GPAI**: According to the Council, GPAI models are deemed high-risk if they are trained on extensive data and exhibit advanced complexity and superior performance and may therefore create systemic risks along the value chain. Providers of such models must go beyond general transparency requirements and undertake thorough evaluations like adversarial testing to address systemic risks. They must also report serious incidents, ensure strong cybersecurity for the model and its infrastructure, and monitor and report the model's energy consumption.

Enforcement and Penalties

Designated authorities of the Member States will enforce the AI Act, while the European AI Board (the ***Board***) will ensure the uniform implementation of the rules across the Union.

The AI Act provides for heavy fines for non-compliance: up to EUR 35 million or 7% of global revenue for prohibited practices, and up to EUR 15 million or 3%, and EUR 7.5 million or 1.5% of turnover for a failure to meet obligations or submitting incorrect information. The AI Act also sets more proportionate fine limits for SMEs and start-ups.

The Commission will establish the European AI Office to handle administrative duties, set standards, and enforce regulations, focusing on GPAI model regulations for Union-wide harmonisation. Additionally, the Board will function as a coordinating and advisory body for the Commission.

Next Steps

Following the political agreement, the AI Act is poised for official adoption by the EP and Council in the first quarter of 2024. It will then be published in the EU's Official Journal and enter into force. The bulk of the AI Act's provisions will be enforceable after a two-year grace period, allowing organisations time to prepare for compliance. Shorter transitory periods apply to the obligations for general purpose AI, which will apply 12 months after the entry into force of the AI Act. For their part, the prohibited AI systems must be stopped within six months after the AI Act's entry into force.

COMPETITION LAW

Belgian Competition Authority Issues Opinion on Retail Banking Sector

On 10 November 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) published an opinion prepared at the request of Deputy Prime Minister and Minister for the Economy and Labour Pierre-Yves Dermagne (the ***Opinion***). The Opinion, dated 31 October 2023, seeks to analyse "a possible lack of competition in the retail banking sector due to apparent malfunctions relating, in particular, to the low interest rates on savings accounts despite the increase in key rates by the European Central Bank".

The Opinion was requested in June 2023, amid a public and political debate as banks persisted in offering low returns on savings accounts despite the rise in key interest rates by the European Central Bank. In August 2023, Belgian media outlets reported on a supposed "gentlemen's agreement" between banks not to compete with the State Treasury bond issued by the Belgian federal government and not to raise interest rates on saving accounts during the subscription period for the State Treasury bond. This caused the BCA to initiate an investigation. However, in September 2023, the BCA suspended its investigation in order to focus its resources on the preparation of the report requested by the Minister (*See*, this Newsletter, Volume 2023, No. 9).

In the Opinion, the BCA indicates from the outset that its work is "descriptive and is not intended tocharacterise the practices or rules under review in the light of Articles IV.1 and IV.2 of the Code of Economic Law [...] and/or 101/102 of the Treaty on the Functioning of the European Union". The BCA also notes that there is no legal basis for it to use its investigative powers when preparing opinions, and that this "significantly limited its ability to analyse and collect the relevant data".

The BCA observes that the retail banking market in Belgium is highly concentrated and presents the characteristics of an oligopoly dominated by four major players: Belfius, BNP Paribas Fortis, ING, and KBC/CBC. As an oligopoly, the retail banking market exhibits features that facilitate coordination between the main players and limit competition, such as a high level of transparency, the offering of similar services, and frequent interactions among the market players.

Specifically, this oligopolistic market structure enables the banks to observe their competitors' behaviour with ease and allows them to adopt collectively similar strategies that are in line with their shared interests. The BCA notes that the four major banks often operate in unison and provide comparable consumer products under broadly similar commercial terms. This is apparent in the context of savings account interest rates, which display a lack of variation in the offerings of major banks compared to smaller, independent, or niche players.

The Opinion identifies obstacles to competition on both the demand and supply sides. On the demand side, these obstacles primarily stem from (i) information asymmetry and a lack of transparency for consumers; (ii) the lack of customer mobility; (iii) low demand elasticity; and (iv) the absence of countervailing buyer power. Regarding the supply side, the BCA notes that the provision of banking services is marked by high fixed costs and several regulatory barriers.

Despite its descriptive nature, the Opinion also proposes several measures to enhance competition within the retail banking market's existing structure without jeopardising its stability. Such measures include providing better information to clients, increasing transparency on rates, transitioning from the complex dual system of base rate and fidelity premium to a more understandable single rate, facilitating customer switching between banks, prohibiting the bundling of banking products, abolishing the favourable tax regime for savings accounts, and encouraging the government to develop alternative savings products.

The BCA says it will strengthen its scrutiny of the banking sector and continue to ensure that each bank devises its commercial strategy autonomously.

The BCA's focus on the retail banking sector is not new. Towards the end of 2022, the competition watchdog initiated an investigation into Batopin, the alliance of Belfius, BNP Paribas Fortis, ING, and KBC/CBC, concerning automated teller machines (***ATMs***) (*See*, this Newsletter, Volume 2022, No. 12). This investigation likely contributed to the agreement which the federal government reached with the banks in March 2023 to expand the network of ATMs. It is premature to say whether the Opinion will have a similar impact.

Belgian Competition Authority Terminates Unprecedented Abuse Investigation Into Acquisition of EDPnet Case by Proximus Following Divestment

On 6 November 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) ended its investigation into the acquisition of EDPnet by Proximus following the decision by Proximus to divest EDPnet and sell it to Citymesh, the aspiring fourth mobile telecommunications operator in Belgium.

The BCA alleged that the acquisition by the incumbent telecommunications operator of EDPnet, which competes with Proximus on copper and fibre-optic networks, amounted to an abuse of Proximus' dominant position contrary to Article 102 of the TFEU and Article VI.2 of the Code of Economic Law (*Wetboek van Economish Recht / Code de droit économique* – the ***CEL***).

This case presents several unprecedented features.

First, this is the first investigation opened by a European national competition authority in the wake of the *Towercast* judgment in which the Court of Justice of the European Union held that a merger or acquisition that does not reach the financial thresholds for review under EU or national merger control rules may, post-transaction, still be made subject to an abuse of dominance review by a national competition authority pursuant to Article 102 TFEU (*See*, VBB on Competition Law, Volume 2023, No. 3). The BCA had so far been reluctant to apply the abuse of dominance rules to such transactions. A few years ago, the BCA even refused to grant interim measures to suspend the acquisition of a brewery, Brouwerij Bosteels, by AB InBev. Competitor Alken-Maes had argued that the acquisition, which was not notifiable under any merger control rules, was abusive, but the BCA dismissed its complaint.

Second, the BCA chose to investigate a court-sanctioned acquisition. EDPnet had been facing significant financial difficulties and had thus been made subject to a judicial reorganisation procedure before the Enterprise Court of Ghent (*Ondernemingsrechtbank Gent / Tribunal de l'entreprise de Gand*). Several companies, including Proximus and Citymesh, had submitted bids to acquire EDPnet. While the Enterprise Court had finally accepted the offer of Proximus, Citymesh had appealed that judgment to the Ghent Court of Appeal. In parallel, the BCA had decided to open an ex officio investigation, considering that this acquisition could amount to an abuse of dominant position (*See*, this Newsletter, Volume 2023, No.3).

Third, the Chief Prosecutor (*Auditeur-generaal / Auditeur général*) of the BCA used, for the first time, his power to seek interim measures on his own initiative, in the absence of any request from a market player (*See*, this Newsletter, Volume 2023, No. 4). This request was granted by the Competition College (*Mededingingscollege / Collège de la concurrence*) of the BCA. The Competition College found that the Chief Prosecutor had prima facie demonstrated that the acquisition by Proximus was abusive and therefore took measures to maintain the independence of EDPnet, pending the outcome of the investigation (*See*, this Newsletter, Volume 2023, No. 6).

The decision by Proximus to divest EDPnet put an end to several procedures, including the procedure initiated by the BCA, the appeal brought by Citymesh against the judgment accepting Proximus' bid, and the appeal of Proximus itself against the interim measures imposed

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by the Competition College of the BCA. For its part, the BCA declared itself satisfied with this outcome, its Chief Prosecutor noting that such a result "*was made possible by the decisive action of the Authority, the full cooperation of the Telecommunications regulator BIPT and the collaboration of the companies involved*".

The press release of the BCA can be found here.

Belgian Competition Authority Conditionally Clears Transaction in Pharmaceutical Sector

On 13 November 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) conditionally approved the acquisition of Pannoc Chemie (Pannoc) by ACE Pharmaceuticals Belgium (***ACE Belgium***) and Febelco CV (***Febelco***). This case had initially been notified to the European Commission (the ***Commission***) under the simplified procedure, but third parties raised objections against the transaction. As a result, the Commission converted the procedure into the regular first phase merger procedure, in accordance with paragraph 19 of the Notice Simplified Procedure. On 6 February 2023, the BCA requested the Commission to be entrusted with the case. The Commission agreed and referred the case to the BCA on 28 February 2023.

Pannoc develops, manufactures, packages and sells medical raw materials and cosmetics, and a limited range of medicines and medical devices. ACE Belgium is a joint venture. One of its parents, ACE Pharma Group BV, develops, manufactures, registers and sells medicines for specific groups of patients or indications and for clinical trials. Its other parent, Pharmentum NV, procures, analyses and reconditions medical raw materials and sells these to pharmacists and hospitals (which then use them in medical preparations). Lastly, Febelco is the largest wholesaler-distributor of pharmaceutical products in Belgium.

The BCA was concerned that the transaction might lead to input foreclosure: post-transaction, Pannoc's products might no longer be available (or less available, or at less favourable conditions) to distributors and wholesalers-distributors competing with Febelco, and, as a result, to pharmacies served by these competitors. The BCA was also concerned that Febelco would no longer purchase products from producers competing with Pannoc. Lastly, the BCA was concerned that, post-transaction, Pannoc would receive sensitive information about its competitors through its parent companies.

The parties addressed these concerns by offering to continue supplying Pannoc's products on a fair, reasonable and non-discriminatory basis. Febelco also undertook to continue distributing materials produced by Pannoc's competitors to pharmacies on a fair, reasonable and non-discriminatory basis. Lastly, the parties committed to establishing Chinese Walls preventing the exchange of commercially sensitive information between them.

These commitments were accepted by the BCA and made binding for a period of five years, renewable once.

Belgian Competition Authority Opens First Investigation into Alleged Abuse of Economic Dependence

On 28 November 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) announced that it had opened an *ex officio* investigation into a possible abuse of economic dependence in the agricultural sector. This marks the BCA's first formal probe under this prohibition.

Since 22 August 2020, Article IV.2/1 of the Belgian Code of economic law (*Wetboek van economisch recht / Code de droit économique* – the ***CEL***) has enabled the BCA to prosecute companies that abuse the economic dependence of other firms. The existence of a situation of economic dependency is assessed based on two criteria: (i) the absence of a reasonable and equivalent alternative available within a reasonable time and under reasonable conditions and costs; and (ii) the possibility for a company to impose terms and conditions that would not prevail in normal circumstances. Unlike the

abuse of a dominant position (which exists both at EU level and in Belgium), which requires the competition authority to establish that the defendant has a dominant position on the entire market, the offence of abuse of economic dominance only requires that the company is in a position of relative dominance vis-à-vis another company (*See*, this Newsletter, Volume 2020, No. 8). While this type of competition law infringement does not exist at EU level, several EU Member States, including France, Germany, and Italy, sanction a similar type of behaviour.

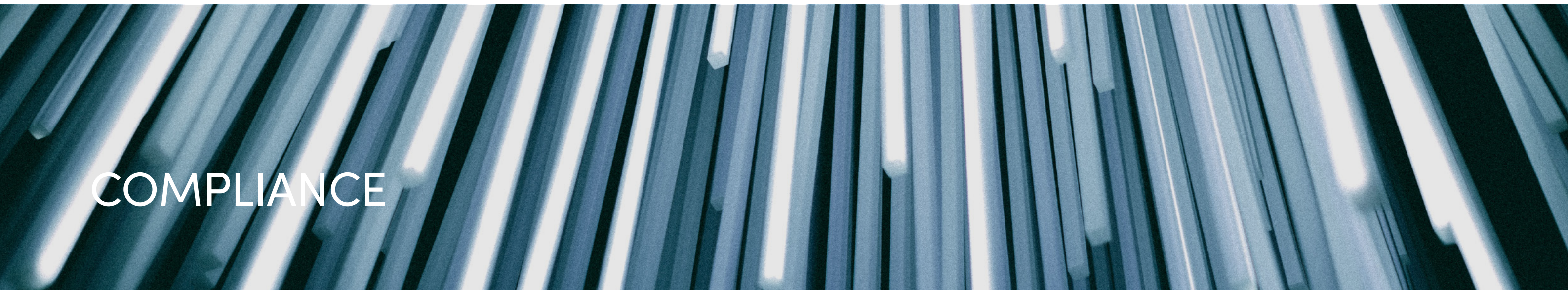
While the BCA has already weighed in on a case of abuse of economic dependence via an amicus curiae opinion issued in litigation between private companies (*See*, this Newsletter, Volume 2023, No. 3), this is the first time that the BCA has launched an investigation into a potential abuse of economic dependence. According to the BCA, a preliminary inquiry "revealed serious indications of a possible infringement".

The BCA considers the agricultural sector to be particularly fitting for this type of investigation. In its press release, the BCA refers to preparatory parliamentary works which explain that Article IV.2/1 CEL aims specifically at concentrated sectors. Additionally, the agri-food industry was identified in the BCA's annual priority note as one of the sectors that would be receiving special attention in 2023 (*See*, this Newsletter, Volume 2023, No. 7).

The BCA also stresses that farmers frequently act as suppliers to large companies, leaving them with minimal to no viable contractual alternatives. According to the BCA, "the cumulative effect of the possible economic dependence of farmers" is "likely to affect competition on the Belgian market".

The BCA indicates that the investigation targets "one of Belgium's main agricultural sectors" and "a product of which Belgium is an important EU producer". The company under investigation is still unknown.

The press release is available here (Dutch), here (English) and here (French).



Rules Implementing Whistleblowers Directive Now Apply to Smaller Companies in Private Sector

On 17 December 2023, Chapter 3 of the Law of 28 November 2022 on the Protection of Persons Reporting Breaches of Union Law or National Law in the Private Sector (the ***Law***) entered into force for companies with between 50 and 249 employees. Chapter 3 deals with internal reporting channels.

The Law transposes the European Whistleblowing Directive (*See*, this Newsletter, Volume 2022, No. 10 and this Newsletter, Volume 2022, No. 12; *See also* this Newsletter, Volume 2023, No. 5 for the public sector). Chapter 3 of the Law had already entered into force on 15 February 2023 for companies with at least 250 employees. Additionally, companies active in the financial sector and those involved in the prevention of money laundering and terrorist financing also have similar obligations in place, regardless of their staff number.

The Law can be consulted here.

CORPORATE LAW

European Parliament and Council of European Union Reach Provisional Agreement on Corporate Sustainability Due Diligence Directive

On 14 December 2023, the European Parliament (the ***EP***) and the Council of the European Union (the ***Council***) reached a provisional agreement on the corporate sustainability due diligence directive (the ***CSDDD***) on the basis of a proposal which the European Commission (the ***Commission***) had tabled in February 2022. The CSDDD imposes obligations on companies to mitigate their possible adverse impact on human rights and the environment.

Scope of Application

Under the agreed version of the CSDDD, its scope of application will extend to:

1. EU-based (parent) companies with a worldwide turnover superior to EUR 150 million and more than 500 employees;

2. EU-based companies active in so-called high-risk sectors with a global net turnover higher than EUR 40 million (if at least EUR 20 million is generated in such high-risk sectors) and more than 250 employees; and

3. non-EU companies generating at least EUR 150 million turnover from within the EU, but subject to a three-year delay in application.

High-risk sectors include production of and wholesale trade in textiles, clothing and footwear; agriculture, including forestry and fisheries, production of food and trade in raw agricultural materials; extraction of and wholesale trade in mineral resources and production of related products; and construction.

The CSDDD will at first not apply to the financial sector. However, this exclusion may be subject to revision following the conduct of an impact assessment.

Obligations and Sanctions

Under its agreed form, the CSDDD requires the following:

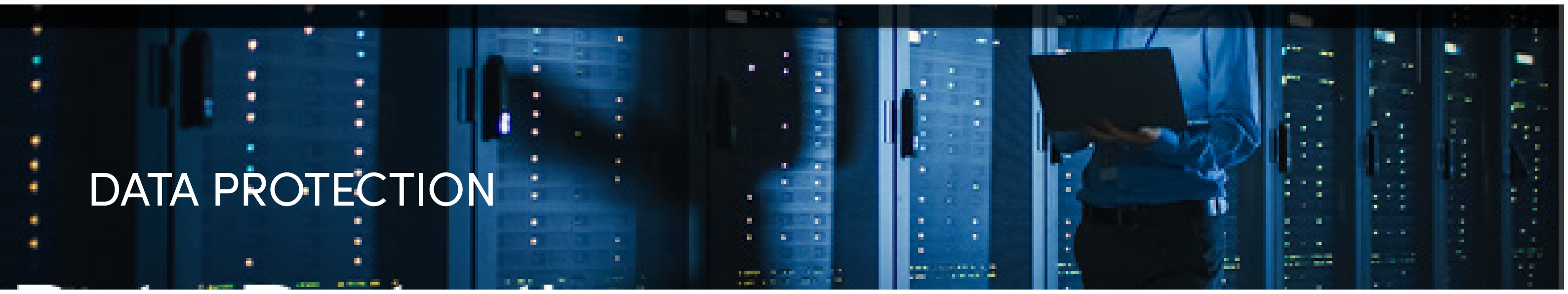
- preparing and implementing a plan ensuring that the business activities comply with limiting global warming to 1.5° C;

- conducting due diligence on a continuous basis to identify, mitigate and counter any negative impact on human rights and the environment caused by the business activities and by upstream and partially downstream partners (this may imply the termination of specific partnerships if no solutions can be found); and

- introducing complaint mechanisms.

Failure to comply with the CSDDD will result in (i) the imposition of penalties such as "naming and shaming" and fines up to 5% of net worldwide turnover; (ii) civil liability towards affected persons; and (iii) lower remuneration for management. Moreover, contracting authorities will be able to use compliance with the CSDDD as an award criterion in public procurement procedures.

Summaries of the provisional agreement are available here and here. More information on the provisional agreement and on the Commission's initial proposal can be found here and here.



Court of Justice of European Union Elaborates on Conditions for Imposing Fine for Violation of Data Protection Laws and Clarifies Concepts of Controller and Processing

On 5 December 2023, the Court of Justice of the European Union (***CJEU***) ruled on the conditions under which data protection authorities (***DPAs***) can impose administrative fines because of a violation of Regulation 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***) and clarified the concepts of data controller and data processing (case C-683/21, judgment of 5 December 2023).

Background

In the first half of 2020, employees of the Lithuanian National Public Health Centre (***NPHC***) started collaborating with a private service provider to develop an application that would register and monitor COVID-19 cases. However, the parties had not yet concluded an agreement.

The application was made available to the public by the service provider on 6 April 2020, and was referring to both NPHC and the service provider as controllers of personal data. 3,802 individuals downloaded the application and introduced various personal data, including identifiers and locational information. On 15 May 2020, the NPHC asked the service provider not to make any reference whatsoever to the NPHC in the application and terminated the procedure that would have led to the formal acquisition of the application due to a lack of funding. The application ceased to be operational on 26 May 2020.

The Lithuanian Data Protection Authority (the ***DPA***) initiated a procedure against the NPHC and the service provider for the use of the application and issued a fine of EUR 12,000 on account of several violations of the GDPR, including the failure to make adequate information available to data subjects, the lack of appropriate technical, organisational and security measures, and the absence of a data protection impact assessment.

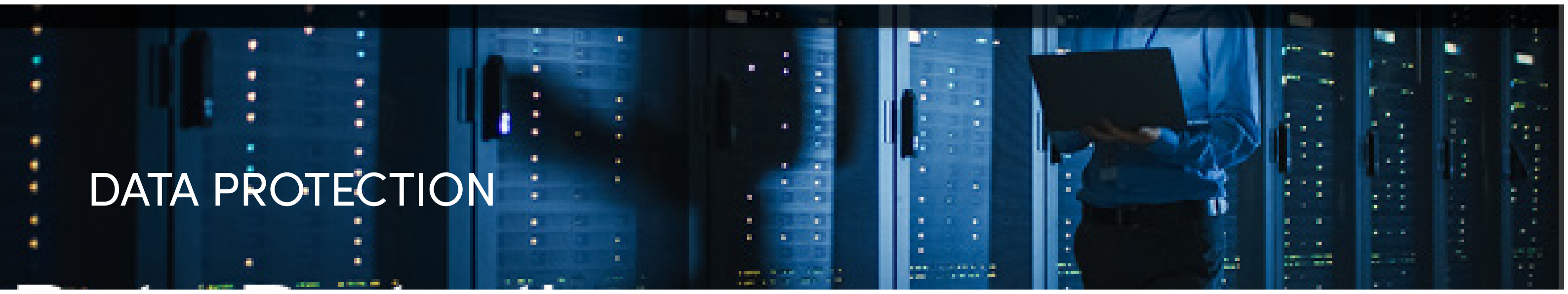
The NPHC challenged the decision before the Vilnius Regional Administrative Court (the ***Referring Court***), which referred several questions to the CJEU.

Judgment of CJEU

The Referring Court first asked whether the NPHC should be considered as a data controller even though it had not itself performed any personal data processing operations, had not expressly agreed to the application being made available to the public, had not concluded an agreement with the service provider and had not completed the acquisition of the application.

The CJEU noted at the outset that the concept of data controller should be interpreted broadly and should be defined as an entity which actually exerts influence, for its own purposes, over the determination of the purposes and means of the processing of personal data. The CJEU considered that entrusting a third party with the task developing an application implies participating in determining the purposes and means of data processing. According to the CJEU, the fact that NPHC did not directly provide instructions to the service provider regarding the design of the application and never became owner of the application does not alter this finding. The CJEU specified that the NPHC would not have been regarded as the controller of personal data only if, prior to the application being made available to users, the NPHC had expressly objected to the data being made available..

The CJEU went on to clarify that the use of personal data for the purposes of the IT testing of a mobile application constitutes processing of personal data within the meaning of the GDPR. It would only have been otherwise if the data had been anonymous or fictitious (and therefore did not relate to an identified or identifiable natural person).



The CJEU then stated that DPAs can impose an administrative fine for an infringement of the GDPR only if the controller committed the infringement intentionally or negligently. This would be the case of a controller could not have been unaware of the infringing nature of its conduct.

Finally, as the controller is responsible for the processing of personal data by the processor, the CJEU confirmed that the controller can be given a fine because of a violation of the GDPR by the processor. However, a controller would escape such liability if (i) the processor processed personal data for its own purposes; or (ii) the processor processed the data in a manner incompatible with the processing as determined by the controller, or (iii) if it could not reasonably be considered that the controller consented to the processing.

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

Belgian Data Protection Authority Warns Credit Information Agency Regarding Automated Decision Making and Relies on Recent Case Law of the Court of Justice of the European Union

On 19 December 2023, the Litigation Chamber of the Belgian Data Protection Authority (the ***DPA***) delivered an interim decision regarding the processing of personal data by a credit information agency in automated decision making, citing recent judgments of the Court of Justice of the European Union (***CJEU***) on the same subject.

Background

The defendant in the case before the DPA is a car sharing company which uses the services of a Dutch credit-risk rating agency to assess its clients' ability to meet payment commitments. The car sharing company automatically suspended the accounts of clients with a high-risk profile in the agency's report. A client requested additional information from the car sharing company regarding the decision against him and sought to exercise his right to erasure of his personal data.

In response to the request, the car sharing company merely referred to the website of the rating agency and told the client to request additional information from that agency. It also referred to its terms and conditions which provide for the possibility to suspend an account automatically in such a case.

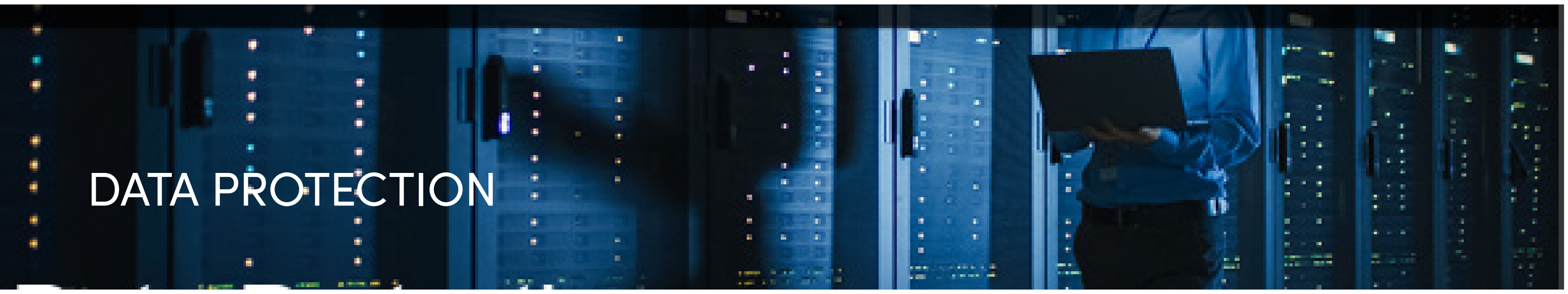
The client brought the case before the DPA invoking his right to access under Article 15 of the Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the ***GDPR***) and his right to erasure under Article 17 GDPR.

Interim Decision of DPA

The DPA first considered that the automatic suspension of the client's account qualifies as a form of automated decision making under Article 22 GDPR. As a result, it is subject to specific obligations of information and transparency, including the obligation to provide meaningful information about the logic which led to the decision, as well as the significance and the envisaged consequences of the automated decision.

The DPA then observed that the car sharing company had acted as a data controller in this case. It therefore had the obligation to provide mandatory information to the client and answer his requests to access and delete personal data. The DPA considered that this obligation applies even though the external agency conducted the risk analysis and not the defendant. Consequently, the DPA ordered the defendant to respond to the client's requests to access and delete his personal data within 30 days after the notification of the interim judgment.

The DPA finally questioned the lawfulness of the processing of personal data by the defendant. In the event of automated decision-making, the lawfulness should be assessed both under Article 22 GDPR (specific to automated decision-making) and Articles 5 and 6 GDPR. The DPA issued a warning against the defendant in that respect, considering that it did not invoke a valid legal basis and that, *prima facie*, it appeared that the defendant did not satisfy the



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conditions for using personal data as part of automated decision-making under Article 22 GDPR. The DPA referred in that respect to the recent case law of the CJEU.

CJEU Judgments in SCHUFFA Cases

In particular, the DPA referred to the CJEU's judgments of 7 December 2023 in a series of cases involving the German credit-risk rating company Schuffa (cases C-634/21, C-26/22 and C-64/22). Schuffa's activity consists in the automated establishment of a probability value based on personal data relating to a person and concerning that person's ability to meet future payment commitments.

In its judgments, the CJEU clarified that such an activity qualifies as automated decision-making under Article 22 GDPR. Schuffa argued that merely establishing a probability value does not qualify as decision-making, the decision being taken by the banks. However, the CJEU adopted a broad interpretation of the concept of "decision" in Article 22 GDPR. It noted that the bank strongly relies on the probability value provided by Schuffa to decide whether or not to grant a credit to a person. As a result, the establishment of that value qualifies as a decision producing legal effects vis-à-vis the data subject legal effects or at least significantly affecting that person. Schuffa must therefore comply with the transparency requirements under the GDPR.

The CJEU also examined a second question regarding the processing of personal data by Schuffa. To establish the probability value, Schuffa was relying on publicly available information, including a public register relating to the grant of a discharge from remaining debts in favour of a natural person. This information is retained in the public register for a period of 6 months before being deleted. Schuffa retained that information in its own data bases for a period of 3 years, according to the provisions of the code of conduct drawn up by the German association of credit information agencies. Schuffa also relied on the legal basis of legitimate interest under Article 6.1 (f) GDPR for the processing of this personal data.

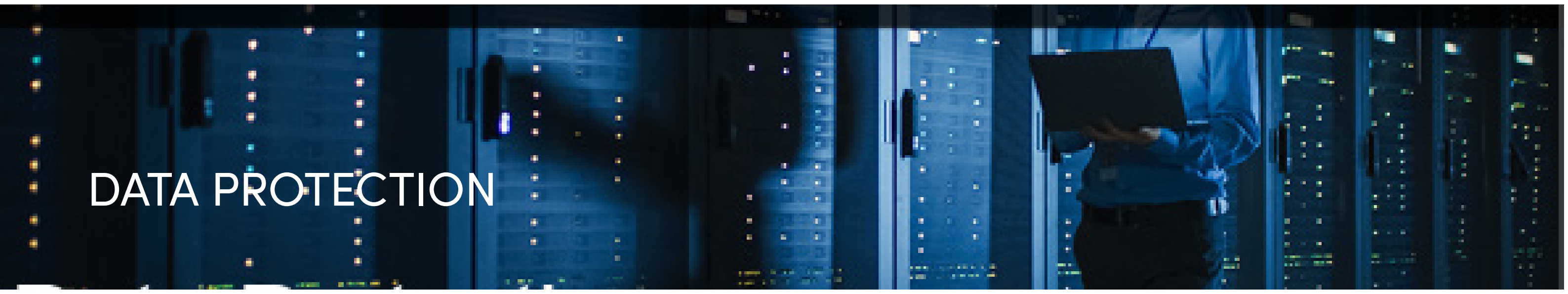
To determine whether the retention period of 3 years was lawful, the CJEU balanced the interests of Schuffa and the data subjects against each other. It found, on the one hand, that the analysis provided by Schuffa allowed for an objective and reliable assessment of the creditworthiness of the potential customers of a bank and therefore helped to reduce the risks of fraud and other uncertainties. On the other hand, the CJEU found that the storage, analysis and transfer of this information to a bank constitutes a serious interference with the fundamental rights of the data subjects and could result in a denial of credit. The CJEU therefore concluded that Schuffa could not retain this data longer than the retention period applying to the public insolvency register. The CJEU also questioned the lawfulness of the parallel storage of personal data of a public register by a private firm such as Schuffa. The CJEU considered that this type of storage must be limited to what is strictly necessary in order to achieve the legitimate interest pursued. The CJEU invited the referring court to make this assessment based on the concrete circumstances of the case.

The DPA Decision is available in French only. The CJEU judgment C-634/21 is available in Dutch, English and French. The CJEU joint judgments C-26/22 and C-64/22 are available in Dutch, English and French.

Markets Court Annuls Data Protection Authority Decision regarding Belgium-US Agreement on Transfer of Tax Information

Belgium and the United States (***US***) concluded on 23 April 2014 a bilateral treaty providing that Belgian tax authorities would transfer automatically financial information collected by Belgian financial institutions on clients possessing US nationality to US tax authorities. This agreement furthered the objectives of the Foreign Account Tax Compliance Act – ***FATCA***).

On 24 May 2023, the Litigation Chamber of the Belgian Data Protection Authority (the ***DPA***) prohibited the processing of personal data under the FATCA, due to various infringements of Regulation 2016/679 on the protection of natural persons with regard to the



processing of personal data and on the free movement of such data (the ***GDPR***) (*See*, this Newsletter, Volume 2023, No. 5). According to the DPA, the FATCA breaches the principles of purpose limitation, necessity, and data minimisation established by the GDPR. The DPA also considered that Belgian authorities could not rely on Article 46.2.a. GDPR for the transfer of personal data to the US. Under this provision, transfers to third countries are allowed if appropriate safeguards are provided for in a legally binding and enforceable instrument between public authorities to ensure data subjects' rights and effective legal remedies. The DPA considered that the FATCA does not provide such appropriate safeguards.

On 20 December 2023, the Markets Court of the Brussels Court of Appeal (the ***Markets Court***) annulled the DPA's decision for a lack of proper reasoning. It found that during the proceedings before the DPA, the DPA's Inspection Service had considered that the transfer of personal data under the FATCA was compliant with the GDPR. The Litigation Chamber disagreed with the Inspection Service and held that the transfer infringed the GDPR. While the Litigation Chamber of the DPA has the power to overrule the Inspection Service, the Market Court noted that the Litigation Chamber must justify its decision and answer the arguments of the Inspection Service.

The Markets Court furthermore held that the Litigation Chamber had failed to consider the concrete elements on which the Inspection Service had based its conclusions, such as:

- The advice of the Belgian Privacy Commission (predecessor of the DPA) which had considered the transfers compliant with the GDPR because of the compelling public interest for Belgium and the reciprocity of information exchanges with US tax authorities;

- The concrete answers of the Data Protection Officer of the Belgian tax authority to the questions of the Inspection Service, especially as regards the implementation of appropriate safeguards;

- The appropriate safeguards contained in the FATCA and related conventions;

- The 2019 judgment of the French Council of State (*Conseil d'Etat*) which had held in a similar case that the FATCA did not infringe the GDPR.

The Markets Court did not rule on whether the FATCA is compliant with the GDPR, but referred the case back to the DPA ordering it to adopt a new decision which responds properly to the views of the Inspection Service.

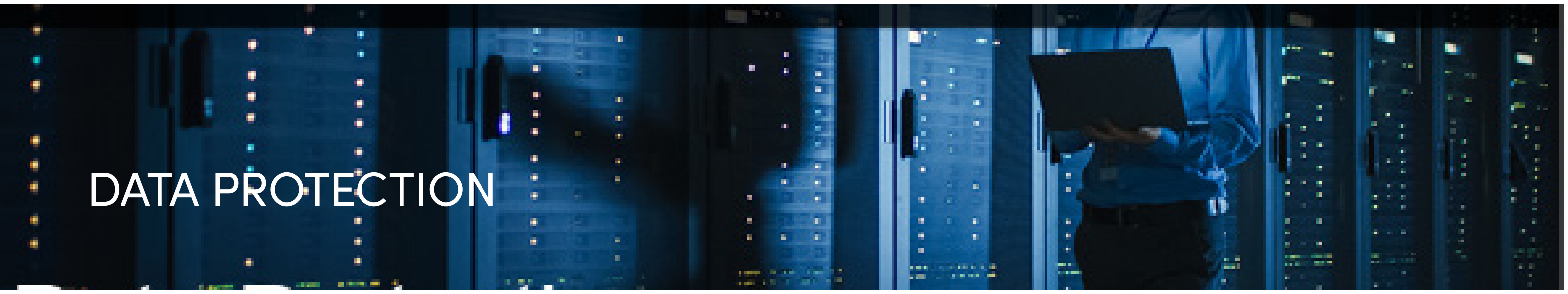
Belgian Data Protection Authority Accepts Measures Taken in Case of Personal Data Breach and Refrains from Imposing Fine

In an interesting decision of 20 December 2023, the Belgian Data Protection Authority (the ***DPA***) concluded that a company that had suffered a data breach acted in a diligent manner and did not infringe data protection rules despite suffering the breach. This decision provides useful insight into how organisations should address data breaches.

The defendant before the DPA managed an online platform which suffered a data breach in August 2019. The data breach affected approximately 90,000 people across the European Union. Leaked data included the credit card number, name, date of birth, gender, address and e-mail address of users.

Following the breach, the DPA's Inspection Service received complaints from affected individuals and transferred the case to the DPA's Litigation Chamber on the grounds that the company may have fallen short of its security obligations under Article 32 of Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the ***GDPR***).

The Litigation Chamber did not follow the arguments of the complainants and held that the defendant had taken appropriate technical and organisational measures following the data breach and did not violate the GDPR.



The DPA took into consideration the following measures taken by the defendant:

- Immediately after being informed of the data breach, the defendant suspended the affected programme and blocked access to the data stored on the platform. The defendant informed data subjects about the data breach even if the preliminary assessment indicated that there was no high risk for data subjects.
- The defendant notified the data breach to the DPA in accordance with Article 33 GDPR despite the absence of high risk for data subjects.
- The data breach was an isolated event, no other data breaches occurred, and the DPA did not identify any systemic failure of the defendant's systems.
- The defendant adopted several measures to prevent any similar data breaches in the future. It continuously improved the security measures with the help of new technologies available on the market. Some of these measures included:
    - Auditing the suppliers active in Europe;
    - Providing training to staff members about the management of the risks with the suppliers;
    - Improving the tools used to monitor suppliers;
    - Hiring new staff members in charge of the assessment of suppliers;
    - Adopting new security measures imposed upon suppliers.

As a result of these measures and the fact that the DPA did not find any violation of the GPDR, the DPA did not impose any penalty on the defendant.

The DPA's decision can be consulted here in French.

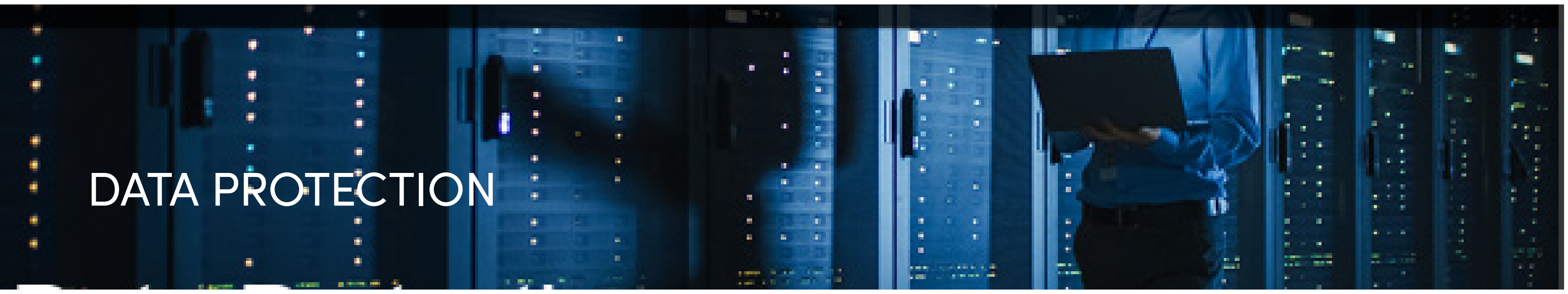
Court of Justice of European Union Confirms Relative Nature of Concept of 'Personal Data' In Relation to Vehicle Spare Part Information

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 context-specific nature of personal data, particularly with regard to Vehicle Identification Numbers (***VINs***). The decision further 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 under Article 6(1) of the General Data Protection Regulation (***GDPR***).

Background

The case before the CJEU concerns a dispute between Gesamtverband Autoteile-Handel eV (***Gesamtverband***), a German trade association for 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 pursuant to the Market Surveillance Regulation which concerns the approval and market surveillance of motor vehicles and their components. The Market Surveillance Regulation aims to increase the quality level and independence of vehicle type approval and testing and 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 website-based access to information that is relevant to maintaining and repairing a vehicle. To find the relevant information, independent operators can search for vehicles by several criteria, including the last seven numbers of the VIN.



DATA PROTECTION

Scania only provided this information to repairers, and not to 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)). The Referring Court stayed the case and referred several questions to the CJEU.

CJEU Judgment

In the realm of data protection law, the Referring Court sought to learn whether Article 61(1) of the Market Surveillance Regulation imposes an 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 is first necessary to determine if in this specific context a VIN may be considered to amount to personal data (Article 4(1) GDPR). It noted that information should be considered personal data if, by "*reason of its content, purpose and effect, the information in question is linked to a natural person*" (para. 45). On the other hand, the CJEU 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.

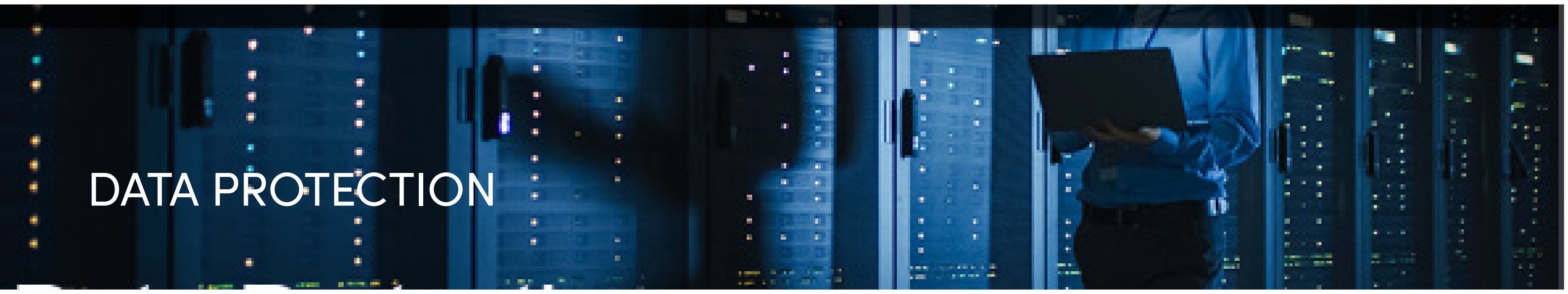
The CJEU then drew on the opinion of Advocate General (***AG***) Sánchez-Bordona, in which the AG observed that, in and of itself, an alphanumeric code for vehicle identification cannot be considered as 'personal data' within the meaning of the GDPR. However, once someone reasonably has the means to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

It follows that since the VIN may constitute personal data for the manufacturer, then the VIN must be processed on one of the grounds set out in the GDPR.

The CJEU examined the Market Surveillance Regulation requiring vehicle manufacturers to provide repair and maintenance information to independent operators. It emphasized 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 observed 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 noted that this legal obligation pursues a public interest objective of ensuring effective competition on the market for vehicle repair and maintenance information services. Moreover, considering the necessity and proportionality of such an obligation, the CJEU found that VIN 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 shows that the same dataset may be personal data for one party, but not for another. The judgment thereby appears to counter an expansive interpretation of what information should be considered personal data. For example, in an earlier case, *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 of this concept when stating that "*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 business should welcome a less expansive definition of personal data 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.



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

FOREIGN DIRECT INVESTMENT

European Court of Auditors Publishes Report Assessing Foreign Direct Investment Screening in EU

Introduction

On 6 December 2023, the European Court of Auditors (the ***ECA***) published a report (the ***Report***) on foreign direct investment (***FDI***) screening in the European Union (the ***EU***). The Report contains the ECA's assessment of whether the EU framework for screening FDI (including EU Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union; the ***FDI Regulation***) is effective at addressing security and public-order risks.

The Report followed on the heels of the third Annual Report of the European Commission (the ***Commission***) on the screening of FDI into the EU (*See*, this Newsletter, Volume 2023, No. 10) and the findings of both reports are generally concurring.

The ECA concluded that the Commission took appropriate steps to establish and implement a framework for screening FDI in the EU. However, the ECA added that significant limitations persist across the EU, reducing the effectiveness and efficiency of the framework. The Report details these shortcomings and also puts forward recommendations to address them.

Shortcomings

- The FDI Regulation does not require Member States to introduce an FDI screening mechanism and specific Member States have not yet done so. This results in blind spots compromising the entire EU, especially in the context of the Single Market.

- The FDI Regulation does not have sufficiently clear provisions to ensure that key concepts are interpreted consistently.

- There are significant divergences between the screening mechanisms of the different Member States in terms of sectoral scope, exemptions, concepts of security and public order, timelines, thresholds determining control, and powers to consider threats to other Member States.

- The Commission has not yet completed any formal assessment of the compliance of national screening mechanisms with the minimum requirements of the FDI Regulation.

- When notifying cases within the EU cooperation mechanism, the Member States do not provide any preliminary eligibility and risk assessments, which results in a high volume of low-risk or ineligible cases overburdening the cooperation mechanism.

Recommendations

- By the end of 2024, the Commission should seek the necessary amendments to the FDI Regulation to strengthen the EU FDI screening framework:

  - requiring that all Member States establish screening mechanisms;

  - clarifying key concepts, such as 'likelihood' of threat or 'portfolio investments' (in line with the case-law of the European Court of Justice - the ***ECJ***);

  - covering explicitly indirect investments, *i.e.*, investments in foreign targets with EU subsidiaries, as well as investments in the EU by foreign owned entities active in the EU. This recommendation follows the ECJ's judgment in the *Xella* case earlier this year which confirmed that the latter category fall outside the scope of the FDI Regulation (*See*, VBB on Competition Law, Volume 2023, Nos. 7 and 8). The Report also refers to the failure of the FDI Regulation to address "golden passports", *i.e.*, residence permits granted to foreigners in exchange for investment;

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    - requiring Member States to provide the Commission and other Member States with feedback on the outcome of their screening decisions, in particular when they have issued an opinion or commented on the investment.

- By 2025 and 2026, the Commission should:
    - assess whether national screening mechanisms comply with the minimum standards of the FDI Regulation;
    - clarify the application of the FDI Regulation to the practice of pre-screening; and
    - encourage Member States to align their criteria, timeframes and processes so that multi-jurisdiction cases can be coordinated effectively.
- By June 2024, the Commission should improve the cooperation mechanism and its assessment in order to provide better justification of mitigation measures in high-risk cases, and, more particularly:
    - assess eligibility before starting risk assessments;
    - make risk assessments more comprehensive by exploring the scope for cooperation with Europol and Eurojust; and
    - recommend prohibiting cases when foreign investors are on a sanctions list banning investment, irrespective of the target's risk profile.
- Finally, the Commission should improve the quality of its next annual reporting by focusing on critical risks and approaches to mitigating them.

Revision of FDI Regulation

As part of a package of measures to boost economic security, the Commission presented a revised draft FDI Regulation on 24 January 2024 which will be discussed in the January 2024 issue of this Newsletter. The draft FDI Regulation addresses several of the above shortcomings and takes on board some of the discussed recommendations.

The Report can be accessed here in Dutch, English and French. A hearing on the subject which was hosted by the European Parliament on 27 November 2023 is reported on here.

INTELLECTUAL PROPERTY

Request for Preliminary Ruling to Court of Justice of European Union on the Right to Fair Compensation for Publishers under Article 15 of the DSM Directive

On 6 December 2023, Meta Platforms Ireland Limited (***Meta***) brought an action before the Regional Administrative Court of Lazio (***TAR Lazio***) against the Authority for Communications Guarantees (***AGCOM***). Meta sought the annulment of AGCOM Regulation No. 3/23/CONS (AGCOM Regulation) which forms part of the transposition into Italian law of Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market (the ***DSM Directive***). Meta argued that, unlike the AGCOM Regulation, Article 15 of the DSM Directive does not impose any obligation on information society service providers (***ISSPs***) to secure a licence for the use of press publications, or an obligation to remunerate press publishers, as this would be incompatible with EU law and Article 16 of the EU Charter on Fundamental Rights (the ***Charter***). TAR Lazio decided to stay the proceedings and refer the matter to the Court of Justice of the European Union (***CJEU***).

This is the first referral to the CJEU regarding the transposition of Article 15 of the DSM Directive into national law. Article 15 creates a right ancillary to copyright in favour of press publishers. This right arises when ISSPs carry out specific online acts (reproduction and making available of a copyright protected work) with respect to particular contents (such as press publications). The right was transposed into Italian law by Article 43bis of the Italian Copyright Act which provides that press publishers must receive "fair compensation" for the online use of their content by ISSPs and also foresees a negotiation procedure. If, after 30 days from the start of the negotiations regarding the amount of the compensation, press publishers and ISSPs have failed to reach an agreement, each of the parties may turn to AGCOM and commence proceedings leading to the determination of "fair compensation" by the authority. AGCOM adopted a regulation setting out the criteria for the determination of "fair compensation" which include the number of online views of the press publication, the advertising revenues generated, the years of activity, the market share of the press publisher and the number of journalists employed, the costs incurred for technological and infrastructural investments by press publishers and ISSPs and the economic benefits deriving, for both parties, from the publication in terms of visibility and advertising revenues.

Before TAR Lazio, Meta argued that the Italian transposition of Article 15 of the DSM Directive is a clear example of 'gold-plating' because its terms are further-reaching than those of the DSM Directive. Meta contended that the Italian transposition would infringe the fundamental freedom to conduct a business, enshrined in Article 16 of the Charter, with the result that the freedom to contract and freedom to compete would be unduly compromised. According to Meta, it would also violate the country of origin principle and the free movement of services.

TAR Lazio decided to stay the proceedings and refer a request for a preliminary ruling to the CJEU on whether Article 15 DSM Directive prevents national legislation which:

1. provides for remuneration obligations (*equo compenso*) in addition to the exclusive rights granted under EU law;

2. mandates ISSPs (a) to negotiate with press publishers, (b) to provide press publishers and AGCOM with the information necessary to determine *equo compenso* and (c) not to restrict the visibility of press publications pending negotiation;

3. confers upon an administrative authority powers involving (a) supervision and sanction; (b) the determination of remuneration criteria; and (c) in the absence of an agreement between the parties, the determination of the remuneration due by the ISSP.

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It also asked the CJEU to rule on whether such a transposition would infringe the right enshrined in Article 16 of the Charter, linked with Article 52 of the Charter and the principle of proportionality, and the freedom to conduct a business.

The CJEU will now rule on the question of whether Article 15 of the DSM Directive allows Member States to adopt national provisions providing remuneration obligations in addition to the exclusive right owned by press publishers and conferring on national authorities powers to set the criteria for such remuneration. This interpretation, were it to have the CJEU's favour, would enable the Member States to individually regulate the remuneration for press publishers. In doing so, it would create disparities between Member States, notably in terms of remuneration criteria, and would thus interfere with objectives of the DSM Directive and the Digital Single Market as a whole, which seek to level the playing field across the EU.

Dutch-Language Enterprise Court of Brussels Denies Design Right and Copyright in Cat Litter Boxes

On 19 October 2023, the Dutch-language Enterprise Court of Brussels (the ***Court***) issued a judgment relating to the infringement of design right and copyright with respect to cat litter boxes.

The plaintiff, Savic, is a manufacturer of plastic accessories and housing for pets and manufactures cat litter trays marketed as "Nestor" and "Nestor Corner". Both Nestor and Nestor Corner are registered Community Designs under design numbers 002090365-0001 and 002090365-0001 (the ***Designs***). The first defendant, Plana, is a Slovenian company that distributes pet products while the second defendant, Petsolutions, is a wholesaler of pet supplies. Plana produces and markets cat litter boxes, including a model called "Ella", which, according to Savic, copies all the characteristic features of the Designs. Savic brought an action before the Court seeking a declaration that by commercialising the disputed Ella cat litter boxes, the defendants (i) infringed Savic's design rights within the meaning of Article 19 of Regulation No. 6/2002 of 12 December 2002 on Community designs (***CDR***), including the Designs, (ii) infringes Savic's copyright vested in its Nestor litter boxes; and (iii) engaged in unfair trade practices. The defendants, in turn, challenged the validity of the Designs by arguing that these are solely dictated by their technical function, are not new and do not have individual character. According to the defendants, all of this makes the Designs ineligible for protection under the CDR.

First, the Court analysed whether the Designs were only dictated by their technical function and applied the principle espoused by the Court of Justice of the European Union (***CJEU***) in its judgment of 8 March 2018 in case C-395/16 *Doceram*. In that case the CJEU held that Article 8.1 CDR excludes the protection under Community design law of features of appearance of a product that are not dictated by considerations other than the need for that product to fulfil its technical function. The Court reached the conclusion that although some of the features of the Designs also have a technical function, the appearance of the Nestor model is the result of deliberate design choices. According to the Court, the rounded design of the cat litter box and the built-in filter grid in the (flip-top in the) hood were prompted by the desire to provide a more streamlined design. The Designs therefore would not have to be invalidated on the basis of the exception provided for by Article 8.1 CDR.

Second, the Court assessed whether the Designs were sufficiently new and had individual character as required by Article 4 CDR. According to the Court, in comparison with earlier cat litter boxes design registrations, the Nestor design did not contain sufficiently obvious differences for an informed user. The Court thus concluded that the Nestor design lacked individual character. As regards the Nestor Corner design, the Court found that it lacked novelty as its characteristics only differed in unimportant details. Moreover, the Court found that Savic failed to explain what the relevant, not unimportant, differences are that could demonstrate novelty. Consequently, the Court declared both Designs invalid.

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As regards the copyright claim based on Article XI.165 §1(1) of the Code on Economic Law, the Court based its reasoning on the design analysis. Notably, it decided that if a design lacks individual character or novelty, its designer did not contribute or contributed insufficient free and creative choices. Thus, the resulting work was deemed unoriginal and not eligible for copyright protection either.

Finally, the Court also dismissed the claim based on unfair trade practices.

The Court based its decision for the determination of copyright on its assessment of the validity of the Designs and found that there is no copyright protection since the Designs lack individual character and novelty, respectively. The reasoning of the Court seems to ignore the finding of the CJEU in its *Cofemel* judgement of 12 September 2019 that the protection of designs, on the one hand, and copyright protection, on the other hand, pursue fundamentally different objectives and are subject to distinct rules.

Court of Justice of European Union Requires Consent by Current Owner for Trade Mark Licence Recording

On 22 November 2023, the Court of Justice of the European Union (***CJEU***) delivered its judgment in case T-679/22 between Oy Shaman Spirits Ltd (***Shaman***) and the European Union Intellectual Property Office (***EUIPO***). The case centred on the question of whether a licence can be formally registered when the licensed trade marks had been transferred to a different owner after the initial granting of the license, particularly considering objections from the new trade mark owner.

In 2016, Brandavid Oy (***Brandavid***) granted Shaman an exclusive licence for three EU trade marks without recording the licence with the EUIPO. The following year, Brandavid sold these trade marks to Global Drinks Finland Oy (***Global Drinks***). This transfer was officially recorded with the EUIPO. In 2020, Shaman recorded its licence with the EUIPO which prompted objections from Global Drinks.

The EUIPO then required Shaman to prove that it had obtained the consent of Global Drinks for the licence registration. Shaman's submitted evidence failed to show the written consent from Global Drinks. In September 2022, the EUIPO Board of Appeal dismissed Shaman's appeal and held that the 2020 licence registration had been made in error since Global Drinks, as the trade mark proprietor, had not approved the recording of the licence. The EUIPO declared Global Drink's awareness of the licence irrelevant and disregarded arguments based on Finnish law. In response, Shaman brought an action before the General Court (the ***GC***).

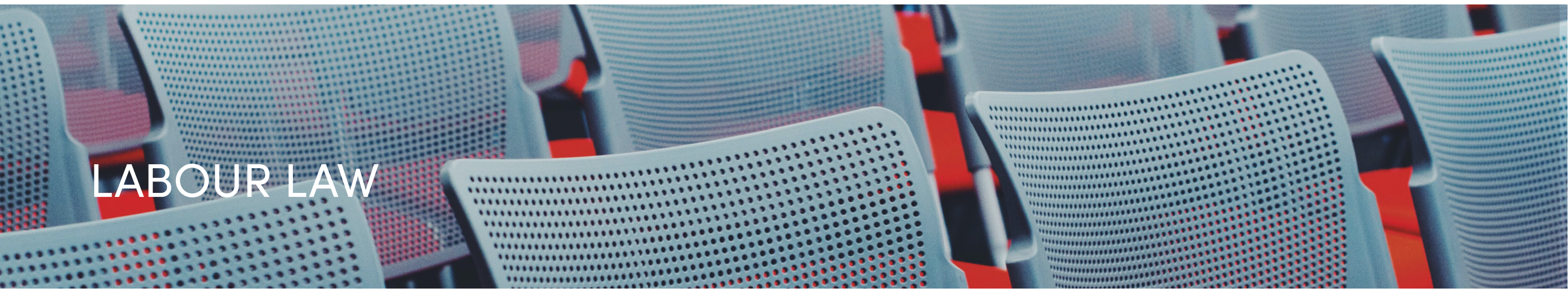
The GC dismissed Shaman's appeal and emphasised that a trade mark transfer must be substantiated with a written agreement signed by both the existing and the new trade mark owners. The GC added that recording a licence agreement necessitates the signature of the current trademark holder. As Global Drinks, the current registered owner, had not signed the agreement, the signature of Brandavid, the previous owner, was deemed inadequate for this purpose.

The GC also dismissed Shaman's contention that Global Drinks was legally bound by the licence because of its knowledge of the agreement at the time of the trade mark transfer. The GC highlighted that the registration of a licence is governed by the formal requirements provided for Regulation 2017/1001 on the European Union Trade Mark, particularly the necessity of the current trade mark owner's signature. The GC specified that the possible violation of a clause in the licence agreement regarding successors might result in contractual liability but does not affect the registration process. Lastly, the GC rejected the application of Finnish law, as requested by Shaman, stating that EU law autonomously governs the recording of an EU trade mark licence.

Although not mandatory, registering a license agreement for an (EU) trade mark provides significant advantages, including making the licence enforceable against third parties and obligating the owner to

INTELLECTUAL PROPERTY

inform the licensee before surrendering the trademark. Nevertheless, as emphasised by this judgment, in case of a trade mark transfer, it is essential for the licensee to obtain the new trade mark owner's explicit consent to have the licence agreement successfully registered.



LABOUR LAW

Law Creates Federal Learning Account to Monitor Compliance with Training Obligations

On 20 October 2023, the federal Parliament adopted the Law relating to the creation and management of the "Federal Learning Account" (*Wet betreffende de oprichting en het beheer van de "Federal Learning Account" / Loi relative à la création et la gestion du "Federal Learning Account"* - the ***Law***), which was published in the Belgian Official Journal of 1 December 2023.

The Federal Learning Account is an online platform that collects and organises all information related to employees' rights to training days. In practice, all employers must report each quarter and for each employee the number of training days which the employee is entitled to and the training sessions which the employee followed during that quarter. The platform will automatically and on a quarterly basis transfer the details of employers who failed to comply with the reporting obligation to the Federal Public Service of Employment.

Under Belgian law, employees are indeed entitled to mandatory training days determined on sectoral level, by joint committees (***JCs***) or on national level. The Law of 3 October 2022 provides for an individual right to mandatory training days for each employee. For organisations employing at least 20 employees, each employee is entitled to at least five mandatory training days per year. For organisations employing more than 10 but less than 20 employees, each employee is entitled to at least one mandatory training day per year.

Some JCs provide for additional mandatory training days. For example, in the auxiliary JC No. 200 for white-collar employees, organisations employing less than ten employees must offer at least four days on average of collective training to each full-time equivalent, over a period of two years, and at least one day should involve individual training for each full-time equivalent.

Employees must follow the training during working hours. However, if the training takes place outside working hours, the employer must pay such training as normal working hours. If the employee does not take all the mandatory days over a given year, the remaining days are transferred to the next year.

The Law will enter into force at the latest on 1 April 2024.

Federal Government Proposes New Bill to Organise Hearings by Video Conference

On 1 December 2023, the federal Government proposed a new Bill on the organisation of hearings by videoconference in judicial proceedings (the ***Bill***). The Bill introduces a general framework for the videoconferencing and recording of hearings in civil and criminal matters, with the aim to facilitate access to justice, speed up proceedings and guarantee the accessibility of hearings to the public.

As a result of the Covid-19 pandemic, Belgian courts are increasingly using videoconferencing in court cases. However, this use remains limited in the absence of a clear legal framework. The Bill therefore aims to enable the use of videoconferencing for all legal proceedings and before all courts of the Belgian judicial system whilst preserving the right to a fair trial. The physical presence of litigants in the courtroom will nevertheless remain the rule, while the Bill will only apply in exceptional cases and subject to strictly defined conditions. The Bill allows for (i) the recording of hearings in civil proceedings; and (ii) the videoconferencing in civil proceedings (as well as criminal proceedings).

Recording of Hearings in Civil Proceedings

First, in civil proceedings, the Bill allows the court to authorise audio or video recording of a hearing, provided that: (i) it is in the interest of historical legal archives or for educational reasons; and (ii) the consent of the persons whose voices and images are recorded has been obtained. Failure to comply with these obligations may result in a prison sentence and/or a criminal fine. Furthermore, no illegally obtained recording can be used as evidence.

Recordings will be stored in the videoconferencing system (*i.e.*, the videoconferencing software as such as well as the hardware on which the software is installed). The persons whose voices and images are recorded may withdraw their consent at any point in the hearing. Overall, the recording must not hinder the proper conduct of the trial or the litigants' rights of the defence.

Videoconferencing in Civil Proceedings

Second, in civil proceedings, the Bill allows the court to invite one or more persons, and if appropriate, the public prosecutor, to appear or participate in the hearing by videoconferencing. The Bill defines videoconferencing as "*any direct audiovisual connection, in real time, designed to ensure multidirectional and simultaneous communication of image and sound visual, audio and verbal interaction between several or groups of people who are geographically distant*".

The court invitation is subject to the consent of the persons involved or, if applicable, of their legal representative. The invitation will only be considered to be legitimate under the following conditions: (i) the use of videoconferencing is compatible with the particular circumstances of the case; (ii) the procedural guarantees for the use of videoconferencing system are met; and (iii) if applicable, the use of the videoconferencing system is in the best interest of the child or the protected person.

Accordingly, the court must ensure that the technical system of the videoconferencing system can operate efficiently in order for the parties to participate and follow the legal proceedings effectively and in full. Moreover, a data protection officer and an administrator for the videoconference will be appointed to monitor compliance with the videoconferencing system, including supervision of the access policy and overseeing the operation and technical infrastructure of the system.

Similar provisions also apply to criminal proceedings. In addition, the Bill provides for further specific rules regarding the access and the conduct of the hearing by videoconference.

Although the use of videoconferencing will only be authorised in exceptional situations and when the court considers this appropriate, the Bill is another modest step to modernise the judicial system.

The Bill can be consulted here.

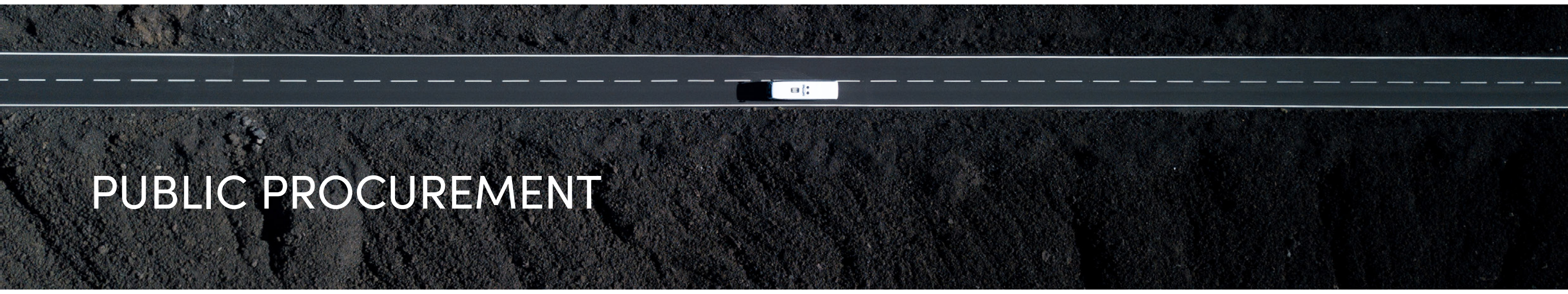
LITIGATION

New Provisions on Civil and Commercial Matters Enter Into Force

On 27 December 2023, the Law of 19 December 2023 containing various provisions in civil and commercial matters was published in the Belgian Official Journal (the ***Law***).

The Law extends the positive effect of res judicata, generalises settlement chambers, widens the general information duty regarding legal remedies, modifies the procedure before the Supreme Court and allows judges in summary proceedings to question the parties on how they have attempted to resolve their dispute amicably (*See*, this Newsletter, Volume 2023, No. 9 and this Newsletter, Volume 2023, No. 11).

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



PUBLIC PROCUREMENT

EU Public Procurement Thresholds Increase Slightly

On 18 December 2023, the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) published a Ministerial Decree of 13 December 2023 implementing in Belgian law the financial thresholds for the application of the EU public procurement Directives for the years 2024-2025. The European Commission had updated these thresholds by Commission Delegated Regulations (EU) 2023/2495, 2023/2496, 2023/2497 and 2023/2510, published in the Official Journal of the EU on 16 November 2023 (*Ministerieel Besluit tot wijziging van de Europese bekendmakingsdrempels in meerdere Koninklijke Besluiten tot uitvoering van de wet van 17 juni 2016 inzake overheidsopdrachten, de wet van 17 juni 2016 betreffende de concessieovereenkomsten en de wet van 13 augustus 2011 inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten op defensie- en veiligheidsgebied / Arrêté ministériel adaptant les seuils de publicité européenne dans plusieurs arrêtés royaux exécutant la loi du 17 juin 2016 relative aux marchés publics, la loi du 17 juin 2016 relative aux contrats de concession et la loi du 13 août 2011 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services dans les domaines de la défense et de la sécurité*).

The thresholds applicable to public supply, service and works contracts increase slightly. The applicable thresholds depend on the sector, the type of contract and the awarding authority:

- in the traditional sectors, the thresholds of EUR 5,382,000 (applicable to public work contracts), EUR 140,000 (public supply and service contracts awarded by specific federal authorities) and EUR 215,000 (public supply and service contracts awarded by other authorities) are replaced by the thresholds of EUR 5,538,000, EUR 143,000 and EUR 221,000 respectively;

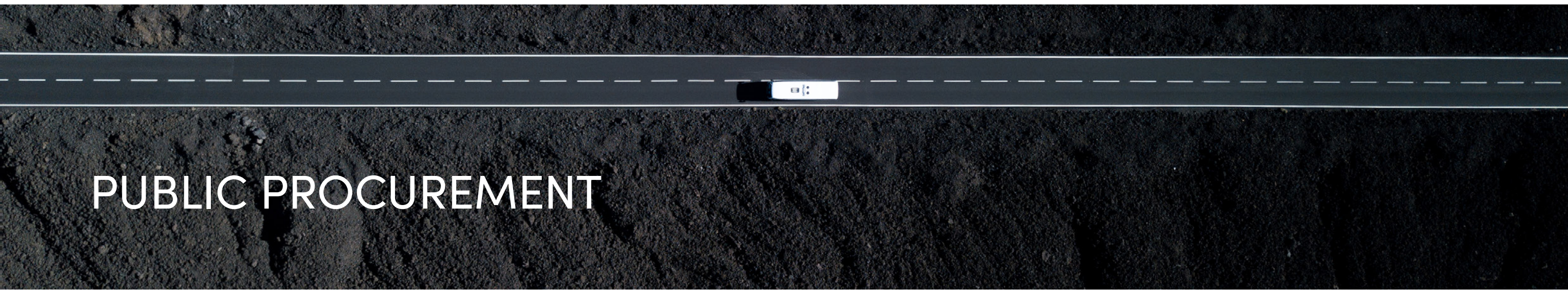
- in the special sectors, the thresholds of EUR 5,382,000 (public work contracts) and EUR 431,000 (public supply and service contracts and competitions) increase to EUR 5,538,000 and EUR 443,000 respectively; and

- in the field of defence and security, the thresholds of EUR 5,382,000 (public work contracts) and EUR 431,000 (public supply and service contracts) rise to EUR 5,538,000 and EUR 443,000 respectively.

The threshold which triggers the application of the Law of 17 June 2016 on concession contracts (*Wet van 17 juni 2016 betreffende de concessieovereenkomsten / Loi du 17 juin 2016 relative aux contrats de concession*) also increases from EUR 5,382,000 to EUR 5,538,000. It is included in Article 4(1) of the Royal Decree of 25 June 2017 on the award and general rules for the execution of concession contracts (*Koninklijk Besluit van 25 juni 2017 betreffende de plaatsing en de algemene uitvoeringsregels van de concessieovereenkomsten / arrêté royal du 25 juin 2017 relatif à la passation et aux règles générales d'exécution des contrats de concession*).

The new thresholds apply from 1 January 2024. Contracts whose estimated value reaches or exceeds the threshold 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).

These changes required the adaptation of two thresholds in the Law of 17 June 2013 on the statement of reasons, information and remedies in relation to public contracts, certain works, supply and service contracts and concessions. This was done by the Royal Decree of 17 December 2023 published in the Official Journal on 21 December 2023 (*Koninklijk Besluit tot aanpassing van twee drempels in de wet van 17 juni 2013 betreffende de motivering, de informatie en de rechtsmiddelen inzake overheidsopdrachten, bepaalde opdrachten voor werken, leveringen en diensten en concessies / Arrêté royal modifiant deux seuils dans la loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics, de certains marchés de travaux, de fournitures et de services et de concessions*).



PUBLIC PROCUREMENT

Public tenders are one of the priority enforcement targets of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) (*See*, this Newsletter, Volume 2023, No. 7).

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