August 2022

VBB on Belgian Business Law

Issue Highlights

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

Legal 500, 2019

Topics covered in this issue

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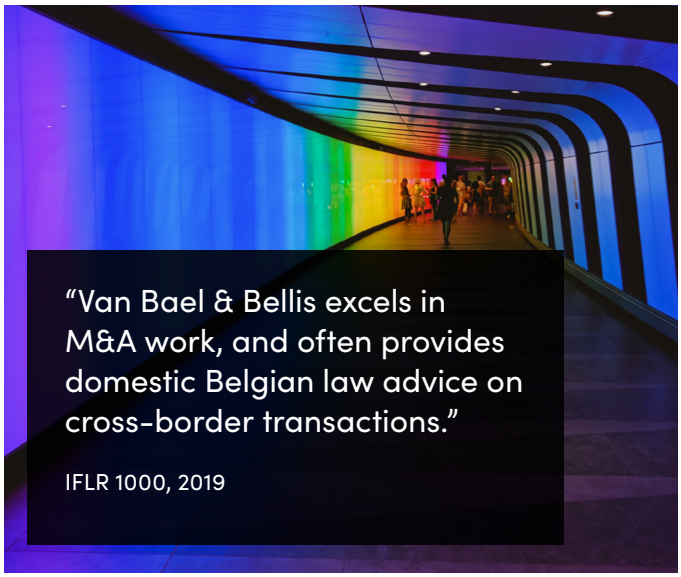

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COMMERCIAL LAW

Default Commercial Interest Rate Remains Unchanged

On 25 August 2022, the default interest rate for commercial transactions applicable during the second semester of 2022 was published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*). It amounts to 8%, remaining unchanged from the rate applied in the first semester of 2022 (*See*, this Newsletter, Volume 2022, No. 2). Pursuant to the Law of 2 August 2002 on combating late payment in commercial transactions (*Wet van 2 augustus betreffende de bestrijding van de betalingsachterstand bij handelstransacties / Loi du 2 août 2022 concernant la lutte contre le retard de paiement dans les transactions commerciales*), the default commercial interest rate applies to compensatory payments in commercial transactions (*handelstransacties / transactions commerciales*), *i.e.*, transactions between companies or between companies and public authorities. The default interest rate for commercial transactions may be deviated from by contract.

COMPETITION LAW

European Commission Publishes 2022 Market Study on Hotel Distribution Practices

On 26 August 2022, the European Commission released the results of an external market study on the distribution practices of hotels within the European Union, covering the period between January 2017 and May 2021 (the ***Study***).

The Study covers six EU Member States, including Belgium, and provides an assessment of the current distribution practices of hotels in the EU, focusing on independent hotels, hotel chains, Online Travel Agents (***OTAs***) and metasearch/price comparison websites. The Study examines whether recent antitrust and legislative interventions in this sector have led to changes in hotel distribution practices in the countries under review. In that regard, the Study focuses on the national laws banning the use of hotel booking platform parity clauses, namely (i) "wide" parity clauses which prevent a hotel from offering better price and other conditions on sales channels other than the OTA with which the hotel has a contract; and (ii) "narrow" parity clauses which prevent a hotel from offering better price and other conditions on its own website than those which it applies to the OTA with which it contracted.

The main results of the Study are the following.

- Direct bookings (*i.e.*, hotel website, telephone, and walk-in) and indirect bookings (*e.g.*, use of OTAs and travel agents) have a similar market share with respectively 48% and 44% of the sales on the market. Small hotels tend to use the services of OTAs more than mid-size hotels.

- The four major OTAs used by independent hotels are Airbnb, Booking.com, Expedia and HRS. Some OTAs appear to apply specific commercial conditions relating to hotel visibility on their websites in order to encourage hotels to offer them more favourable conditions.

- The level of differentiation in the conditions applied by independent hotels on the different sales channels seems to have decreased since 2016. For instance, while 40% of hotels applied a form of price differentiation between their own websites and OTAs in 2016, 31% applied this form of differentiation in 2021. Moreover, while 21% of hotels applied a form of price differentiation between different OTAs in 2016, this number fell to 9% in 2021.

With respect to Belgium, the Study explains that Belgium was one of two out of the six studied countries that adopted sector-specific laws prohibiting the use of wide and narrow OTA parity clauses. However, the Study shows that the entry into force of the law prohibiting OTA parity clauses in 2018 did not seem to have materially impacted the hotel distribution practices in Belgium. In particular, the Study demonstrates that:

- the use of OTAs by Belgian independent hotels amounted to 85%, which is slightly above the average level of OTAs' use in the studied countries (*i.e.*, 80%);

- the sales of Belgian independent hotels through OTAs represented around 55% of their sales while this number amounted to 48% in Spain, 48% in Cyprus and 40% in Sweden;

- the share of Belgian independent hotels that advertise on metasearch websites was the highest (60%), followed by Sweden (48%), Poland (41%), Spain (40%) and Austria (38%);

- despite the national prohibition of OTA parity clauses, the share of Belgian independent hotels being subject to one or more OTA parity clauses in their contracts amounted to 28%, with Belgium featuring as the second country where OTA parity clauses are the mostly used behind Sweden;

- in the countries that prohibited the use of OTA parity clauses such as Belgium, hotels were found to be more likely to offer lower prices on their direct online sales channels than on OTAs.

The results of the Study will probably be considered by the Commission and by national competition authorities in their enforcement activities in the hotel accommodation distribution sector and are available here.

DATA PROTECTION

Belgian Data Protection Authority Fines Laboratory for Conducting Medical Analysis without Adequate Security or Data Protection Impact Assessment

In a decision of 19 August 2022, the Belgian Data Protection Authority (the ***DPA***) imposed a fine of EUR 20,000 on an unidentified medical laboratory in respect of various General Data Protection Regulation (***GDPR***) infringements. The DPA held that the medical laboratory had failed to take adequate security measures and inform data subjects. According to the DPA, it should also have carried out a data protection impact assessment (***DPIA***).

The case started with a complaint by a patient who suspected that the medical laboratory had not adequately protected the processed personal data. The complainant, whose health-related data had been processed on numerous occasions, alleged that the laboratory had failed to conduct a DPIA, failed to inform individuals correctly and processed special categories of data, in this case health-related data, through an unsecured website.

After investigating, the DPA found that the medical laboratory's website, where physicians could consult laboratory results, provided insufficient security. Login and passwords for the website were not encrypted and vulnerable to attacks. Additionally, the website was not secure and did not provide adequate protection for the sensitive, health-related personal data that was made available through the website. The DPA therefore found the laboratory in breach of Articles 5.1.f), 24, 25 and 32 of the GDPR.

Furthermore, the complainant suspected that the medical laboratory had not conducted a DPIA, which it should have done according to Articles 35.1 and 35.3 of the GDPR. Under these provisions, a DPIA is required for any processing on a large scale of special categories of data, such as data concerning health.

The laboratory argued that its processing could not be considered "large scale" as it initially only processed data regarding approximately 50 patients per day, even though it admitted that the activity had increased due to the Covid-19 pandemic.

The DPA referred to the criteria adopted by the European Data Protection Board for assessing whether a processing activity is "large scale", in particular:

- the number of data subjects concerned - either as a specific number or as a proportion of the relevant population;
- the volume of data and/or the range of different data items being processed;
- the duration, or permanence, of the data processing activity;
- the geographical extent of the processing activity.

In addition, the DPA considered that internal compliance documentation of the laboratory referred to a large scale of processing. Based on these considerations, the DPA concluded that the processing should be considered "large scale". Moreover, the DPA pointed out that the DPA's Decision 01/2019, which sets out a list of activities for which a DPIA is always required, includes a situation in which "special categories of personal data within the meaning of Article 9 GDPR [...] are systematically exchanged between various controllers". This is the case here as the laboratory's platform allows physicians to consult the test results. In the process, these physicians act as data controllers within the meaning of Article 4 (7) GDPR.

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Finally, the DPA found that an insufficient amount of information had been given to the data subject regarding the processing of the health-related data, which is in breach of Articles 12 to 14 of the GDPR.

For the calculation of the fine, the DPA did not rely on the draft fining Guidelines published by the EDPB as this document was not yet final. Instead, it initially proposed a fine of EUR 25,000, to which the defendant responded that various elements supported a reduction of the fine. For instance, the defendant claimed that the infringements were the result of negligence rather than an intentional fault and that the company was advised incorrectly. The DPA considered these to be aggravating factors, indicating that the company did not give due importance to its responsibility under the GDPR. The DPA nevertheless agreed to diminish the fine to EUR 20,000 considering the company's difficult financial position.

The decision is available in Dutch and in French.

One-Stop Shop Mechanism Results in Increased Fine for Accor SA

On 15 June 2022, the European Data Protection Board (the ***EDPB***) issued a binding decision (the ***Decision***) pursuant to Article 65(1)(a) of the General Data Protection Regulation (the ***GDPR***). The Decision caused the French supervisory authority to increase its proposed fine on Accor SA (***Accor***). The EDPB's Decision was published on 17 August 2022, a few days after the French SA had published its own draft decision applying the EDPB's Decision.

The case relates to Accor, a company operating in the hospitality sector, which allegedly failed to respect the data subject's right to object to receiving marketing messages by mail. The data subject also claimed to have faced difficulties when exercising the right of access. Accor carried out cross-border processing and other SAs received complaints as well. However, given that the main establishment of Accor was found the be in France, the French SA was identified as being the lead supervisory authority (***LSA***) within the meaning of the GDPR.

Under the GDPR's one-stop shop mechanism, the concerned SAs could file "reasoned and relevant objections" to the LSA's proposed decision. The Polish SA filed an objection, arguing that the amount that the LSA proposed for the administrative fine – *i.e.*, a fine of 100,000 EUR – was too low for a controller like Accor and that the fine would not be effective, proportionate and dissuasive as required by Article 83(1) GDPR. The Polish SA referred to the "substantial" provisions of the GDPR that have been infringed and the cross-border nature of the processing.

The French SA, on the other hand, explained that to determine the level of the fine, it had considered that the infringements in question had not been of a structural nature, and that following the investigation of the French SA, Accor had taken measures to correct the breaches. In addition, the French SA clarified that it had considered the significant drop in the turnover of Accor between 2019-2020 as a mitigating factor under Article 83(2)(k) GDPR, due to the serious impact of the Covid-19 health crisis to the hotel sector.

In the Decision, the EDPB instructed the LSA to ensure the proportionality of the fine in accordance with Article 83(1) GDPR by taking into account the financial situation of Accor on the basis of its 2021 turnover figure, without considering the reduction of the turnover due to the Covid-19 pandemic as a mitigating factor. Contrary to the request of the Polish SA, the EDPB noted that there is no need for the French SA to demonstrate the impact of the fine on Accor's economic viability, as the French SA did not base a reduction of the fine on the controller's inability to pay it.

In addition, the EDPB held that, in view of the turnover of Accor and of the fact that the case relates to "substantial" infringements, the LSA's proposed fine was not dissuasive as required under Article 83(1) GDPR. For this reason, the EDPB instructed the French DPA to reassess the elements which it relied upon to calculate the amount of the fine to meet the criterion of dissuasiveness under Art. 83(1) GDPR, taking into account, in particular, the relevant turnover of Accor.

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The French SA reviewed the case once more and, taking account of the EDPB's Decision, issued a new draft decision on 3 August 2022 (available here), in which it expressed its intention to impose an administrative fine of 600,000 EUR.

The EDPB's Decision can be consulted here.

INTELLECTUAL PROPERTY

Law of 19 June 2022 Transposing Digital Single Market Directive and Making Important Changes to Belgian Copyright Law Enters into Force

On 1 August 2022, the Law of 19 June 2022 (the ***Implementing Law***) transposing Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (the ***DSM Directive***) was published in the Belgian Official Journal. Most of the provisions of the Implementing Law entered into force on the same day. Almost all of the provisions of the Implementing Law now form part of Book XI of the Code of Economic Law (***CEL***) while the new provisions relating to enforcement were added to Book XVII CEL.

The DSM Directive came into force on 6 June 2019 and Member States had until 7 June 2021 to implement the DSM Directive into their national laws. The DSM Directive harmonised copyright legislation of the Member States in an effort to reflect digital and technological developments and ensure a better enforcement of copyright and related rights on the internet.

The main changes brought about to Belgian copyright law by the Implementing Act are as follows.

Four New Mandatory Exceptions to Copyright

The DSM Directive introduces four new mandatory exceptions to copyright and related rights which are considered necessary to reflect new realities with regard to digital technologies in the fields of research, innovation, education and the conservation of cultural heritage:

1. Text and data mining for research purposes (Articles XI.191/1, XI.191/2, XI.217/1 and XI.310 CEL);

2. A general text and data mining exception (Articles XI.190, XI.191, XI.217, XI.299 and XI.310 CEL);

3. Digital use of works for teaching purposes (Articles XI.191/1, XI.191/2, XI.217/1, XI.240, XI.299 and XI.310 CEL);

4. Preservation of cultural heritage (Articles XI.191/1, XI.191/2, XI.217/1, XI.240, XI.299 and XI.310 CEL).

New Rules for Online Content-sharing Providers (OCSPs)

The controversial Article 17 DSM Directive created new rules for OCSPs in relation to protected content uploaded by users. OCPSs (such as Facebook and YouTube) must obtain the authorisation of the rightsholder when allowing the public to access the content uploaded by the users. Without obtaining such authorisation, the OCSP will be liable for unauthorised acts of communication to the public, unless the OCSP can demonstrate that it made best efforts to obtain the authorisation. In practice, this means that the OCSP will have to carry out a prior review of the content that the users wish to upload.

The Implementing Law also provides for a non-transferable right to remuneration for authors and holders of related rights whose works and performances are uploaded on such platforms.

New Neighbouring Right for Press Publishers

The Implementing Law creates a new neighbouring right for press publishers for the online use of their publications by information society providers, by facilitating the licensing of their publications. Furthermore, this new right aims to ensure that the actual authors of the works receive an appropriate share of the remuneration paid to the publisher. The new right of press publishers has a limited duration and expires two years after the date of publication of the press publication.

Appropriate and Fair Remuneration in Copyright Contracts

The DSM Directive further tries to ensure that authors and performers receive appropriate and fair remuneration for the exploitation of their works and

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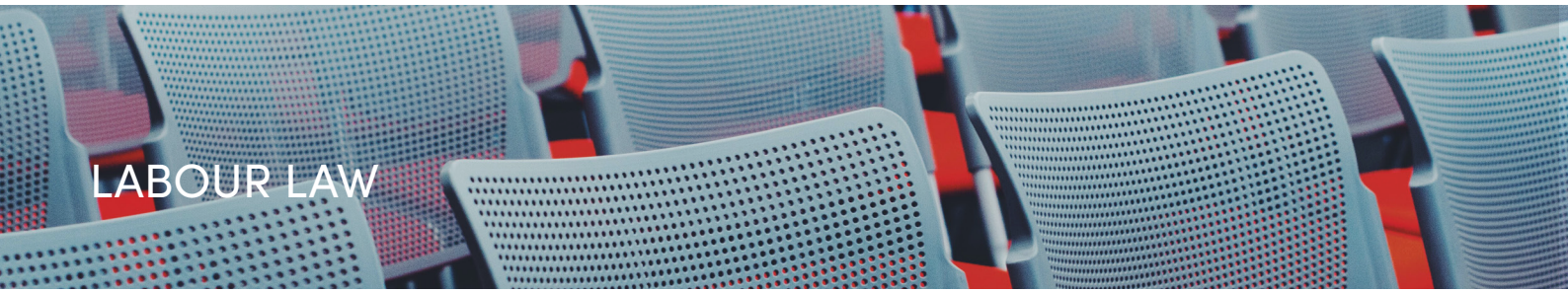
performances. In this respect, the Implementing Law introduces the following measures:

- A general right to obtain appropriate and fair remuneration;
- A transparency obligation for the assignee or licensee (at least once per year) with respect to the exploitation of the assigned or licensed works;
- A right to claim an additional appropriate and fair compensation in case the initially agreed compensation is too law in the light of the relevant revenues resulting from the exploitation of the work;
- A right of revocation when the works are not exploited by the persons with whom the rightsholder concluded an exclusive contract.

Better Enforcement of Intellectual Property Rights against Online Mass Infringement of Copyright, Neighbouring Rights and Database Rights

The Implementing Law established a new "special procedure" to obtain preliminary measures in the case of a "clear and significant online infringement of copyright, neighbouring rights and database rights". The President of the Brussels enterprise courts can issue a preliminary ruling in summary proceedings, including a cease-and-desist order.



LABOUR LAW

On 1 January 2023, Saturday Will No Longer Be Considered Working Day

Due to the introduction of Book 1 in the new Civil Code, Saturdays will no longer be considered as working days, at least for the calculation of notice periods as provided for in the Law of 3 July 1978 on Employment Contracts (the ***Law***).

Current Rules

The notice period can only start on the Monday of the week following the one in which the employee is informed of the dismissal. The Law also states that the letter is always notified on the third working day following the day on which the registered letter was posted (regardless of whether the employee receives the letter earlier or later).

According to current rules, all days of the week are 'working days', except for Sundays and public holidays. Saturday is therefore also considered to be a "working day". The same rule applies to dismissal for serious cause: for the purpose of calculating the three-working-day period, Saturdays are currently regarded as working days.

Practically, this means that a registered letter must be posted at the latest on Wednesday in order for the notice period to start on the following Monday. In this case, Wednesday is 'the day of posting' and Saturday is the third working day following the day of posting, the so-called 'day of notification'.

Changes to Current Rules

An amendment to the Belgian Civil Code published on 1 July 2022 in the Belgian Official Journal provides that Saturdays will no longer count as working days, just like Sundays and public holidays. This change will have a direct impact on the rules concerning notice of termination by registered letter. The day of notification will have to fall at the latest on a Friday, in order for the notice period to start on the Monday of the following week.

This means that the last day for posting the registered letter will have to be one day earlier, which implies that the registered letter will have to be posted on Tuesday at the latest, provided there are no public holidays in that week following Tuesday.

The new rule will apply on 1 January 2023, when the new Civil Code comes into force.

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