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Legal 500 2019

September 2020

VBB on Belgian Business Law

Highlights

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IFLR1000, 2019

Topics covered in this issue

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COMPETITION LAW

Belgian Competition Authority Adopts Fining Guidelines for Abuses of Economic Dependency

On 3 September 2020, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) adopted new guidelines on the method of setting fines for competition law infringements (*Richtsnoeren van de Belgische Mededingingsautoriteit betreffende de berekening van de geldboeten voor ondernemingen en ondernemingsverenigingen bedoeld in artikel IV.79, § 1, eerste lid, en § 2, eerste lid WER bij overtredingen van de artikelen IV.1, § 1, IV.2 en/of IV.2/1 WER, of van de artikelen 101 en/of 102 VWEU / Lignes directrices de l'Autorité belge de la Concurrence concernant le calcul des amendes pour les entreprises et associations d'entreprises prévu à l'article IV.79, § 1er, premier alinéa, et § 2, premier alinéa CDE pour infractions aux articles IV.1, § 1er, IV.2 et/ou IV.2/1 CDE, ou aux articles 101 et/ou 102 TFUE* - the ***Fining Guidelines***). The Fining Guidelines were published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur Belge*) on 16 September 2020 and entered into force on that same day. They replace a previous version published on 25 May 2020.

The new Fining Guidelines are almost identical to the May 2020 guidelines (which drew strong inspiration from the European Commission's guidelines of 2006 on the method of setting fines), but their scope has been extended to include penalties for abuse of economic dependency. The ban on abuse of economic dependency entered into force only recently (*See, this Newsletter, Volume 2020, No. 8, p. 4*).

Draft Bill Correcting Provisions of Code of Economic Law

On 22 September 2020, the federal government submitted a draft Bill regarding various provisions concerning the economy (*Wetsontwerp houdende diverse bepalingen inzake Economie / Projet de loi portant dispositions diverses en matière d'Économie* – the ***Draft Bill***) to the federal Chamber of Representatives. The Draft Bill seeks to amend numerous provisions of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* – ***CEL***), including Book IV governing competition law.

The Draft Bill does not significantly change the current competition rules but makes technical corrections to Book IV, which in its current form includes several erroneous cross-references and unclear text. Some of these incorrect cross-references concern the imposition of fines for "gun jumping" offences and for abuse of economic dependency.

The Draft Bill also establishes that a request to lift or amend conditions that form part of a merger clearance decision of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) will constitute one of the exceptions to the principle of full jurisdiction of the Markets Court of the Brussels Court of Appeal (*Marktenhof / Cour des marchés* – the ***Markets Court***) in competition cases. This means that if such a request is granted, the Markets Court will only have the power to annul the decision of the BCA and refer the case back to the BCA.

The clarification had been made necessary following an amendment to Book IV, CEL that was brought about by the May 2019 reform of the competition rules (*See, this Newsletter, Volume 2019, No. 5, p. 4*). That amendment unintentionally suggested otherwise. Following this change, the Markets Court held, in a judgment of 23 October 2019 in the *Kinepolis* case, that it had full jurisdiction to review merger conditions and that it no longer had to refer the case back to the BCA (*See, this Newsletter, Volume 2019, No. 10, p. 8*). If adopted, the Draft Bill will prevent the Markets Court from adopting similar judgments in future.

European Commission Investigates Whether Belgian Capacity Mechanism Constitutes State Aid

On 21 September 2020, the European Commission (the ***Commission***) announced the launch of an in-depth State aid investigation into Belgium's capacity mechanism (***CM***). The CM is designed to ensure security of electricity and resource adequacy in view of Belgium's decision to phase-out its nuclear capacity by 2025. The Commission has three concerns pointing to a possible incompatibility of the CM with its Guidelines on State aid for environmental protection and energy.

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First, the Commission considers at this stage of its analysis that Belgium failed to quantify properly its adequacy requirements. As a result, the Commission is concerned that the support foreseen by the CM may exceed what is necessary to satisfy adequacy needs and may result in over-procurement of capacity.

Second, the Commission is concerned that the CM may, in its current form, discriminate against technologies such as renewable energy and unfairly limit the participation of cross-border capacity.

Third, the Commission considers it necessary to verify that the CM effectively incentivises further interconnection between Belgium and neighbouring countries and does not impede competition and trade.

Belgium and other interested parties will now be given the opportunity to offer their views before the Commission reaches a final decision on the compatibility of CM with the State aid rules.

Belgian Competition Authority Imposes Penalty Payments on Belgian Bumper Pool Association

On 28 August 2020, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) imposed penalty payments on the Belgian Bumper Pool Association (*VZW Belgische Golfbiljartbond* - ***BGB***) for non-compliance with interim measures taken against the BGB.

On 23 January 2020, the Competition College decided to impose interim measures on BGB to ensure competition for the supply of bumper pool balls that may be used in competitions and matches organised by BGB or its affiliated associations and clubs (*See, this Newsletter, Volume 2020, No. 1, p. 6*).

In the new decision, the Competition College ordered BGB to amend its rules in accordance with the interim measures decided in January 2020 and to publish these amendments by 4 September 2020, in view of the start of the Belgian national bumper pool competition. The BCA also ordered BGB to adopt and publish its decisions on the balls approved for use in its competitions and matches within a week following the application for approval.

Non-compliance with these obligations will result in penalty payments of EUR 125 per day. This amount corresponds to 5% of BGB's average daily turnover, which is the maximum that can be imposed under Belgian competition rules. While the BCA acknowledged that such low penalty payments are symbolic, it considered that they should nonetheless be imposed as a matter of principle.

Federal Chamber of Representatives Hears President of Belgian Competition Authority

On 30 September 2020, the committee for economic affairs, consumer protection and digital agenda of the Chamber of Representatives heard Jacques Steenbergen, President of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) on the work of the BCA and the level of retail prices in Belgium.

Lack of Culture of Competitiveness in Belgium

Mr Steenbergen first pointed out that, while the number of cases handled by the BCA has increased in recent years, Belgium is still lacking a strong culture of competitiveness as can be witnessed in Germany or The Netherlands.

Lack of Resources and Jurisdiction of BCA

Mr Steenbergen reiterated the complaint often made that the BCA lacks the human resources necessary to investigate and sanction anticompetitive practices properly. When asked whether the BCA has the requisite legal instruments to deal with technology giants such as Apple, Google and Microsoft, Mr Steenbergen expressed the view that these issues should be tackled at the EU level and not by national competition authorities.

Interim measures adopted by the BCA

Mr Steenbergen stated that interim measures are more relied on in Belgium than in other European Member States. In addition, Book V of the Belgian Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* – ***CEL***) established a procedure allowing the BCA to adopt interim measures in situations where the Pricing Observatory (*het Prijzenobservatorium / l'Observatoire des prix*) finds that a market is failing. However, this specific procedure has never been applied. According to Mr Steenbergen, the amount of data which the Belgian Statis-

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tics Authority can share is not sufficient to enable the Pricing Observatory to draw firm conclusions that could trigger the application of this procedure.

Level of Supermarket Prices in Belgium

Mr Steenbergen also discussed the prices charged by retailers following a study on the subject which the Pricing Observatory completed in 2017. He noted that some price differences between Belgium and neighbouring countries cannot be explained objectively. Licensing and authorisation procedures to open points of retail have not restricted the access to the Belgian retail market. Profit margins do not explain price differences between Belgium and neighbouring countries, and it is not the large companies that earn the most, with the notable exception of Colruyt. Differences in wages have a relatively limited impact on purchase prices. However, national regulations (such as the prohibition to sell at a loss) may have an impact on price differences between countries, which Mr Steenbergen did not quantify. Similarly, the fragmentation of joint committees (*paritaire comités / commissions paritaires*) in Belgium may have an impact on pricing levels because competing chains may be subject to very different rules.

Mr Steenbergen observed that local supermarkets are in expansion and found it very unlikely that large supermarkets will prevent their local counterparts from continuing to grow. Whether local supermarkets (often acting as franchisees) pay a higher purchase price for their supplies is an issue that should be further analysed. However, obtaining the data necessary to carry out such an analysis may prove to be difficult. Mr Steenbergen's first impression is that prices are not necessarily higher in small, local supermarkets than in large supermarkets.

Vertical Restraints in Belgium

Mr Steenbergen believes that the rules laid down in the Vertical Block Exemption Regulation will remain very strict when it comes to resale price maintenance (***RPM***) and that the enforcement of the prohibition of RPM must remain a top priority for national competition authorities. He added that territorial supply constraints also remain an enforcement priority in the Internal Market because they may lead to significant price differences. Mr Steenbergen also considers it necessary to raise the SMEs' awareness of these competition rules. SMEs should receive sufficient guidance enabling them to achieve a higher level of compliance with the competition laws.

Finally, Mr Steenbergen observed that some practices should be dealt with by regulatory intervention rather than by competition authorities. For instance, labelling, which was one of the issues of the *AB InBev* case (*See, VBB on Competition Law, Volume 2019, No. 5, p. 7*) is subject to rules that require the use of the language of the territory where the product is sold. As a result, a product with a label in Dutch can be sold in Flanders but not in Wallonia. Labelling should not only be analysed from a consumer information perspective but also from a competition angle and this may raise different questions.

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CORPORATE LAW

Supreme Court Rules that Bankruptcy Trustee Can Terminate Agreement Subject to Payment of Contractual Damages

On 4 September 2020, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) held that the decision of a bankruptcy trustee to terminate a lease agreement concluded prior to the date of the bankruptcy judgment, precludes the creditor from claiming the performance in kind (or its equivalence) of the lease agreement. Consequently, the creditor can only claim contractual damages on the basis of a breach of contract. Such a claim must be filed with the bankruptcy estate.

Pursuant to Article 46 of the old Bankruptcy Law (now Article XX.139 of the Code of Economic Law), the bankruptcy trustee has the power to terminate agreements that have been concluded before the date of the bankruptcy judgment, if such termination is in the interest of the bankruptcy estate.

In the case at hand, the company was declared bankrupt on 11 October 2016. On 17 October 2016, the bankruptcy trustee terminated a lease agreement which had been entered into by the company on 27 March 2012 for a term of ten years. Following the termination of the lease agreement, the lessor filed a claim with the bankruptcy estate for an amount equal to the lease monies due for the remainder of the agreement, *i.e.* the equivalent of the performance in kind of the lease agreement. The bankruptcy trustee contested the claim and argued that the lessor was only entitled to contractual damages resulting from the termination of the lease agreement, in this case six months of lease as provided for in the lease agreement.

Siding with the bankruptcy trustee, the Court of First Instance (acting as court on appeal) held that the application of Article 46 of the old Bankruptcy Law may give rise to a breach of contract, following which a creditor can only claim contractual damages but no performance in kind (or its equivalence). Consequently, a claim for damages must be filed with the bankruptcy estate, despite the fact that the agreement had been terminated after the date of the bankruptcy judgment. The Supreme Court confirmed the judgment of the Court of First Instance.

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DATA PROTECTION

European Data Protection Board Draft Guidelines on Targeting of Social Media Users

On 2 September 2020, the European Data Protection Board (the ***EDPB***) adopted its draft guidelines on the targeting of social media users (the ***Guidelines***). Targeting users of social media is a way to advertise in a specific and focused manner. The "targeter" relies on social media services to "*direct specific messages*" at a given group of social media users based on particular criteria or parameters. Over time, those targeting methods have increased in sophistication and these methods form part of many social media business models. Against this background, the Guidelines focus on the roles and responsibilities of the social media providers and targeting service providers (***targeters***) under the EU General Data Protection Regulation (the ***GDPR***) when aiming at social media users. Under specific circumstances, a targeter will qualify as a joint controller with a social media provider. This will result in several additional obligations under the GDPR.

Risks to Rights and Freedoms

The EDPB identifies specific risks to the fundamental rights and freedoms of individuals which targeters, social media providers and others should consider while targeting social media users. Those risks include the use of personal data against or beyond individuals' reasonable expectations and the possibility of discrimination, exclusion and manipulation of social media users. The EDPB stresses that a 'chilling effect' on freedom of expression may arise since the targeting of social media users on the basis of browsing behaviour may create the impression that such behaviour is systematically monitored. The EDPB also notes that targeting may have a significantly greater adverse impact on vulnerable categories of persons, such as children.

Actors' Roles and Responsibilities

Depending on the situation, social media providers and targeters may qualify as joint controllers or independent controllers. In other cases, they will not even be considered as a controller. The Guidelines clarify those situations and draw on the case-law of the Court of Justice of the European Union (the ***CJEU***). In *Wirtschaftsakademie* the CJEU held that the administrator of a 'fan page' on Facebook qualifies as a joint controller with Facebook (*See, this Newsletter, Volume 2018, No. 6, p. 9*). In *Fashion ID*, the CJEU held that a website operator could be considered as a controller of a social plugin when it embeds such a plugin on its website (*See, this Newsletter, Volume 2019, No.8, p. 6*). If there is joint controllership, controllers are required to put in place an arrangement which defines their respective responsibilities for compliance with the GDPR (*See, This Newsletter,* next article).

Different Targeting Methods

The EDBP identifies three categories of data which may be used, alone or in combination, to target social media users. These are (i) data provided by the social media user; (ii) observed data generated on the basis of the user's behaviour; and (iii) inferred data created by data controllers. The Guidelines set out the roles of targeters and social media providers for each of those categories and describe their obligations under the GDPR. For instance, if the social media provider will undertake profiling that is likely to have a "*similarly significant effect*" on a data subject, the controller will have to carry out an assessment of the "*similarly significantly effect*" with reference to the specific facts of the targeting.

Transparency and Right of Access

The EDBP stresses the importance of transparency under the GDPR in collecting personal data, in (where applicable) establishing an agreement between joint controllers, and in creating access to data subjects' personal data in a user-friendly manner, for the benefit of data subjects.

Special Categories of Data

The GDPR provides specific protection for special categories of personal data that are sensitive in relation to fundamental rights and freedoms. These special categories include data about an individual's health, sexual orientation and racial or ethnic origin. The Guidelines explain when data will amount to a special category of data for the purposes of targeting.

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The processing of special categories of personal data is, as a rule, prohibited but the GDPR allows for such processing if the data were made manifestly public by the data subject. However, there is a high threshold for relying on this exception in relation to targeting of social media users.

Joint Controllership and Responsibilities

Joint controllers are required to determine, in an agreement, their respective responsibilities when complying with the obligations of the GDPR. This agreement should encompass all processing operations for which the social media provider and the targeter are jointly responsible. The EDBP stresses that superficial and incomplete arrangements will result in a breach of these parties' obligations under the GDPR. Further, the EDBP recommends using the same legal basis for a particular targeting tool and specific purpose, even though the use of different legal bases is possible under the GDPR.

Lastly, the EDPB recognises that targeters who want to use targeting methods of social media providers may be confronted with 'take-it-or-leave-it' conditions. However, such a situation does not do away with the joint responsibility of the targeter and the social media provider under the GDPR. The EDBP nonetheless adds that the degree of responsibility of the targeter and the social media provider may vary depending on the specific obligations at issue.

The Guidelines can be found here. Stakeholders are expected to submit their comments by 19 October 2020.

European Data Protection Board Clarifies Concepts of Controller and Processor

On 7 September 2020, the European Data Protection Board (***EDPB***) published for public consultation draft guidelines (the ***Guidelines***) regarding the concepts of controller and processor in the General Data Protection Regulation (the ***GDPR***). These concepts play a critical role in the application of the GDPR. They determine who is responsible for compliance with various data protection rules and how data subjects can exercise their rights. Whether parties interact as separate or joint controllers, or as controller and processor will have an important impact on the rights and obligations of the parties.

The Guidelines replace the previous opinion of the Article 29 Working Party on the same topic (WP169).

Concepts of Controller, Joint Controllers and Processor Under GDPR

The first part of the Guidelines discusses the definitions of the different roles that an organisation can assume when processing personal data. For each role, the EDPB reiterates that the facts matter for an assessment of which concept applies.

Definition of controller

The Guidelines start by underlining the importance of the concept of "controller". This concept must ensure accountability and the effective and comprehensive protection of personal data. Therefore, the EDPB gives a broad interpretation of the concept. It states that any lacunae and possible circumvention of the rules must be avoided.

Article 4(7) of the GDPR defines the controller as the party that decides the purposes and means of the processing. This must be determined on the basis of a factual analysis. This means that the role of a controller does not stem from the nature of the entity that is processing data, but rather from its concrete activities in a specific context. The controller is the party which determines "*why*" and "*how*" personal data are processed for a particular purpose.

In practice, processors may have some degree of flexibility to determine "non-essential" means (*i.e.*, "how" data are processed). This may cause some difficulties in determining if a party is only a processor or should really be regarded as a controller. The EDPB explains that the "essential means" of the processing will be determined by the controller. This concept refers to the measures that are closely linked to the purpose and the scope of the processing and are traditionally and inherently reserved to the controller (*e.g.*, deciding which data will be processed or whose personal data are being processed). By contrast, "non-essential means" concern practical aspects of implementation, such as the choice for a particular type of hard- or software or the detailed security measures which may be left to the processor to decide on.

Definition of joint controllers

The qualification as joint controllers may arise when more than one actor is involved in deciding the purposes and means of the processing. Article 26 of the GDPR contains

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specific rules for joint controllers and provides a framework to govern their relationship. An allocation of obligations for compliance with data protection rules is required, in particular with respect to the rights of individuals.

The EDPB has significantly extended its guidance on the concept of joint controllership compared to the previous advice of the Article 29 Working Party. It relied on recent case law of the Court of Justice of the European Union (***CJEU***), including *Fashion ID* (C-40/17), *Jehovah's Witnesses* (C-25/17) and *Wirtschaftsakademie* (C-210/16). The EDPB explains that the joint participation in the determination of the purposes and means of a processing operation can take the form of a *common decision* taken by two or more entities or result from *converging decisions* by two or more entities regarding the purposes and essential means (*e.g.*, if the processing would not be possible without both parties' participation).

For instance, in *Wirtschaftsakademie*, the CJEU held that Facebook and the administrator of a Facebook fan page acted as joint controllers for the processing of statistics on visitors to the Facebook fan page. These statistics allow Facebook to improve its system of advertising and allow the page administrator to have information about the page visits. The EDPB explains that while each party has its own interest, these different interests are closely linked and the parties can be regarded as jointly determining the purpose and means of the processing.

Importantly, the EDPB points out that the existence of joint responsibility does not necessarily imply equal responsibility of the various operators involved. Instead, the CJEU clarified in *Wirtschaftsakademie* that those operators may be involved at different stages of the processing activities and to different degrees so that the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case.

The fact that several actors are involved in the same processing does not mean that they are necessarily acting as joint controllers. For instance, the exchange of the same data between two entities without jointly determined purposes or jointly determined means of processing should be considered as a transmission of data between separate controllers.

Definition of processor

Article 4(8) of the GDPR defines the "*processor*" as "*a natural or legal person, public authority agency or another body which processes personal data on behalf of the controller*". The Guidelines explain that two basic conditions lead to the classification as a processor. First, it must be a *separate entity* from the controller. Secondly, the processing of personal data happens *on the controller's behalf*.

The role of the processor is to implement the controller's instructions (at least with regard to the purpose of the processing and the essential elements of the means). The controller's instructions may still leave a degree of discretion about how best to serve the controller's interests, allowing the processor to choose the most suitable technical and organisational means. But the controller must make the final decision and approve the way the processing is carried out. It should at least be able to request changes.

It follows that if the processor infringes the GDPR by determining the purposes and means of processing, it will be considered a controller in respect of that processing.

Consequences of Attributing Different Roles

The second part of the Guidelines covers the legal consequences of each role and the distribution of responsibilities between the different parties. Under the GDPR, both the controller and processor are subject to accountability obligations. In particular, the controller will be responsible for, and must be able to demonstrate compliance with, the basic principles for processing personal data contained in Article 5 of the GDPR. The controller also has a general accountability obligation under Article 24 of the GDPR.

Additionally, the GDPR also imposes accountability obligations on processors. For instance, processors must ensure that persons authorised to process the personal data have committed themselves to confidentiality (Art. 28(3) of the GDPR) and they must keep a record of processing obligations (Art. 30 of the GDPR).

The Guidelines further discuss the various obligations in a controller-processor relationship:

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- **A written agreement** must govern the processing of personal data by a processor, with Article 28 of the GDPR laying down the core elements of such an agreement. The EDPB underlines that the processing agreement should not merely restate the provisions of the GDPR. Instead, it should include specific, concrete information as to how the requirements will be met by both actors. For instance, the processing agreement should specify the level of security required for the personal data processing at issue. The agreement is intended to help the processor understand the risks to the rights and freedoms of data subjects that arise from the processing.

- The processor is only allowed to process data on the documented **instructions** of the controller. Such instructions can include permissible and unacceptable handling of personal data, more detailed procedures or ways of securing data. The level of detail of these instructions, for instance on the appropriate technical and organisational security measures to be implemented, will depend on the specific circumstances. If the risks to the rights and freedoms of data subjects are low, a description of the minimum security objectives will prove sufficient.

- **Sub-processing** is subject to the controller's prior written authorisation which will be specific, *i.e.*, for identified sub-processors, or general. In case of a general authorisation, the controller should still be informed if a new sub-processor is added to the processing operations. The EDPB notes in this regard that the processor's duty to inform the controller of any change of sub-processors implies that the processor should actively point out such changes to the controller.

In a joint controller's relationship, the following obligations have to be observed:

- The **allocation of responsibility** for compliance with data protection rules must be determined in a transparent manner. The EDPB recommends documenting relevant factors, such as who is competent and in a position to effectively ensure data subject's rights, as well as to comply with the relevant obligations under the GDPR (*i.e.*, as part of the documentation under the accountability principle).

- A new obligation under the GDPR results from Article 26(1) which indicates that joint controllers should determine their respective responsibilities in **an arrangement** between them. According to the EDPB, they are free to agree on the form of the arrangement.

- The arrangement must set out the respective obligations of the joint controllers towards **data subjects**. It should prescribe who will inform data subjects and who will answer their requests.

The Guidelines also contain useful examples as well as a flowchart for applying the concepts of controller, processor and joint controllers.

A copy of the Guidelines can be found here. Stakeholders are invited to submit comments before 19 October 2020.

Belgian Data Protection Authority Finds Hospital to Be in Breach of Right of Access and Information

In a decision of 29 July 2020, the Litigation Chamber of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit/Autorité de protection des données* - the ***DPA***) found against a hospital for its failure to comply with a right of access and information.

In February 2019, a doctor lodged a complaint with the DPA against a hospital. The complaint followed the use of the doctor's personal data in a report examining malfunctions within the medical imaging service that employed the doctor. A few days after this report was presented to a competent committee of the hospital, the complainant was dismissed for serious misconduct. The doctor immediately requested to be able to consult her personal data that had been processed and requested access to the report that had formed the basis for the decision to dismiss her. This request was refused by the hospital and the doctor brought the case before the DPA's Litigation Chamber.

Right to Obtain Copy of Processed Data

In accordance with Article 15, paragraph 1 of the General Data Protection Regulation (***GDPR***), a data subject has the right to obtain confirmation as to whether or not personal data concerning him or her are processed. If this is the case, the data subject has the right to obtain access to those data. Article 15, paragraph 3 of the GDPR provides the right for the

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data subject to receive a copy of his or her personal data that are processed.

In its decision, the DPA refers to the judgment of the Court of Justice of the European Union (***CJEU***) in *Nowak* (C-434/16) to explain that any opinion or assessment concerning a specific person is covered by the notion of personal data (*See, this Newsletter, Volume 2018, No 1, at p. 9*).

The hospital first justified its refusal to heed the request arguing that the GDPR did not apply. The hospital pointed out that it was not the author of the report which had been drawn up by an independent external expert. However, since the hospital had retained the external expert to draft the report, the Litigation Chamber found that the right of access could be exercised against the hospital, in its capacity of data controller that decided on the purposes and means of data processing at hand.

The hospital also invoked several obstacles to the exercise of the right of access, referring in particular to the confidential nature of the report, the existence of a copyright in the report and the fundamental rights and freedoms of others. The Litigation Chamber replied, in regard to the confidential nature, that Article 15, paragraph 3 of the GDPR does not require that a copy of the original document should be provided to the data subject but it confers a right to obtain a copy of the data that are processed. The DPA added that this right of access enables a person to ensure that no data concerning him or her are processed without his or her knowledge. It is therefore a first step towards a possible exercise of the right of rectification, erasure or objection. The right to obtain a copy of the personal data is one of the major changes effected by the GDPR and strengthens data subjects' control over their personal data.

The Litigation Chamber also held that the principle of accountability set out in Articles 5.2 and 24 of the GDPR requires the hospital to implement adequate procedures allowing data subjects to access their rights in a manner that is compatible with other rights, such as copyright of the author of the report.

Finally, the Litigation Chamber refuted the argument that access to personal data could affect the rights and freedoms of others. It explained that the right can be exercised in a manner that filters out data relating to other doctors or staff members.

Failure to Provide Information

Articles 13 and 14 of the GDPR require controllers to inform any person whose personal data are processed of a series of elements such as the identity and contact details of the controller, the purposes of the processing, the legal basis and the recipients of the data. For data collected directly from the data subject, the information must be communicated at the time when the data are obtained (Article 13 of the GDPR). For data not collected directly from the data subject, Article 14 of the GDPR stipulates that the information must be made available within a reasonable time period or at the latest when the data are first communicated to another recipient. The hospital failed in its obligation to provide this information to the data subject.

Finally, the Litigation Chamber noted that the procedure put in place by the hospital to allow data subjects to exercise their rights did not satisfy the requirements of Article 12, paragraph 2 of the GDPR (facilitation of the exercise of data subject rights). The hospital required the scheduling of a face-to-face meeting. The Litigation Chamber considered this to be excessive, possibly intimidating and therefore an obstacle to the effective exercise of the rights conferred by the GDPR.

Decision

The Litigation Chamber concluded that the hospital had failed to comply with the complainant's right of access and its own duty to inform. Because of the public nature of the hospital in question, the Litigation Chamber could not impose an administrative fine but merely reprimanded the hospital (Article 221(2) of the Belgian Data Protection Law of 30 July 2018 (*Wet betreffende de bescherming van natuurlijke personen met betrekking tot de verwerking van persoonsgegevens/Loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel*) prohibits the DPA from fining government bodies, other than public law entities that offer goods or services on a market). The Litigation Chamber furthermore ordered the hospital to ensure a right of access and to bring its data processing relating to independent care providers in line with Articles 12, 13 and 14 of the GDPR.

The DPA's decision can be consulted here (currently only available in French).

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FINANCIAL LAW

Extension of Temporal Scope of Royal Decree Granting State Guarantee for Specific Loans

On 16 September 2020, the Federal Government extended the temporal scope of the Royal Decree granting a state guarantee for specific loans from 30 September 2020 until 31 December 2020 (the ***Royal Decree***).

The Royal Decree was adopted on 14 April 2020 to limit the negative impact of the Covid-19 pandemic and introduced a state guarantee for loans granted to viable non-financial companies, SMEs and self-employed persons.

This guarantee regime applies to loans granted by financial institutions between 1 April 2020 and 31 December 2020, with a maximum term of twelve months. The maximum amount guaranteed includes an interest rate of 1.25% (plus fees) and the lower of:

1. EUR 50 million; or
2. the higher of:
    - the cash required by the borrower to continue its activities during a period of 12 months, or 18 months in case of an SME;
    - twice the borrower's total annual personnel cost of the last financial year for which the accounts were closed; or
    - 25% of the turnover of the last financial year for which the accounts were closed.

In addition, the guaranteed funds cannot exceed the total funds that the minister has granted to each creditor on the basis of the advice of the National Bank of Belgium.

The Belgian State will cover the losses which the creditor suffered on guaranteed loans, as follows:

1. up to 3%: 0% coverage;
2. between 3% and 5%: 50% coverage; and
3. exceeding 5%: 80% coverage.

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INTELLECTUAL PROPERTY

According to Benelux Court of Justice One Possible Descriptive Meaning Sufficient to Refuse Benelux Trade Mark

On 16 June 2020, the Benelux Court of Justice (***BCJ***) delivered an important judgment in ANISERCO S.A. v. Benelux Office for Intellectual Property (*Benelux-Bureau voor de Intellectuele Eigendom/L'Office Benelux de la Propriété Intellectuelle* - ***BOIP***) (case C2019/6/9). The judgment embraced a stricter criterion for the assessment of whether a sign or a trade mark is descriptive.

In the judgment, the BCJ confirmed the BOIP's refusal of the Benelux trade mark PET'S BUDGET on the grounds that it was descriptive. The court's reasoning could lead to more refusals before the BOIP when the sign whose protection is sought lacks distinctiveness.

Factual Background and Procedure

On 24 January 2017, ANISERCO submitted an application for the Benelux word mark 'Pet's Budget' for goods in Classes 3, 5, 18, 20, 21 and 31. The goods (ranging from animal shampoos and perfumes, pet clothing and accessories, to cages) relate to animals and are sold in pet stores.

The application was rejected by the BOIP for being descriptive. ANISERCO argued that the words 'Pet's Budget' would refer to a budget for pets rather than constitute a description of the goods for animals. It added that another meaning of 'budget' in English is cheap or advantageous, which implies that the sign could be perceived by some as referring to cheap products for pets. However, ANISERCO failed to convince the BOIP that the sign was not descriptive and also failed to demonstrate its acquired distinctiveness by use throughout the Benelux.

ANISERCO then appealed the BOIP's decision to the BCJ.

Judgment of BCJ

On appeal, the central question concerned the criterion used to assess the descriptiveness of a sign. ANISERCO relied on case law of the General Court of the European Union (***GC***) (case T-150/16, *Ecolab USA v. EUIPO*) which uses the criterion that a sign is descriptive only where it "*shows a direct and specific relationship that it would enable the public concerned to perceive therein, without further thought, a description of the goods in question or one of their characteristics*". ANISERCO argued on that basis that the words 'Pet's Budget' did not lack distinctiveness and were not descriptive of the goods.

For its part, the BOIP maintained that the above criterion is incorrect and relied on the case law of the Court of Justice of the European Union (***CJEU***) (cases C-191/01 P, *Doublemint* and C-265/00, *Biomild*) to assess descriptiveness. The correct criterion for refusal based on descriptiveness is that the sign "*in at least one of its potential meanings refers to a characteristic of the concerned goods or services*".

The BCJ confirmed that the criterion relied on by the BOIP is the correct one and concluded that the BOIP had justly refused the application. The BCJ explained that signs may help the relevant public identifying the goods or services concerned, either directly or by indicating one of their essential characteristics. In order for the BOIP to refuse an application, it is not necessary that the signs of a trade mark should be used for the description of the concerned goods and services, but it is sufficient that the sign may serve this purpose. Therefore, the registration should be refused if the sign describes at least one of the characteristics of the concerned goods or services.

The BCJ also explicitly noted that there is no need for a direct and immediate link between a sign and the relevant goods and services so that the relevant public is able to recognise a description of any of the characteristics of those goods and services immediately and without further thought.

Criterion for Assessing Descriptiveness

In this important judgment, the BCJ confirmed the criterion for descriptiveness used by the BOIP and explicitly rejects the criterion that there must be an immediate link between

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a sign and the goods or services concerned. The BCJ thus rejected the criterion used by the European Union Intellectual Property Office (***EUIPO***).

The BCJ's judgment also appears to be add odds with the EUIPO Trade Mark Guidelines (version of 2020), which state that the relationship between a sign and the concerned goods or services "*must be sufficiently direct and specific, as well as concrete, direct and understood without further reflection*". Moreover, in December 2019 the GC confirmed the application of this criterion in case T-270/19, *Amazon Technologies Inc. v European Union Intellectual Property Office*.

Given the stricter approach of the BOIP and following the BCJ's decision, it will become more difficult to register Benelux trade marks that have a potentially descriptive meaning. Applicants of such trade marks may have better chances of success applying for an EU trade mark instead. This judgment might have important implications for future trade mark applications and might be used as a defence in infringement cases by claiming that a trade mark is descriptive and therefore must not be enforced.

Distinctiveness of Slogan: which Relevant Public?

On 8 July 2020, the General Court (***GC***) delivered its judgment in *Teva Pharmaceutical Industries Ltd v European Union Intellectual Property Office* (case T-697/19) and addressed the meaning of 'the average consumer' in proceedings concerning the distinctive character of a sign.

The GC considered the public's perception when it comes to advertising slogans and messages as well as the level of attention if the goods and services are not only aimed at a specific public, but also bought by everyday consumers who are part of the general public. The GC held that a sign may indicate the origin of the goods or services when it possesses a certain degree of originality.

Factual Background and Procedure

In August 2018, Teva Pharmaceutical Industries (***Teva***) applied to register the slogan "*Weniger Migräne. Mehr vom Leben*" (Translated to English: *Less Migraines. More of Life*) as an EU trade mark for goods in Class 16 (printed materials relating to the treatment of migraines) and services in Class 44 (information relating to the treatment of migraines).

The European Union Intellectual Property Office (***EUIPO***) examiner refused the registration in February 2019 on the ground that the sign lacks distinctiveness under Article 7(1)(b) of Regulation 2017/1001 on the European Union Trade Mark.

Teva appealed the decision of the examiner to the EUIPO Board of Appeal (***EUIPO Board***), but the appeal was dismissed on the same basis. The EUIPO Board was of the opinion that the slogan lacks distinctiveness and would be perceived by the relevant public as a promotional slogan relating to the quality of the concerned goods or services.

Teva then appealed to the GC and requested the annulment of the EUIPO Board's decision.

Judgment of GC

The GC recalled that a mark has a distinctive character when it serves to identify the concerned goods or services originating from a certain undertaking for which registration is applied and thus distinguishes the goods or services from those of other undertakings (case C-311/11 P, *Smart Technologies v. OHIM*). Therefore, the distinctive character of a sign can only be assessed by reference to the concerned goods or services and the relevant public's perception of the sign.

After establishing that the concerned goods and services concern the treatment of migraines, the GC recalled that the 'average consumer' cannot be understood as being only the consumer who is part of the general public, but as the consumer who is part of the public specifically targeted by the concerned goods and services.

It follows from the case law that marks consisting of promotional slogans can still be capable of indicating the commercial origin of the concerned goods or services, when, for example, the marks are not merely ordinary advertising messages, but also possess a certain originality or resonance, requiring at least some interpretation by the relevant public, or setting off a cognitive process in the minds of that public (case C-398/08 P, *Audi v. OHIM*).

However, in the present case, the phrases "*Weniger Migräne*" and "*Mehr vom Leben*" were not considered sufficiently unusual in terms of the rules of the German language. They deliver a simple message to the relevant public, which is not likely to confer any originality or resonance to require further

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interpretation or to set off a cognitive process. The mark thus encourages the relevant public to discover the concerned goods and services by promising to improve daily life. Therefore, the mark has a merely promotional character and is not capable of indicating the commercial origin of the goods and services and not capable of functioning as a trade mark.

The judgment of the GC can be consulted here.

Emailing Copyright-Protected Content to Court is No Communication to the Public (AG Opinion)

On 3 September 2020, Advocate General Hogan (***AG Hogan***) delivered his opinion in case C-637/19, BY v. CX, in which he advises the Court of Justice of the European Union (***CJEU***) that the electronic submission as evidence by a party in legal proceedings of copyright-protected materials does not constitute a communication to the public or a distribution to the public within the meaning of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (***InfoSoc Directive***).

AG Hogan added that the underlying copyrighted material does not become part of the public domain based on the mere fact that it forms part of an exhibit that was submitted to the court as evidence.

Factual Background and Procedure

The request for a preliminary ruling was made by the Svea Court of Appeal (Patents and Market Court of Appeal in Sweden) in the context of a dispute between CX and BY, both private persons who own and operate a website. During a dispute in civil proceedings between these parties, CX submitted, as evidence, a copy of a page of text containing a protected photograph taken from BY's website. BY holds the rights in the photograph and claimed that the disclosure made by CX amounted to an infringement of copyright and/or related rights.

The court of first instance held that the disclosure did not qualify as an infringement under Swedish constitutional law on access to documents. BY appealed the judgment to the Svea Court of Appeal, which stayed the proceedings and asked the CJEU for clarification.

The Svea Court of Appeal was unsure whether a court could be considered a 'public' for the purpose of copyright law and whether the concept of 'public' should be interpreted in the same way in Articles 3 and 4 of the InfoSoc Directive. The uncertainty arose due to earlier case law of the CJEU, in which the CJEU held that for there to be 'distribution to the public' it is sufficient that the protected work has been delivered to a member of the public (case C-516/13, *Dimensione*).

Opinion of AG

AG Hogan noted that this case raises some important issues regarding the interaction of EU copyright legislation and national freedom of information, together with the right to an effective remedy and a fair trial, as also guaranteed under Article 47 of the EU Charter of Fundamental Rights (the ***Charter***).

In relation to the notion of 'public', AG Hogan found that it would not be necessary to answer the question concerning the notion of 'public' in Articles 3 and 4, since it is apparent that the activity at issue would qualify as communication to the public, rather than distribution. As the CJEU confirmed, the right of distribution concerns physical copies (case C-263/18, *Tom Kabinet*). By contrast, in the case at hand, the protected photograph had been sent by e-mail. Therefore, Article 4 of the InfoSoc Directive did not come into play.

Regarding communication of protected content to a court, AG Hogan considered whether the disclosure of protected content to a court by e-mail would constitute a 'communication to the public'.

AG Hogan noted that whilst the communication of protected content to third parties performing administrative or judicial duties "*may very well surpass 'a certain de minimis threshold given the number of people potentially involved*", it would still fail to be a communication to the public within Article 3(1) of the InfoSoc Directive because those persons would be constrained by the nature of their official functions as "*they would not be entitled to treat the copyrighted material as being free from copyright protection*." In addition, the communication at issue would not have any independent economic significance and would not be directed at an indeterminate number of potential recipients.

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AG Hogan added that copyright law must not prevent the disclosure of evidence of protected material as this would seriously compromise the right to an effective remedy and the right to a fair trial (Article 47 of the Charter). While intellectual property is protected under Article 17(2) of the Charter, its protection is not absolute and must be fairly balanced or weighted against other rights.

Finally, AG Hogan added that there is no communication to the public when a litigant e-mails copyright-protected content as evidence to a court, because it is the court that decides on granting access (or not) under national rules on freedom of information and transparency. Further, any disclosure of copyrighted material under such rules does not then mean that that material subsequently loses its copyright-protected status and enters the public domain. It must be the case that Swedish law does not permit copyright protection to be lost merely because one of the parties has disclosed the material in the course of civil proceedings and a third party can then gain access to that material by virtue of Swedish freedom of information law. Any conclusion to the contrary would mean that Sweden would be in breach of its obligations under EU law, including the InfoSoc Directive and Article 17(2) of the Charter.

The opinion of AG Hogan can be consulted here.

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LABOUR LAW

Employees Who Have Been Subject To Temporary Unemployment Due To Covid-19 Force Majeure Will Not Lose Their Holiday Entitlements In 2021

The Royal Decree of 13 September 2020 which was published in the Belgian Official Journal on 24 September 2020 equates work interruptions between 1 July 2020 and 31 August 2020 resulting from temporary unemployment due to Covid-19 force majeure with periods of activity that must be taken into account for the calculation of the holiday entitlements in 2021 (*Koninklijk Besluit houdende gelijkstelling van de dagen van arbeidsonderbreking ingevolge tijdelijke werkloosheid wegens overmacht door de pandemie, ten gevolge van het coronavirus in het stelsel der jaarlijkse vakantie van de werknemers voor de periode van 1 juli 2020 tot en met 31 augustus 2020 / Arrêté royal visant à assimiler les journées d'interruption de travail résultant du chômage temporaire pour cause de force majeure à la suite de la pandémie due au virus corona, dans le régime des vacances annuelles des travailleurs salariés, pour la période du 1er juillet 2020 jusqu'au 31 août 2020 inclus* - the ***Royal Decree***).

The Royal Decree follows the Royal Decree of 4 June 2020 which was published in the Belgian Official Journal on 5 June 2020 (*Koninklijk Besluit van 4 juni 2020 houdende gelijkstelling van de dagen van arbeidsonderbreking ingevolge tijdelijke werkloosheid wegens overmacht ten gevolge van de pandemie, ten gevolge van het coronavirus in het stelsel der jaarlijkse vakantie van de werknemers voor de periode van 1 februari tot en met 30 juni 2020 / Arrêté royal du 4 juin 2020 visant à assimiler les journées d'interruption de travail résultant du chômage temporaire pour cause de force majeure suite à la pandémie due au virus corona, dans le régime des vacances annuelles des travailleurs salariés, pour la période du 1er février 2020 jusqu'au 30 juin 2020 inclus*) and which already provided for a similar equation of work interruptions resulting from temporary unemployment due to Covid-19 force majeure between 1 February 2020 and 30 June 2020.

As a result, full-time employees who have been temporarily unemployed due to force majeure resulting from Covid-19 during the period running from 1 February 2020 until 31 August 2020 included will still be entitled to all of their 20 statutory holidays in 2021 (and their related single and double holiday pay).

This rule is meant to counter the negative impact of the Covid-19 pandemic on employees' holiday entitlements in 2021 as periods of temporary unemployment due to force majeure are not considered as periods of activity under the rules governing annual holidays.

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