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Legal 500 2019

November 2020

VBB on Belgian Business Law

Highlights

"Van Bael & Bellis excels in M&A work, and often provides domestic Belgian law advice on cross-border transactions."

IFLR1000, 2019

Topics covered in this issue

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COMMERCIAL LAW

Minister for Economic Affairs Publishes Policy Note

On 3 November 2020, the Federal Minister for Economic Affairs and Labour, Pierre-Yves Dermagne, submitted his policy note regarding economic affairs and employment (*beleidsverklaring/exposé d'orientation politique* - the ***Policy Note***) to the Federal Chamber of Representatives. In the Policy Note, the Minister outlines the main objectives which the Federal Government will be pursuing in the areas for which he bears responsibility.

In economic affairs and consumer matters, these are the digitisation of the economy, the fight against excessive indebtedness, and better regulation to improve fair competition, buying power (including the development of a circular economy) and consumer rights (*see*, this Newsletter, Consumer Law).

The Policy Note discusses three plans that will impact Belgian commercial law.

First, the Minister will seek to establish a regulatory framework to address the challenges associated with the digitisation of the economy, including big data and artificial intelligence. The Minister will ensure that data sharing takes place in a responsible manner that respects the privacy, autonomy and commercial secrets of all stakeholders.

Second, the Minister intends to assess the efficacy of the legal warranty regime and to examine methods to improve it. This review should take place on the occasion of the implementation into Belgian law of Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services and Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods (*See*, this Newsletter, Volume 2019, No. 5, p. 7). The deadline for the implementation of both Directives is 1 July 2021. The Minister will reflect on ways to ensure that the final seller of a product benefits from an actual and effective remedy against the manufacturer.

Third, the Minister intends to modernise access to so-called "intellectual professions", a notion that presumably includes professional groups such as architects and attorneys, to enhance fairness and preserve the quality of the services provided.

COMPETITION LAW

Belgian Competition Authority Imposes Interim Measures Requested by Football Club Virton Following Appeal Judgment of Markets Court

On 19 November 2020, the Competition College (*Mededing¬ingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) imposed interim measures on the Royal Belgian Football Association (the ***RBFA***) at the request of Royal Excelsior Virton (***Virton***). The BCA's previous decision to decline Virton's request for interim measures had been annulled by the Markets Court of the Brussels Court of Appeal (*Marktenhof / Cour des marchés* – the ***Markets Court***).

In April 2020, the RBFA had refused to issue a new operating licence to Virton because the football club was not able to guarantee its continuity according to the RBFA's rules. Virton was therefore relegated to a lower tier in the national football competition. Virton complained to the BCA that the conditions imposed by the RBFA to obtain a licence restricted competition and it requested interim measures to address this issue.

On 29 June 2020, the Competition College of the BCA ruled on Virton's request for interim measures (*See*, this Newsletter, Volume 2020, No. 6, p. 6, and Volume 2020, No. 7, p. 3). The BCA found that, although subjecting the participation in the championship to the condition of obtaining a licence and requiring that the clubs concerned comply with the continuity principle may restrict competition, these condi¬tions *prima facie* seemed to pursue the legitimate objective of allowing an orderly competition. The BCA also considered that while "it cannot be *prima facie* ruled out" that some criteria applied by the RBFA were disproportionate, Virton had not established that it would have satisfied the conditions to obtain a licence absent these problematic criteria. As a result, the BCA dismissed Virton's request for interim measures.

Virton appealed this decision. On 23 September 2020, the Markets Court annulled the BCA's decision for failure to provide adequate reasons (*See*, this Newsletter, Volume 2020, No. 10, p. 5). The Markets Court considered it necessary for the BCA to determine if the criteria imposed by the RBFA were effectively disproportionate or applied too rigidly and therefore *prima facie* contrary to the competition rules. The Markets Court found that the BCA wrongly decided that (i) it cannot be excluded that the RBFA requirements or their application may breach competition rules; and (ii) Virton did not *prima facie* establish that it satisfied the conditions for a licence absent the problematic conditions, while Virton had, in fact, demonstrated that it satisfies the requirements of the RBFA (*i.e.*, absence of social security debts or debts vis-à-vis third parties). In addition, the Markets Court held that it was contradictory for the BCA to consider that a sponsorship requirement for obtaining a licence may be disproportionate while, at the same time, maintaining that there was no prima facie infringement of the competition rules. As a result, the Markets Court annulled the decision and referred the case back to the BCA.

On 19 November 2020, the Competition College of the BCA (in a different composition than the Competition College which had adopted a decision in June 2020) granted Virton's request for interim measures in part. The BCA decided that the conditions for obtaining a professional licence appear *prima facie* incompatible with competition law. The BCA added that Virton "could not make use of other possibilities that would have enabled the RBFA or the CBAS [*i.e.*, the Belgian Sport Arbitration Court – *Belgisch Arbitragehof voor de Sport / Cour belge d'Arbitrage pour le Sport*] to grant the licence". This is because the RBFA's rules on how to assess a football club's compliance with the continuity requirements ignore significant factual elements such as guarantees offered by private individuals or sponsoring by an entity linked to the football club.

As a result, Virton will be allowed to re-enter division 1B of the national football competition during season 2021-2022. The BCA specifically decided that it would be disproportionate to order Virton's reinstatement during the ongoing season 2020-2021.

Court of Justice of European Union Holds That Belgian Collecting Society Festival Fees Are Not Necessarily Abusive Under Article 102 TFEU

On 25 November 2020, the Court of Justice of the European Union (the ***CJEU***) delivered a judgment in case C-372/19 holding that the fee structure for music played at festivals adopted by collecting societies such as SABAM is not necessarily abusive under Article 102 TFEU. The case had come before the CJEU following a request for a preliminary ruling from the Court of Enterprises (*Ondernemingsrechtbank*) of Antwerp (the ***Antwerp Court***).

The Antwerp Court made the request in disputes between SABAM and festival organisers Weareone.World and Wecandance over allegedly unpaid royalties for music played in the Tomorrowland and Wecandance festivals between 2013 and 2016. The organisers contended that the royalty fees charged by SABAM were abusive.

Facts

SABAM Rates: Minimum Rate

SABAM's fees consisted of a minimum rate determined by the size of the festival space and the number of available tickets.

SABAM Rates: Base Rates

However, SABAM could also opt to charge a base rate calculated on the gross revenues from ticket sales and on the value of the tickets offered for free in accordance with sponsorship agreements. An alternative method for calculating the base rate was for SABAM to take the "artistic budget", *i.e.*, the total amount of fees paid to the artists, if that budget was higher than the gross revenues from ticket sales.

SABAM Rates: Discounts

Several discounts on the base rate applied if the proportion of music from SABAM's repertoire played during the festival amounted to less than one-third, or less than two-thirds, of the total volume of music played during the festival.

The festival organisers maintained that these fees were not proportionate to the economic value of the licensing services provided by SABAM insofar as the base rate and the discounts did not reflect SABAM's contribution in a sufficiently precise manner and were based in part on elements unrelated to those services. In its request for a preliminary ruling, the Antwerp Court asked whether the use of a minimum rate and the inclusion of "external elements" – *e.g.*, technical and artistic costs – in the base rate could constitute an abuse of a dominant position.

On 16 July 2020, Advocate General Pitruzzella delivered an opinion (*See*, VBB on Competition Law, Volume 2020, No. 7, p. 5).

CJEU Ruling

Base Rates

The CJEU held that using total revenues as a base rate is acceptable under Article 102 TFEU. The CJEU noted that there is no single suitable method to identify more narrowly the contribution of music to the overall attractiveness of a live music festival and found that requiring a collecting society to make such a calculation would be an unreasonable administrative burden. The CJEU stated that a form of remuneration expressed as a percentage of turnover was a normal method to compensate for intellectual property rights which can also be applied to festival ticket sales. However, the CJEU also pointed out that, even if SABAM's base rate was intrinsically legitimate and pursued a legitimate goal, it could still be excessive. However, that would be a finding for the national court.

Discounts

The CJEU noted that the one-third, two-thirds rule may be considered unreasonable if there are more accurate ways to measure which music is played. It added that the rule makes for a very inaccurate estimate of the share of music falling under SABAM's management that results in levy which is systematically higher than the levy that

would apply if only the music for which SABAM is responsible were considered. According to the CJEU, these wide increments could be considered a violation of Article 102 TFEU, if there was a more refined method to gauge the actual share of SABAM's repertoire in the total amount of music played. The CJEU added, in its view, such more refined methods actually exist. The CJEU pointed to software-based solutions that allow for the precise determination of SABAM's share of the music performed during a festival. In this regard, the CJEU mentioned that SABAM had already switched to an incremental system with 10% increments, which makes it possible to take into account with greater accuracy the proportion of the played works that originate from SABAM's repertoire.

Conclusion

On this basis, the CJEU concluded that SABAM's methodology for setting fees charged for music played at festivals was not necessarily abusive under Article 102 TFEU. Furthermore, the CJEU held that a model which provides for the calculation of fees on the basis of total ticket sales is reasonable, provided the model corresponds to the economic value created. Unfortunately, the CJEU did not take a firm view on whether the incremental system with 10% increments would be sufficiently precise or could still raise concerns under Article 102 TFEU. This issue was left to the Antwerp Court which will still have to decide on an accurate method to determine the share of SABAM's repertoire in the overall volume of music played.

CONSUMER LAW

Adoption of Collective Redress Directive For Consumers

On 24 November 2020, the European Parliament adopted a Directive on representative actions for the protection of the collective interests of consumers (the "Collective Redress Directive" or ***CRD***).

The proposed CRD was initially published by the European Commission (the ***Commission***) in April 2018 (*See*, this Newsletter, Volume 2018, No. 4, p. 19). The proposal was then examined by the EP and by the Council of the European Union (the ***Council***), which entered into interinstitutional negotiations in January 2020 (*See*, this Newsletter, Volume 2020, No. 1, p. 14). The EP and the Council reached a political agreement on the final text of the Directive on 22 June 2020 (*See*, this Newsletter, Volume 2020, No. 6, p. 20). On 4 November 2020, the Council adopted its position at first reading, which has now been formally approved by the EP and has since also been published in the Official Journal (Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, O.J. (2020) L 409/1).

The CRD establishes an EU-wide "class action" or "representative action". It covers infringements of EU law which are harmful to the collective interests of natural persons in their capacity as consumers, regardless of whether those consumers are referred to in the relevant instruments as "consumers", "travellers", "users", "customers", "retail investors", "data subjects" or otherwise. Accordingly, representative actions may be brought not only for infringements of general EU consumer law, but also of EU rules pertaining to the protection of personal data, geo-blocking, financial services, energy and telecommunications.

The CRD provides for safeguards against the abusive litigation historically associated with class actions in other jurisdictions. First, it does not allow courts to impose punitive damages on the infringing trader. Second, it opts for the "loser pays principle", which ensures that the unsuccessful party pays the procedural costs of the successful party. Third, EU Member States should ensure that the court or the administrative authority can dismiss manifestly unfounded cases as soon as it has received the necessary information to justify such a decision.

Fourth, a further safeguard against abusive litigation is the eligibility for specific entities to represent groups of consumers harmed by relevant infringements of EU law. This is limited to so-called "Qualified Entities", such as consumer organisations (*e.g., Test Aankoop / Test Achats* in Belgium) and public bodies.

In order to be eligible to bring cross-border actions, Qualified Entities will have to satisfy a set of criteria that are identical across the EU. Qualified Entities will thus have to (i) demonstrate 12 months of prior activity in protecting consumer interests; (ii) show a legitimate interest in protecting consumers; (iii) present a non-profit making character; (iv) demonstrate not being subject to insolvency proceedings; and (v) demonstrate not collaborating with parties that have economic interests opposed to those of consumers. By contrast, in order to be eligible to bring purely domestic representative actions, Qualified Entities will have to comply with criteria defined by national law. Generally, EU Member States are not expected to enact special rules but should instead apply to the general rules for representative actions as long as these do not encourage abusive litigation.

Representative actions may seek injunctive measures and/or redress measures. Injunctive measures are described as measures aiming to protect the collective interests of consumers, irrespective of whether any actual loss or damage is suffered by individual consumers and irrespective of whether the practice was committed intentionally or as a result of negligence. Such measures can require a practice to be ceased or require traders to take specific action (*e.g.*, providing consumers with information that was previously missing). Redress measures, in contrast, are defined as measures requiring a trader to provide consumers actually affected by a violation of a relevant provision of EU law with remedies, such as compensation, repair, replacement, a price reduction, contract termination or reimbursement of the price paid, as appropriate and available under EU or national law.

In order to be able to respect their legal traditions, each Member State has the choice between an opt-in mechanism, an opt-out mechanism, or a combination of the two for redress measures. It will also be for the Member State to decide at which stage of the proceedings consumers should exercise this right. Under an opt-in mechanism, consumers are required to make an express wish to be represented by the Qualified Entity in the representative action for redress measures. In an opt-out mechanism, consumers are required to express their wish not to be represented by the Qualified Entity.

EU Member States will have until 25 December 2022 to implement the provisions of the CRD and will have to apply them from 25 June 2023.

Entry into Force of Law on Cooperation Between National Authorities Responsible for Enforcement of Consumer Protection Laws

As reported in the previous issue of this Newsletter (*See*, this Newsletter, Volume 2020, No. 10, p. 6), the federal Chamber of Representatives adopted on 24 September 2020 a Law modifying the Code of Economic Law and other laws in order to strengthen the investigation and enforcement powers in relation to consumer protection laws in conformity with Regulation (EU) 2017/2394 of 12 December 2017 (*Wet van 4 november 2020 tot wijziging van het Wetboek van Economisch Recht en van andere wetten met het oog op het versterken van de opsporings- en handhavingsbevoegdheden in overeenstemming met en in uitvoering van Verordening (EU) 2017/2394 van het Europees Parlement en de Raad van 12 december 2017 betreffende samenwerking tussen de nationale autoriteiten die verantwoordelijk zijn voor handhaving van de wetgeving inzake consumentenbescherming / Loi du 4 novembre 2020 modifiant le Code de droit économique et d'autres lois en vue de renforcer les compétences de recherche et d'application conformément au règlement (UE) 2017/2394 du Parlement européen et du Conseil du 12 décembre 2017 sur la coopération entre les autorités nationales chargées de veiller à l'application de la législation en matière de protection des consommateurs* – the ***Law***).

The Law was published in the Belgian Official Journal on 20 November 2020. It entered into force on 30 November 2020.

Minister for Economic Affairs and Secretary of State for Budget Publish Policy Note on Consumer Protection

On 30 October 2020 and 3 November 2020, the Secretary of State for the Budget and Consumer Protection, Eva De Bleeker, and the Federal Minister for Economic Affairs and Labour, Pierre-Yves Dermagne, submitted their respective policy notes (*beleidsverklaring/exposé d'orientation politique* - the ***Policy Notes***) to the Federal Chamber of Representatives. Consumer protection is a shared competence of the Secretary of State and the Minister. Accordingly, their Policy Notes jointly outline the main objectives that the Government will be pursuing in that field.

The Government generally intends to protect consumers from unfair commercial practices and facilitate consumer access to accurate data which is supposed to lead to informed choices. To this end, the Government is considering the following cross-sectoral actions:

- First, the Government plans to involve more actively the Belgian Competition Authority in the preparation of new laws and regulations that stimulate competition.

- Second, the Government plans to grant the Economic Inspection (E*conomische Inspectie / Inspection économique*) broad powers to address unfair commercial practices against consumers and companies, particularly with regard to the sale and safety of masks and personal protective equipment, vouchers issued by the travel and events organisation sector, online unfair practices resulting from the Covid-19 crisis and the protection of users of financial services.

- Third, to ensure that the quality of products and services corresponds to the consumers' reasonable quality expectations, the Government aims to take action against misleading advertising, such as greenwashing practices, which consist in a company deceitfully marketing itself as environmentally friendly.

- Other notable cross-sectoral policy proposals relate to the planned re-evaluation of the efficacy of the "Don't Call Me" list and the fight against a perceived "digital divide" affecting consumers who do not have easy access to modern telecommunications services.

Additionally, the Government will focus on the following areas:

- First, in the banking and insurance sectors, consumers should have access to transparent information and benefit from a balance between a high level of protection and a decrease in the administrative burden associated with the purchase of products and services. In addition, the Government will seek to ensure that any future relevant EU Directive is implemented in due time to allow consumers to compare products and services effortlessly and switch credit and insurance providers easily.

- Second, in the travel sector, the Government aims to defend the rights of consumers whose plans were impacted by the Covid-19 crisis. It will do so in cooperation with the European Commission. As part of this exercise it will reassess existing systems of insolvency insurance for the travel sector.

- Third, in the legal and justice sector, the Government intends to take action to ensure that the costs associated with judicial and amicable debt recovery (including bailiff fees) decrease. This fits into the fight against excessive indebtedness of natural persons.

- Fourth, in the energy sector, the Government plans to make utilities more financially accessible and to facilitate switching and comparing between utilities providers. It intends to launch an investigation into costly and/or dormant contracts, in cooperation with the competent regulator and public authorities.

- Fifth, in the telecommunications sector, the Government wishes to reduce the digital divide that affects certain consumers with little to no access to the internet and electronic means of communication. To that end, it intends to examine the possibility of extending social tariffs from only landline services to mobile services. In addition, it seeks to protect consumers against unpredictable costs and undesired advertising. The Government will also pay close attention to methods of comparing and switching between telecommunications providers.

DATA LAW

European Commission Tables Data Governance Act

On 25 November 2020, the European Commission (the ***Commission***) proposed a Regulation on data governance (Data Governance Act) to make better use of the potential of ever-growing data in a trustworthy European framework (the ***proposed Regulation***). The proposed Regulation is the first of a set of measures announced in the 2020 European strategy for data (available here).

According to the Commission, the proposed Regulation offers a new form of data governance and establishes an alternative model to the data-handling practices of the big technology platforms. The model is based on the neutrality and transparency of data intermediaries as organisers of data sharing or pooling. The proposed Regulation has four pillars:

Re-use of Public Sector Data

Chapter II of the Regulation creates a mechanism for re-using specific categories of protected public sector data which is conditional on the respect of the rights of others (on the grounds of protection of personal data, intellectual property rights or commercial confidentiality). The proposed Regulation prohibits the exclusive use of such data and sets out conditions for re-use (including a requirement that the re-use should be non-discriminatory, proportionate and objectively justified).

Importantly, the re-use of such data falls outside the scope of Directive (EU) 2019/1024 (the "Open Data Directive"). Rather than creating the right to re-use such data, the proposed Regulation creates a set of harmonised conditions under which the re-use of such data may be allowed. Public sector bodies that would allow this type of re-use will have to be technically equipped to ensure that data protection, privacy and confidentiality are preserved. Member States will have to set up a single contact point supporting researchers and innovative businesses in identifying suitable data and are required to establish structures designed to support public sector bodies with technical means and legal assistance. Allowing the re-use of data may be subject to a fee.

Data Sharing Services Providers as "Trusted Intermediaries".

The proposed Regulation aims to foster the availability of data by increasing trust in intermediaries. Under the proposed Regulation, intermediaries for data sharing will have to register with national authorities.

Data sharing services providers will have to comply with several requirements, including the need to remain neutral as regards the data exchanged. Providers will have an obligation to keep data sharing services separate from other commercial operations and not to monetise the data generated through the intermediary activities. Access to data held by intermediaries should be based on criteria that are "fair, transparent and non-discriminatory".

In addition, the proposed Regulation imposes an additional requirement for obtaining consent: if the intermediary "provides tools for obtaining consent from data subjects or permissions to process data made available by legal persons, it shall specify the jurisdiction or jurisdictions in which the data use is intended to take place". According to the Commission, this approach will ensure that data sharing services function in an open and collaborative manner while empowering natural and legal persons by giving them an overview of and control over their data.

Data Altruism

The proposed Regulation also provides a framework for sharing data on "altruistic grounds". Individuals and organisations engaging in data altruism can register on a voluntary basis as a 'Data Altruism Organisation recognised in the EU' in order to increase trust in their operations. Besides, a common European data altruism consent form will be developed to lower the costs of collecting consent and to facilitate portability of the data.

European Data Innovation Board

Finally, the proposed Regulation further creates a formal expert group, the European Data Innovation Board, which will facilitate the emergence of best practices by Member State authorities. The Board will consist of representatives of the Member States, the Commission, relevant data spaces and specific sectors (such as health, agriculture, transport, and statistics), and the European Data Protection Board, an independent EU body which advises on the application of EU data protection rules.

DATA PROTECTION

Belgian Data Protection Authority Allows Employer to Rely on Consent for Obtaining Employee Trade Union Membership Data But Specifies Conditions

On 9 November 2020, the Litigation Chamber (*Geschillenkamer/Chambre contentieuse* – the ***Litigation Chamber***) of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit/Autorité de protection des données* – the ***DPA***) found a hospital to be in breach of the General Data Protection Regulation 2016/679 (the ***GDPR***) when processing personal data relating to trade union membership.

Factual Background

In May 2018, a trade union representative for an unidentified trade union "A" sent a complaint to the DPA asking for an opinion on a data processing operation carried out by his employer, a hospital. The hospital in question deducted directly, as employer, the membership fees for trade union "B" of the salary of its employees. In more general terms, the complainant questioned the interest that an employer would have in collecting data on the trade union membership of its employees and added that the treatment of trade union membership data could lead to discrimination between employees on the basis of trade union membership.

Lawfulness of Processing

The Litigation Chamber of the DPA first observed that the processing of data concerning trade union membership is, as a rule, prohibited (Article 9(1) of the GDPR). It is however possible to process such data on the basis of the explicit consent of the data subject (Article 9(2) of the GDPR). This consent must be freely given, specific and informed and must convey an unambiguous indication of the data subject's agreement to the processing of his or her personal data (Article 4(11) of the GDPR). The "free" nature of the employee's consent is often problematic in an employment context due to the imbalance of power between the data subject who is an employee and the controller who is the employer.

In the case at hand, the Litigation Chamber found that the data controller (i.e., the hospital) did not derive any benefit from the employee's consent. For that reason, it decided that the imbalance of power between the parties did not stand in the way of the employee's "free" consent.

However, the Litigation Chamber also found that the consent had not been informed since the employee did not receive information on his or her right to withdraw consent to the processing at any time (Article 7(3) of the GDPR).

Processing Purpose

Article 5(1)(b) of the GDPR provides that personal data can be collected only for specified, explicit and legitimate purposes and cannot be processed further in a manner that is incompatible with those purposes. The processing purpose as such was well determined according to the Litigation Chamber, insofar as it was to allow the direct deduction of the union fees from the salary.

However, the processing purpose was not explicit enough. According to the Litigation Chamber, the processing of union trade membership data by the employer presents an obvious risk for the employees concerned, since it gives the employer data of a sensitive nature that could be used wrongly to put pressure on or discriminate against employees, particularly during promotion procedures or social elections procedures. Therefore, special precautions should be taken when processing this type of data. This brought the Litigation Chamber to consider whether the consent given should be in writing.

Should Explicit Consent Be In Writing?

The Litigation Chamber noted that the mechanism was decided on the basis of a simple oral agreement and considered that the absence of a written document constituted significant negligence on the part of the hospital.

This is because the absence of a written agreement contributed to a possible vagueness on the intentions of the data controller and cast doubt on the part of employees not concerned by the processing operation, as revealed by the request for information and the complaint. The lack of documentation also created uncertainty as to the limits and terms of the processing.

Moreover, the Litigation Chamber considered that it did not have competence to rule on the legitimacy of the processing purpose under social law, namely the possibility for the employer to withhold the employee's trade union membership fees from the monthly salary in accordance with Article 23 of the Law on the Protection of Remuneration. To be sure, the automatic withholding of trade union membership fees from the employee's salary without consent and without observing additional formalities is not permissible under that provision, given the protected status of the employee's salary.

Decision

The Litigation Chamber concluded that the hospital violated Articles 5(1)(b), *juncto* 24(1) and 9(2)(a), *juncto* 7.3 of the GDPR for processing information despite the lack of informed consent and an explicit processing purpose. However, the Litigation chamber did not impose a penalty on the hospital. It considered that the hospital had investigated the matter internally and had stopped the processing activity. The hospital also noted that the processing activity had been set up at a time when there was only one trade union delegation at the hospital. Finally, the complainant himself was not concerned by the processing.

The full decision of the DPA can be found here (currently only available in French).

Court of Justice of European Union Confirms Invalidity of Consent Obtained Through Pre-Ticked Boxes

On 11 November 2020, the Court of Justice of the European Union (***CJEU***) handed down a judgment in which it confirmed that pre-ticked boxes to indicate that a customer consents to the collection and storage of his/her data are not capable of creating a valid form of consent (Case C-61/19, *Orange Romania*).

The case was referred to the CJEU by a Romanian court after the Romanian National Authority for the Supervision of Personal Data Processing (the ***Romanian data protection authority***) had imposed a fine on Orange România SA (***Orange***), a telecommunications company, for having concluded contracts for the provision of telecommunications services in which a pre-ticked box stated that its customers agreed to the collection and storage of copies of their identity documents for identification purposes (the ***Decision***). The Romanian data protection authority considered that the documents were processed without the customers' express consent. The Romanian court competent to deal with Orange's appeal against the Decision requested the CJEU to clarify when customers' consent to the processing of their personal data can be considered valid.

The CJEU first observed that the GDPR provides for specific cases in which the processing of personal data is lawful. One such basis for lawful processing is by obtaining the free, specific, informed, and unambiguous consent from the data subject. In this respect, the CJEU pointed out that while ticking a box when visiting a website could constitute valid consent, silence, or the use of pre-ticked boxes or inactivity, could not.

In addition, the CJEU noted that if consent is given in a written declaration which also relates to other matters, the request for consent must (i) be presented in a comprehensible and easily accessible form; (ii) use clear and plain language; and (iii) provide information to the data subject on the type of data collected, the identity of the data controller as well as the period, the procedure and the purposes of the processing. Furthermore, data subjects may not be misled as to the possibility of concluding the contract in question even if they refuse to consent to the processing of their personal data. A separate consent is necessary, one for concluding the contract, and one for the processing of personal data.

Finally, the CJEU found that the contracts concluded by Orange and its customers required the customers to declare in writing, by using a specific form, that they refused to consent to the collection and storage of copies of their identity documents. According to the CJEU, requiring customers to express their refusal actively is likely to compromise their freedom to object to the collection and storage of their personal data.

The full judgment of the CJEU is available here. While the use of pre-ticked boxes is still widespread, the CJEU judgment should not come as a surprise. In an earlier judgment involving the collection of cookies from website visitors, the CJEU has already explained that only active (opt-in) consent is valid and that a pre-ticked cookie checkbox is not liable to give rise to valid consent under the GDPR (case, C-673/17, judgment of 1 October 2019, *Planet49*) (*See*, this Newsletter, Volume 2019, No. 10, at p. 11).

European Data Protection Board Adopts New Recommendations to Review International Data Transfers

The *Schrems II* judgment of the Court of Justice of the European Union (***CJEU***) had significant ramifications for organisations that transfer personal data outside the EU. First, the judgment invalidated the EU-US Privacy Shield scheme that was designed to permit transfers between the EU and self-certified organisations in the US. Second, it held that Standard Contractual Clauses (***SCC***) that had been approved by the European Commission still provided sufficient safeguards, but that organisations would nevertheless have to assess on a case-by-case basis whether the SCC should be supplemented by additional measures (*See*, this Newsletter, Volume 2020, No. 7, at p. 8).

The European Data Protection Board (***EDPB***) adopted on 10 November 2020 two recommendations outlining the approach which it expects organisations to take when transferring data out of the EU: (i) Recommendations 01/2020 on measures that supplement transfer tools; and (ii) Recommendations 02/2020 on European Essential Guarantees for surveillance measures. Below we explain the steps that organisations will have to take to assess their international transfers in accordance with these recommendations.

Assisting International Transfers of Personal Data

In Recommendations 01/2020, the EDPB sets out a six-step process for data exporters (controllers or processors, private entities or public bodies processing and transferring personal data out of the EU) to comply with the provisions on international transfers under General Data Protection Regulation 2016/679 (the ***GDPR***). EU data exporters are advised to:

1. Map all transfers of data outside of the EU;
2. Verify the transfer tools relied on for each transfer;
3. Assess whether there is anything in the law or practice of the third country that may impinge upon the effectiveness of the appropriate safeguards. To carry out this assessment, the EDPB refers to its guidance on "European Essential Guarantees" (see below);
4. Identify and adopt supplementary measures;
5. Take formal procedural steps to implement supplementary measures;
6. Regularly re-evaluate the developments of the transfers.

In addition to the compliance steps, the Recommendations include a non-exhaustive list of supplementary measures to guarantee an adequate level of protection for international transfers. For instance, the Recommendations consider the case of a data exporter which relies on a hosting service provider in a third country to store personal data, e.g., for backup purposes. If the personal data are processed using strong encryption before transmission, then the EDPB considers that the encryption performed provides an effective supplementary measure.

Finally, the EDPB stresses the importance of documenting this process and the assessments that are made in light of the accountability principle of Articles 5.2 and 24 of the GDPR.

European Essential Guarantees for Surveillance Measures

As noted, data exporters may have to assess the laws on surveillance measures in the jurisdiction of the data importer to make sure that possible interferences with the rights to privacy and the protection of personal data "do not go beyond what is necessary and proportionate in a democratic society".

Following the analysis of the jurisprudence, including the *Schrems I* and *II* cases, the EDPB considers that the assessment of the limitations to the data protection and privacy rights recognised by the Charter is based on four European Essential Guarantees:

1. Processing should be based on clear, precise and accessible rules;

2. Necessity and proportionality with regard to the legitimate objectives pursued have to be demonstrated;

3. An independent oversight mechanism should exist; and

4. Effective remedies have to be available to the individual.

Recommendations 1/2020 are available here and Recommendations 02/2020 are available here. Recommendations 01/2020 are still open for public consultation and feedback can be submitted until 21 December 2020.

European Commission Publishes Draft Implementing Decisions on Standard Contractual Clauses Governing International Data Transfers and Contracts Between Controllers and Processors

On 12 November 2020, the European Commission (the ***Commission***) released two draft implementing decisions on standard contractual clauses (***SCC***): (i) one for the transfer of data to third countries (the ***Draft Decision on SCC for international transfers***) and (ii) another one for contracts between controllers and processors (the ***Draft Decision on controller-processor SCC***).

Draft Decision on SCC Governing International Transfers

The publication of the Draft Decision on SCC for international transfers follows by just two days that of the European Data Protection Board's Recommendations on how to review international data transfers (*See*, this Newsletter, Data Protection).

Pursuant to Article 46(1) of the General Data Protection Regulation 2016/679 (the ***GDPR***), in the absence of an adequacy decision, a data controller or data processor may transfer personal data to a third country only if it has provided appropriate safeguards, and on the condition that enforceable rights and effective legal remedies for data subjects are available. Such safeguards may be provided for by SCC adopted by the Commission pursuant to Article 46(2)(c) of the GDPR. The role of SCC is limited to ensuring appropriate data protection safeguards for international data transfers and can therefore be part of a broader contract. Additional clauses or safeguards should not directly or indirectly contradict the SCC or prejudice the fundamental rights or freedoms of the data subjects. In the Draft Decision on SCC for international transfers, the Commission encourages data controllers and data processors to provide such additional safeguards via contractual commitments that supplement the SCC.

A modernisation of the SCC was thought essential because of the important developments that have taken place in the digital economy, including the widespread use of new and more complex processing operations. These often involve multiple data importers and exporters, long and complex processing chains, as well as evolving business relationships. An update was of course also necessary in the light of the judgment of the Court of Justice of the European Union's (***CJEU***) in *Schrems II*.

In an annex to the Draft Decision on SCC for international transfers, the Commission sets out the SCC that may be used by a controller or a processor in order to provide appropriate safeguards within the meaning of Article 46(1) of the GDPR for the transfer of data outside of the EU. The SCC combine general clauses with a modular approach to cater for various transfer scenarios and the complexity of modern processing chains. In addition to the general clauses, controllers and processors should select the module applicable to their situation, which makes it possible to tailor their obligations under the SCC to their corresponding role and responsibilities in relation to the data processing at issue. It should be possible for more than two parties to adhere to the SCC. Moreover, additional controllers and processors should be allowed to accede to the SCC as data exporters or importers throughout the life cycle of the contract of which those clauses form part. Also, with a view to ensuring transparency of processing, data subjects should be provided with a copy of the SCC and should be informed of any change of purpose and of the identity of any third party to which the personal data is disclosed. The Commission gives other guidance as to the SCC, *e.g.* on the necessity to provide specific safeguards to address any effects of the law of the third country of destination on the data importer's compliance with the clauses.

The Draft Decision on SCC for international transfers states that, for a period of one year from the date of its entry into force, data exporters and data importers may continue to

rely on SCC provided for by Decisions 2001/497/EC and 2010/87/EU for the performance of a contract concluded between them before that date, provided the contract remains unchanged, with the exception of the supplementary measures necessary in order to ensure that the transfer of personal data is subject to appropriate safeguards within the meaning of Article 46(1) of the GDPR.

The European Commission's Draft Decision on SCC for international transfers and the Annex are available here. The decision was open for public consultation until 10 December 2020.

Draft Decision Governing Controller-Processor SCC

The Draft Decision on controller-processor SCC is completely new. These SCC will have an EU-wide effect and aim to ensure full harmonisation and legal certainty across the EU for contracts between controllers and their processors. According to the Commission, the concepts of controller and processor play a crucial role in the application of General Data Protection Regulation 2016/679 (the ***GDPR***).

The controller and processor should be free to include the SCC at issue in a broader contract, and to add other clauses or additional safeguards provided that they do not directly or indirectly contradict the SCC or prejudice the fundamental rights or freedoms of data subjects. The SCC should provide for both substantive and procedural rules. Moreover, in line with Articles 28(3) and 29/3 of the GDPR, the SCC should require the controller and processor to define the subject matter and duration of the processing, its nature and purpose, the type of personal data concerned, as well as the categories of data subjects and the obligations and rights of the controller.

The European Commission's Draft Decision on controller-processor SCC and the Annex are available here. This decision was also open for public consultation until 10 December 2020.

INTELLECTUAL PROPERTY

European Commission Adopts Action Plan on Intellectual Property

On 25 November 2020, the European Commission (the ***Commission***) published a new Action Plan on Intellectual Property (the ***Action Plan***). The Action Plan identifies five key challenges, namely (i) the fragmentation of the EU's intellectual property (***IP***) system; (ii) the limited use of IP by SMEs; (iii) the insufficient development of tools to facilitate access to IP; (iv) counterfeiting and piracy; and (v) a lack of fair play at the global level.

In response to these challenges, the Commission will take the following steps.

Unitary Patent System - Better IP protection will be achieved by launching the unitary patent system which will create a one-stop shop for patent litigation (in an area covering all EU Member States except Croatia and Spain) and will significantly reduce the cost of patent enforcement. Other action points include an optimisation of the Supplementary Protection Certificates system for extending patent protection afforded to medicines, the modernisation of the EU legislation on industrial designs, a strengthened protection of geographical indications for agricultural products, the possible creation of a system for non-agricultural geographic indications and an evaluation of the plant variety legislation.

SMEs – The Action Plan proposes supporting SMEs by contributions to the financing of IPR registration and strategic IP advice and IP assistance services.

COVID-19 Crisis - Regarding access to IP protected assets during COVID-19 crisis times, the Commission will support the voluntary pooling and licensing of IP associated with COVID-19 therapies and vaccines. It is also looking to incentivise the rapid pooling of critical IP in times of crisis, for instance through a novel licensing system making such IP available in a "controlled manner and on a temporary basis". The Commission furthermore stresses the need for compulsory licences as a means of last resort. It encourages Member States to share information and envisage a fast-track procedure for granting permission to a party seeking use of a patented invention without the consent of the patent owner in cases of emergency.

Standard Essential patents (SEP) - The Commission observes the increasing number of SEPs and the need for stable, efficient and fair rules governing the licensing of SEPs. It refers to the many disputes regarding the fair, reasonable and non-discriminatory character of patent licences in the automotive sector but notes that such disputes may also extend to other sectors, such as health, energy, smart manufacturing, digital and electronics ecosystems. In the short term, the Commission says it will facilitate industry-led initiatives to reduce frictions and litigation. In parallel, it will consider reform if and where needed. As an example, it mentions the creation of an independent system of third-party essentiality checks to increase legal certainty and reduce the cost of litigation.

The Commission's plans in relation to SEPs remain fairly abstract. For example, the Commission does not specify how it intends to "facilitate industry-led initiatives". Patent pools like Avanci in the automotive sector are not discussed. While an independent system of third-party essentiality checks might reduce infringement proceedings, it is unclear what input the system would require from patent holders or other stakeholders, how it would be financed and how it would avoid the trap of making IP in Europe more costly and thereby internationally less competitive. Similarly, the Action Plan does not tackle hot litigation topics, such as the question which party in the value chain should take out a licence covering the SEP and on the basis of what product (an input product that relies on the SEP or the final product) the licence fee must be calculated.

Data sharing - The Commission points out that the scope of the Trade Secrets Directive requires further clarification. In this regard, it launched a study with specific focus on strategic sectors, including the automotive and healthcare sectors.

Databases - Furthermore, the Database Directive will be reviewed to facilitate the sharing of and trading in machine generated data and data resulting from the roll-out of the Internet of Things. The review will also consider the competition law implications of data sharing. The Commission

points to the Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements ("Horizontal Guidelines") which are also under review. That process may result in guidance for data sharing against the backdrop of new forms of joint R&D. Further guidance may address the compulsory access to data under the essential facilities doctrine.

IP enforcement - The Digital Services Act package will harmonise a set of obligations for digital services under a strengthened supervisory framework. Before the end of the year, new rules will clarify and upgrade the responsibilities of online platforms and remove disincentives that stand in the way of voluntary actions to tackle illegal content which they host.

In addition, the Commission wants the fight against counterfeiting and piracy to be given a higher priority. This implies criminal prosecution, the strengthening of the role of the European Anti-Fraud Office ("OLAF") and the creation of an EU toolbox against counterfeiting setting out principles for joint action, cooperation and data sharing among right holders, intermediaries and law enforcement authorities.

As regards fair play at a global level, the Commission regards the EU as a potential global standard setter in IP, even though the EU should protect its IP better. Actions in this context include ambitious IP chapters in Free Trade Agreements, IP dialogues with main trading partners and other priority countries, technical co-operation and the creation of IP SME Helpdesks but also, together with the Member States, the determination and defence of global IP standards in international organisations. In addition, the Commission encourages EU Member States to make full use of their foreign investment screening mechanisms in order to address relevant aspects of security and public order of foreign direct investments that may involve critical IP assets in the EU.

The Action Plan forms part of a range of new IP related documents which the Commission produced. Other significant publications include a Landscape study of potentially essential patents disclosed to ETSI; an Evaluation report on the Observatory on Infringements of Intellectual Property; a Pilot Study for essentiality assessments of Standard Essential Patents; and a Study on trends and developments in Artificial Intelligence.

The Action Plan can be found here.

LABOUR LAW

Belgian Data Protection Authority Allows Employer to Rely on Consent for Obtaining Employee Trade Union Membership Data But Specifies Conditions

See, this Newsletter, Data Protection.

Supreme Court Judgment on Calculation of Severance Pay For Dismissal During Time Credit Creates Legal Uncertainty

On 22 June 2020, the Supreme Court held that the severance pay and protection indemnity of an employee dismissed during time credit to take care of his/her child should be calculated based on the employee's full-time salary applicable prior to the time credit rather than based on the employee's reduced salary applicable at the time of the dismissal.

Legal Background

The question of whether the severance pay of an employee dismissed during time credit (or other career reduction schemes) should be calculated based on the employee's full-time salary applicable prior to the time credit or the reduced salary applicable at the time of dismissal (during the time credit) has formed the subject of controversy and diverging case law. However, the Constitutional Court ruled on 7 November 2019 that it was not unconstitutional to calculate the severance pay on the basis of the reduced salary of the employee in the event of time credit (or a career reduction scheme) to take care of a child, as the employee was free in taking the leave. The more recent Supreme Court judgment of 22 June 2020 is in contradiction with the judgment of the Constitutional Court and has reopened the discussion. As a result, there is fresh uncertainty regarding the calculation of the severance pay (and the protection indemnity) when an employee reduced his or her working hours to take care of a child.

Factual Background

A female employee, hired on a full-time basis in the framework of an open-ended employment contract, applied for and was granted part-time time credit to take care of her child. Her employer decided to dismiss her during her time credit calculated the severance pay based on her reduced salary applicable at the time of her dismissal during her part-time time credit.

Together with the Institute for the Equality of Women and Men, the employee disputed her dismissal and brought an action before the Labour Court of Hainaut, division Charleroi (*Tribunal du travail du Hainaut, Division Charleroi*, the ***Labour Court***). The case then moved to the Labour Court of Appeal of Mons (*Cour du travail de Mons*, the ***Labour Court of Appeal***).

The employee claimed a protection indemnity and severance pay, both calculated on the basis of her full-time salary. By contrast, according to the employee, a calculation of her compensation on the basis of a reduced salary would result in a form of indirect discrimination as time credit is mostly used by women.

Judgment Labour Court of Appeal

In its judgment of 23 November 2018 (which can be found here), the Labour Court of Appeal found that the employee was dismissed because of her time credit and that, as a result, she was entitled to a lump sum protection indemnity amounting to six months' salary. However, the Labour Court of Appeal decided that both the employee's protection indemnity and the severance pay had to be calculated based on her reduced salary at the time of the dismissal. According to the Labour Court of Appeal, such an approach does not result in a form of indirect discrimination based on gender, given that the regulatory framework for time credit applies equally to women and men and that the decision to apply for time credit is a personal and voluntary choice of the employee.

The employee and the Institute for the Equality of Women and Men challenged this line of reasoning and appealed to the Supreme Court.

Judgment Supreme Court

In its analysis, the Supreme Court observed that, in accordance with European law, each Member State must ensure the application of the principle of equal pay for male and female employees for equal work or work of equal value. It referred to several judgments of the Court of Justice of the European Union (the ***CJEU***) confirming that both the severance pay and the protection indemnity should be considered as salary.

Based on the CJEU's judgements, the Supreme Court held that the calculation of the severance pay and protection indemnity on the basis of the employee's reduced salary because of time credit would not be compatible with the general principle of equality of men and women, if it were to become apparent that considerably more women than men choose to reduce their working time and salary to take care of their child. The Supreme Court added that this difference in treatment between female and male employees is unlikely to be justified by objective factors unrelated to any discrimination on the grounds of gender.

Consequently, it overruled the Labour Court of Appeal's judgment and referred the case to the Labour Court of Appeal of Liège for a new review.

Implications for Employers

It is important to bear in mind that an employee who benefits from time credit is protected against dismissal and can be dismissed only for reasons unrelated to the time credit. The employer must prove such reasons on pain of the payment of a protection indemnity amounting to six months' salary or the actual damage suffered if the employee is able to prove such injury.

Following the recent judgment of the Supreme Court and the contradictory earlier judgment given by the Constitutional Court, it is uncertain how the severance pay and the protection indemnity should be calculated if an employee reduced his/her working hours to take care of a child. Both judgments have the same legal value. However, there is a possibility that the labour courts will follow the most recent judgment handed down by the Supreme Court. If that is true, the severance entitlements of employees benefitting from time credit in order to take care of a child will have to be calculated on the basis of the employees' full-time salary that applied prior to the time credit.

LITIGATION

Adoption of Collective Redress Directive For Consumers

See, this Newsletter, Consumer Law.

Council of Europe Publishes Report on Efficiency and Quality of Justice in Europe

On 22 October 2020, the Council of Europe's European Commission for the Efficiency of Justice (the ***CEPEJ***) published a report analysing the efficiency and quality of judicial systems in Europe (the ***Report***). The Report covers 45 countries that are members of the Council of Europe and three observer states (*i.e.*, Israel, Kazakhstan and Morocco). It addresses the broad trends of judicial systems in Europe as well as the trends per country on the basis of several aspects, such as budget, justice professionals and courts, court users, use of information and communication technology (***ICT***) and performance of legal systems.

The Report shows that European countries spend on average € 72 per year per inhabitant for their judicial system (amounting to € 83,7 in Belgium) and dedicate 65% of their budget to courts, 24% to prosecution authorities and 11% to legal aid. The Report also indicates that the number of professional judges and the number of lawyers varies significantly between countries, with an average of 21 judges per 100,000 inhabitants and of 164 lawyers per 100,000 inhabitants. In Belgium, the average number of professional judges per 100,000 inhabitants amounts to 13,3 while the average number of lawyers per 100,000 inhabitants amounts to 163,2.

In addition, the Report shows that the average length of civil and commercial proceedings in Europe amounts to 201 days in first instance, 141 days on appeal and 207 days at the highest courts (i.e., supreme courts). Although the Report does not provide data on the length of proceedings in Belgium in first instance and on appeal, it shows that the estimated length of civil and commercial proceedings before the Belgian Supreme Court amounts to approximately 472 days. Interestingly, the Report also shows that in 2018, Belgium recorded the highest number of incoming first instance civil and commercial cases per 100 inhabitants (with 6,7 incoming cases per 100 inhabitants in Belgium as opposed to 2,4 cases per 100 inhabitants on average).

The Report of the CEPEJ is available here and the country profiles can be found here.

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