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COMMERCIAL LAW

Default Commercial Interest Rate and Statutory Interest Rate Remain Unchanged

On 29 January 2019, the default interest rate for commercial transactions applicable during the first semester of 2019 was published in the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*). It remains unchanged from that applied in 2018 (*See, this Newsletter, Volume 2018, No. 1, p. 3; and No. 7, p. 3*) and will amount to 8%. Pursuant to the Law of 2 August 2002 on combating late payment in commercial transactions (*Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties/Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales*), the default commercial interest rate applies to compensatory payments in commercial transactions (*handelstransacties/transactions commerciales*), *i.e.*, transactions between companies or between companies and public authorities.

By contrast, relations between private parties and companies or between private parties only are subject to the statutory interest rate. The statutory interest rate for 2019, as published in the Belgian Official Journal on 14 January 2019, amounts to 2% and will thus also remain unchanged from 2018 (*See, this Newsletter, Volume 2018, No. 1, p. 3*).

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COMPETITION LAW

Belgian Competition Authority Closes Investigation into International Horse-Jumping Governance Body

On 20 December 2018, the Belgian Competition Authority (the "BCA") decided to close its investigation into allegedly anticompetitive practices by the *Fédération équestre internationale* ("FEI"), the body governing horse-jumping competitions.

Background

The BCA decision is the latest development in a long-running legal saga in the equestrian sector.

Following a complaint by Global Champions League ("GCL") alleging that the exclusivity clause contained in the General Regulations of the FEI was anticompetitive, the BCA imposed on 27 July 2015 interim measures temporarily suspending the exclusivity clause at issue (*See, this Newsletter, Volume 2015, No. 7, p. 4*). This decision was upheld by the Brussels Court of Appeal on 28 April 2016 (*See, this Newsletter, Volume 2016, No. 5, p. 4*).

In January 2017, GCL, Global Champions Tour ("GCT") and FEI announced that they had reached a settlement, materialised in a memorandum of understanding ("MoU"), pursuant to which FEI approved the GCL events, the parties also agreed on rules governing participation at GCL and GCT events and GCL withdrew its complaint to the BCA.

On 13 November 2017, a Dutch horse rider based in Belgium and a horse stable established in Belgium lodged a new complaint with the BCA on the ground that the MoU was anticompetitive.

As a result, the BCA imposed interim measures on GCL, GCT and FEI on 20 December 2017 (*See, this Newsletter, Volume 2017, No. 12, p. 5*) which were coupled with penalty payments on 13 April 2018 (*See, this Newsletter, Volume 2018, No. 4, p. 5*). However, on 27 June 2018, the Brussels Court of Appeal annulled the decision of the BCA of 20 December 2017 due to inappropriate reasoning and then held on 7 August 2018 that the members of the Competition College who had adopted the annulled decision could not reassess the case (*See, this Newsletter, Volume 2018, No. 8, p. 3*). After the BCA reassessed the case with a differently composed Competition College, it decided to reject the requests for interim measures because of insufficient evidence (*See, this Newsletter, Volume 2018, No. 10, p. 4*).

Preliminary Assessment

The BCA found in a preliminary assessment thatthree practices potentially infringed competition law on the market for the organisation and commercial exploitation of international, five-star horse-jumping competitions.

First, the BCA took issue with the lack of transparency characterising the FEI's approval procedure. The FEI required its bureau to approve all competitions before the latter could be scheduled in the official FEI calendar. However, FEI's General Regulations did not contain any procedural rules or deadlines applicable to the decision-making process. Consequently, FEI's bureau enjoyed broad discretion in approving or rejecting an application, which in turn allowed it to control or prevent new organisers from entering the market.

Second, the BCA found that the penalties imposed on athletes, horses and officials who participated in competitions not approved by FEI's bureau - the so-called unsanctioned events - could likewise restrict competition. FEI'sGeneral Regulations allowed it to impose penalties of six months (renewable) on any athlete, horse or official who had taken part in such an unsanctioned event. This rule had been introduced in 2012 and had, since then, been applied mechanically and without regard for special circumstances. According to the BCA, this inherently prevented participation by athletes, horses and officials in unsanctioned events, leading to the *de facto* exclusion of independent competition organisers.

Third, the BCA objected to the possibility for existing competition organisers to prevent new entrants from accessing the market through FEI's General Regulations rules

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regarding overlapping dates. These rules provided that in the case of (late) applications by aspiring competition organisers, existing organisers of competitions of the same level and which could be affected by the new competitions could raise objections to the application and request that the dates of the new event be modified. The BCA noted that existing organisers would object to new competitors whose events partially or completely overlapped with their own competitions in an effort to protect their economic interests. Such a possibility allowed for the exclusion of new organisers. In addition, the FEI was in a position to distort competition and to engage in market and athlete allocation.

Commitments

Following the above preliminary assessment, the FEI decided to submit commitments to the BCA.

First, the FEI promised to enhance the transparency of its approval procedure. In a document entitled "*FEI Policy for approval of series*", the governing body clarifies all steps which an applicant has to follow in order to obtain approval.

Second, the FEI modified its General Regulations relating to penalties applicable to athletes, horses and officials who participated in unsanctioned events. The imposition of such penalties is now subject to procedural safeguards. In addition, penalties will be replaced by a so-called "no-fault finding" whenever the athlete, horse or official has participated in a competition which should have been approved by the FEI (but was not, due to administrative errors) or in exceptional circumstances. The FEI may now also replace the penalty with a warning.

Third, the FEI committed to modify the General Regulations to the extent that these allowed competition organisers to object to applications by potential competitors. Instead, existing organisers will only be able to provide the FEI with information that could allow the FEI to reject a late application for enrolment on the official calendar. Further, such a rejection will have to be reasoned.

The BCA decided that these commitments adequately address its concerns. Consequently, the BCA closed its investigation without taking position on whether the General Regulations infringed competition law.

Belgian Competition Authority Imposes Interim Measures on Television Broadcasting Network Operator

On 22 January 2019, the Belgian Competition Authority (the "BCA") imposed interim measures on Norkring Belgium NV ("Norkring") to safeguard the continuity of the public broadcasting services provided by VRT, the Flemish public media channel.

This decision follows a complaint lodged by VRT. Currently, VRT broadcasts its programmes over a network of transmission towers on the basis of a contract which is set to terminate on 5 March 2019. VRT awarded the broadcasting of its programmes relying on a network of transmission towers, including four transmission towers of Norkring, to BV Broadcast Technology & Development ("Broadcast Partners") following a public tender process. However, Norkring did not reach an agreement with Broadcast Partners for the use of its transmission towers.

Consequently, VRT lodged a complaint in which it held Norkring responsible for not having reached an agreement with Broadcast Partners in order to preserve the continuity of the broadcasting of its programmes.

In the meantime, Broadcast Partners had filed for an injunction with the Enterprise Court of Antwerp in order to reach an agreement with Norkring allowing it to use its transmission towers.

The Competition College of the BCA decided that VRT had not demonstrated that the conditions to impose interim measures were met. Still, the Competition College went on to observe that the general economic interest resulting from the continuity of the public service provided by VRT would be sufficient to conclude a *prima facie* violation of competition law if the public service was not secured after 5 March 2019.

The resulting interim measures imposed by the BCA seek to ensure a continuation of the current service over the transmission towers of Norkring after 5 March 2019 in line with the conditions put forward in the unsuccessful bid which Norkring had submitted in response to the public tender organised by VRT. The interim measures apply until an agreement between Norkring and Broadcast Partners is reached or until the Enterprise Court of Antwerp will have given judgment on the injunctive relief.

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Belgian Competition Authority Fines Infrared Cabins Distributor on Account of Resale Price Maintenance

On 24 January 2019, the Investigation and Prosecution Service (*Auditoraat / Auditorat*) of the Belgian Competition Authority (the "BCA") imposed a fine of EUR 98,000 on HM Products Benelux ("HM") on account of resale price maintenance ("RPM") in a settlement decision.

HM imports and distributes infrared cabins of the Health-Mate® brand in the Benelux territory. The BCA found that HM had determined the maximum level of discounts which its distributors were allowed to grant to their own customers. Only distributors complying with this cap were allowed to enter HM's distribution network. HM also monitored the prices charged by its distributors and threatened to sanction (and possibly actually sanctioned) distributors who departed from the imposed cap.

The BCA qualified these RPM practices as a "hardcore restriction" of competition and, consequently, indicated that there was no need to demonstrate the anticompetitive effects of such practices on the market. In addition, the BCA found that the infringement had lasted for 8 years and 6 months.

However, for several reasons, the BCA only imposed a modest fine. First, the BCA decreased the initial (undisclosed) amount of the fine as it exceeded the statutory maximum of 10% of HM's turnover in the preceding year (Article IV.74 of the Code of Economic Law). Second, the BCA further reduced the fine by an undisclosed percentage on account of proportionality. In this respect, the BCA noted that HM is "a small independent market player which does not belong to a large international group". Third, the resulting amount of the fine was again reduced by 10%, as HM agreed to settle the case.

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CORPORATE LAW

Flanders Introduces Safeguard Mechanism to Control Foreign Investments

On 1 January 2019, the Flemish Decree of 7 December 2018 concerning good governance (*Bestuursdecreet*) entered into force (the "Decree"). The Decree introduced a safeguard mechanism to control foreign investments into specific Flemish public authorities and institutions in order to protect public security (the "Safeguard Mechanism").

The Safeguard Mechanism is introduced amid growing concern regarding foreign investments in strategic infrastructure and technology in Europe. In November 2018, the European Parliament, the European Council and the European Commission reached a political agreement on a European framework for foreign direct investment screening, which seeks to introduce rules governing national screening mechanisms and enhanced cooperation between the Member States (*See, this Newsletter, Volume 2018, No. 11, p. 8*). More recently, in its resolution of 14 February 2019, the European Parliament adopted the Commission's proposal at first reading.

Pursuant to the Safeguard Mechanism, any legal act by an institution pursuant to which a foreign private individual or foreign legal entity would gain control of or the decision-making power over such institution, is liable to be annulled or declared inapplicable by the Flemish Government. This will be the case if such an act is capable of endangering the strategic interests of the Flemish Region (*Vlaams Gewest*) or the Flemish Community (*Vlaamse Gemeenschap*), by compromising their strategic independence or the continuity of vital processes or by losing specific strategic or sensitive knowledge to foreign interests.

The scope of the Safeguard Mechanism includes Flemish public authorities (such as the Flemish Government or the Flemish administration) and other local authorities (such as the municipalities (*gemeenten / communes*) or provinces (*provincies / provinces*)). The Decree also contains a *catch-all* clause, pursuant to which other institutions may fall under the scope of the Safeguard Mechanism if they satisfy the following criteria: (i) they have been founded for the specific purpose of fulfilling goals in the general interest; (ii) they have legal personality; and (iii) they are funded for more than half or controlled (through the majority of the votes in the board of directors or otherwise through the control on their governance) by institutions falling within the scope of the Safeguard Mechanism.

The Decree specifies that the Flemish government is only entitled to use the Safeguard Mechanism if it has first tried to protect the strategic interests through the consent of the relevant institution.

DATA PROTECTION

Installing Facebook "Like" Button Makes Website Joint Controller, Says Advocate General

On 19 December 2018, Advocate General Bobek ("AG Bobek" or the "AG") delivered hisopinion in case C-40/17, *Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV*. The AG argued that the operator of a website integrating a third party plugin such as the Facebook "Like" button, which causes the collection and transmission of the users' personal data, is jointly responsible for that stage of the data processing.

Fashion ID, a German online retailer, integrated the Facebook "Like" button into its website. As a result of the functionality of the Facebook "Like" button, information about a user's IP address and browser string is transferred to Facebook Ireland. This occurred automatically when Fashion ID's website was loaded, regardless of whether the user has a Facebook account or whether he or she clicked on the "Like" button. Verbraucherzentrale NRW, a German consumer protection association, filed for a cease-and-desist injunction against Fashion ID on the ground that the use of the Facebook "Like" button results in a breach of data protection legislation.

At issue is the interpretation of several provisions of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the "GDPR"). The Düsseldorf Higher Regional Court asked the Court of Justice of the European Union ("ECJ") whether an online retailer who integrates the Facebook "Like" button into its website is a data controller of the relevant data processing.

Pursuant to Article 26(1) of the GDPR, several parties involved in data processing are to be considered as "joint controllers for data processing" when jointly determining the purposes and means of data processing. In order for joint controllers to be responsible, each party involved must have actual influence. On 5 June 2018, the ECJ already held that there was joint controllership between Facebook Ireland and the operator of a so-called "Facebook Fanpage" (*See this Newsletter, Volume 2018, No. 6. p. 9*).

According to AG Bobek, the threshold for assumption of joint controllership is very low. Therefore, the AG suggests in his opinion that the ECJ should rule that the operator of a website such as Fashion ID who has integrated into its website a third-party plugin, such as the Facebook "Like" button, which causes the collection and transmission of the users' personal data, is a joint controller, along with the third party. Accordingly, the mere integration of the plugin is considered to be a form of co-decision-making for data processing purposes. Nevertheless, the joint responsibility should be limited to those operations for which these parties effectively co-decide on the means and purposes of the processing of the personal data. That implies that a joint controller is responsible for that operation or set of operations for which it shares or co-determines the purposes and means as far as a given processing operation is concerned.

The ECJ will now have to decide whether Fashion ID and Facebook co-decided on the means and purposes of the data processing at the stage of the collection and transmission of the personal data, and whether Fashion ID acted as a controller and whether its liability is, to that extent, joint with that of Facebook Ireland.

Japan Adequacy Decision Facilitates Transfer of Personal Data

On 23 January 2019 the European Commission issued its adequacy decision establishing that Japan provides a comparable level of protection of personal data to that existing in the European Union. It follows that personal data will flow unhindered from the European Economic Area (EEA) (the 28 Member States as well as Norway, Liechtenstein and Iceland) to Japan without being subject to specific authorisation measures.

Pursuant to Article 44 of the General Data Protection Regulation (EU Regulation 2016/679, the "GDPR"), personal data cannot be transferred to be processed by a controller or processor established outside of the EU, unless the third country has been recognised by the European Commis-

sion as providing an "adequate level of protection" (Article 45 of the GDPR).

In the absence of such an adequacy decision, the data exporter (in the EU/EEA) and importer (outside the EU/EEA) must establish other safeguards, such as concluding contracts containing standard contractual clauses ("SCC") approved by the European Commission, or implementing Binding Corporate Rules ("BCR") that must be approved by national supervisory authorities. In specific situations, international transfers can also be permitted under derogations contained in Article 49 of the GDPR (for instance, if personal data are transferred for the defence of a legal claim).

The EU has adopted similar adequacy decisions for other countries (Andorra, Argentina, Canada, Faeröer Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Uruguay and US companies certified under the EU US Privacy Shield). Still, the EU-Japan adequacy decision is novel in two ways: it is the first of such decisions to be adopted under the GDPR and it marks the first time that the EU and a third country agreed on mutual recognition of the adequate level of data protection.

In the process leading to the adoption of the adequacy decision, the European Commission had to satisfy itself that the Japanese system is 'essentially' equivalent as regards both the protection guarantees and the relevant oversight and redress mechanisms available. Accordingly, it is not necessary that Japan's data protection system is identical to that available to EU data subjects. During the assessment period, the EU highlighted some shortcomings of the Japanese system (*See, this Newsletter, Volume 2018, No 7, p. 9*). In order to bridge the difference in the level of protection and remedy the shortcomings, Japan committed to modify its domestic legislation and introduce a series of additional safeguards so as to mirror the protection offered under EU law.

The 'Supplementary Rules', which are legally binding and enforceable by the Personal Information Protection Commission (PPC) provide for:

- an expansion of the definition of sensitive data;
- a higher level of protection for the 'onward transfers' of Europeans' data from Japan to another third country;
- the establishment of a complaint handling mechanism tasked with investigating and resolving European complaints under the supervision of the PPC.

In addition, Japanese authorities clarified that there will be safeguards concerning the access of Japanese public authorities for criminal law enforcement and national security purposes. Personal data will only be limited to what is necessary and proportionate and subject to independent oversight and effective redress mechanisms.

The adequacy decision is indefinite, but it provides for a monitoring mechanism that will enable the European Commission to carry out periodic reviews of the level of protection guaranteed. The first review is foreseen in two years' time. However, the Commission may partially or completely suspend the adequacy decision at any time if an event were to cast doubt on the level of protection provided by the Japanese rules.

As of 23 January 2019, the date of entry into force of the adequacy decision, both Japanese and European companies can rely on it to transfer freely personal data without having to adopt additional measures such as BCR or SCC. The adequacy decision will complement and enhance the benefits of the Economic Partnership Agreement between the EU and Japan which became effective on 1 February 2019.

Scope of De-Referencing: Advocate General Issues Two Opinions on Obligation of Search Engine Operators

On 10 January 2019, Advocate General Szpunar (the 'AG') issued his opinions in cases C-507/17 and C-136/17 on the scope of the right to be forgotten with respect to the obligations of search engine operators.

At the outset, it should be pointed out that both cases do not concern the interpretation of the General Data Protection Regulation 2016/679 (GDPR) but rather Data Protection Directive 95/46, which was repealed on 25 May 2018.

Google v. CNIL: European Territorial Scope of Right to Be Forgotten

On 10 January 2019, the AG issued his opinion in Case C-507/17, *Google v. CNIL*, on the territorial scope of the 'right to be forgotten'.

The dispute in question stemmed from a disagreement between Google and the French Commission for Information Technology and Civil Liberties ("CNIL"). Google had been served a formal notice by CNIL requesting the worldwide removal of links to webpages generated by searching a person's name.

Google refused to comply fully and only did so for the domain names corresponding to the versions of its search engine in the Member States of the EU, while also proposing to 'geoblock' access from IP addresses deemed to be located in the state of residence of the person concerned. CNIL regarded this proposal as insufficient and imposed a fine of EUR 100,000.

Google sought to have the CNIL decision annulled before the "Conseil d'Etat" which decided to seek clarification from the Court of Justice of the European Union ("ECJ") on several questions.

In its first question, the "Conseil d'État" asked whether the geographical scope of the right to de-referencing under EU law is 'national, European or worldwide.' In other words, does the operator of a search engine, when granting a request for de-referencing, have to perform this de-referencing on all the domain names of its engine so that the disputed links no longer appear irrespective of the place from which the name search was launched?

The AG first clarifies that *Google Spain and Google* (Case C 131/12) does not expressly govern the issue of the territorial scope of de-referencing. However, pursuant to Article 52 of the Treaty on European Union, the Treaties apply to the territory of the 28 Member States. Outside this territory, Union law cannot apply and create rights and obligations, without running the risk of violating international law.

The AG acknowledges that even if extraterritorial effects are possible in specific cases affecting the internal market, such as competition and trade mark law, such effects should not be afforded to the territorial scope of the right to be forgotten, since the internet is by its very nature accessible worldwide. Even if he admits that a global right of de-referencing appeals for its "clarity, simplicity and efficiency," he does not favour giving the provisions of EU law such a broad interpretation.

He explains further that the fundamental 'right to be forgotten' is not absolute, but must be balanced against other fundamental rights, such as the right to data protection and the right to privacy, as well as the legitimate public interest in accessing the information sought. Furthermore, if de-referencing had worldwide territorial scope, the EU authorities would not be in a position to define and determine a right to receive information. There would also be a risk that third countries would be prevented from accessing information, and vice versa.

The AG ultimately concludes that the Court should hold that the search engine operator is not required, when acceding to a request for de-referencing, to carry out that de-referencing irrespective of the location from which the search on the basis of the requesting party's name is performed. Therefore, it is not required to carry out the de-referencing on all the domain names of its search engine in such a way that the links in question no longer appear for searches outside the EU.

Although not justified by the facts of the case at hand, the AG underlines that he does not rule out entirely the possibility, under different circumstances, that a search engine operator may be required to take de-referencing actions at the global level.

Furthermore, once a right to de-referencing within the EU has been established, the search engine operator is under the obligation to take every measure available to ensure full and effective de-referencing within the EU. To achieve this, the search engine operator is free to make use of the 'geo-blocking' technique with respect to an IP address deemed to be located in one of the Member States, irrespective of the domain name used by the internet user who performs the search.

GC & Others v. CNIL: De-referencing of Sensitive Personal Data

Also on 10 January 2019, the AG issued his second opinion concerning the de-referencing obligation of sensitive personal data on search engine operators.

Four different individuals sought the de-referencing of various links which contained a satirical photomontage of a female politician posted under a pseudonym, an article referring to one of the individuals concerned as the public

relations officer of the Church of Scientology, the investigation of a male politician and the conviction of another individual for sexual assaults against minors. All four of these de-referencing requests had been turned down by both CNIL and Google.

When the refusal decisions were challenged, the "Conseil d'Etat" again considered that a number of serious difficulties of interpretation of Directive 95/46 were at stake and referred several questions for a preliminary ruling to the ECJ.

The two main questions sought to learn whether, having regard to the responsibilities, powers and specific capabilities of the operator of a search engine, the prohibition imposed on other data controllers on processing sensitive data also applied to such an operator. The questions also probed for the extent to which a journalistic exemption could apply if the links concerned contained journalistic material.

The AG is of the opinion that Directive 95/46 should be interpreted to take account of the responsibilities, powers and capabilities of a search engine. The AG first clarifies that the task of an operator of a search engine is, as its title indicates, to search, find, pick up and make available, using an algorithm that can find the information in the most efficient way. In this sense, the prohibitions in Directive 95/46 cannot apply to the operator of a search engine as if it has itself placed sensitive data on the internet. Logically, the activity of a search engine only intervenes after the posting of (sensitive) data and has a secondary character. As a consequence, the prohibitions can only apply to a search engine by reason of that referencing, and through subsequent verification, when a de-referencing request is made, since *ex ante* and *ex officio* control is neither possible nor desirable.

The AG continues that once a search engine operator establishes that a processing of sensitive data takes place, it is appropriate to grant a request for de-referencing, subject to the exceptions provided for by Directive 95/46, even if some of the exceptions appear to be more theoretical than practical as regards their application to a search engine.

Regarding the question of the derogations authorised under freedom of expression, the operator of a search engine should conduct a balancing exercise between the right to respect for a private life/the right to protection of data and the right of the public to access information and the right to freedom of expression.

The same balancing exercise must be carried out with respect to de-referencing requests for personal data which is deemed to have become incomplete, inaccurate or obsolete.

French Data Protection Authority Fines Google for Breach of General Data Protection Regulation

On 21 January 2019, the French Data Protection Authority (*Commission Nationale Informatique et Liberté* – "CNIL") imposed a fine of EUR 50 million on Google for infringing the General Data Protection Regulation 2016/679 (the "GDPR"). As the operator of the Android system, Google was found to have breached various requirements of the GDPR, including providing insufficient information to users and failing to obtain valid consent for the personal advertisements targeting users. CNIL asserted its territorial jurisdiction over Google, arguing that Google could not benefit from the one-stop-shop principle under the GDPR. Given its possible value as a precedent for the enforcement of data protection rules across Europe, the CNIL decision also has its place in a newsletter covering Belgian legal developments.

The CNIL decision follows complaints that had been filed by consumer rights organisations None of Your Business ("NOYB") and La Quadrature du Net ("LQDN") on 25 and 28 May 2018, just after the GDPR had become applicable throughout the EU.

No One-Stop-Shop for Google

Under the GDPR, enforcement of data protection law is left to the national supervisory authorities of the Member States. To avoid multinational organisations established in various EU Member States having to answer to various national supervisory authorities, Article 56 of the GDPR creates a "one-stop-shop", pursuant to which the supervisory authority of the main establishment acts as "lead supervisory authority" for cross-border processing.

Google has various establishments in Europe, including a French affiliate, Google France SARL. However, Goog-

le's European headquarters are located in Ireland, where Google Ireland Limited is established. Google Ireland Limited is the contracting party for all European sales contracts and boasts a much larger workforce than its French affiliate. Google therefore argued that CNIL should transfer the case to the Irish Data Protection Commissioner which would act as the lead supervisory authority.

However, CNIL rejected Google's arguments and held that the European seat of an organisation does not necessarily equate to the "main establishment" which defines the lead supervisory authority under Article 56 of the GDPR. CNIL considered that the Irish establishment did not have real decisional powers and therefore could not be regarded as the main establishment for the matter at hand. Moreover, it noted that Google Ireland Limited had not appointed and registered a data protection officer with the Irish Data Protection Commissioner. In addition, Google had admitted during the proceedings that it was still in the process of transferring responsibility from its global headquarters to the Irish affiliate. On this basis, CNIL concluded that Google could not assert a "main establishment" for the processing activities at hand, and that, as a result, CNIL was competent to handle the complaints that it had received.

Insufficient Transparency on Use of Personal Data

First, complaints by NOYB and LQDN argued that Google had failed to provide the required information to users about the processing of their personal data.

Google had adopted various initiatives in this regard, including a "dashboard" for users and a "privacy check-up" tool. However, CNIL considered that these measures are insufficient.

In particular, CNIL found that the overall architecture did not allow for the providing of information as required under Articles 12 to 14 of the GDPR. It held that users would have to navigate various notices and click different hyperlinks before finding essential information. For instance, CNIL noted that information about the personalisation of advertisements and information on geolocalisation requires at least five steps before it can be retrieved. Similarly, information on retention periods was found to be hiding behind a title which did not clearly label its content. Accordingly, CNIL concluded that the information was not provided in a transparent and easily accessible manner, as required by the GDPR.

CNIL thereby considered that Google's processing activities are particularly "massive and intrusive", and are taken from a large number of sources, including mobile phone use, Gmail, YouTube, as well as other information society services and third-party websites using Google Analytics cookies. This information is deemed to provide very precise information about the most intimate aspects of a person's private life, including their habits, taste, contacts, opinions as well as their movements. This led to the conclusion of CNIL that the information provided regarding the purposes for which the data would be used, was often too general and insufficiently clear.

No Valid Consent for Personal Advertisements Targeting Users

Under the GDPR, any processing of personal data must be based on a "lawful basis" set out in Article 6 of the GDPR (or Article 9 for categories of sensitive data). CNIL held that Google's notices to users were not clear as to whether the processing for the purpose of personal advertisements targeting users would be based on consent (Article 6.1 (a) of the GDPR) or Google's legitimate interests (Article 6.1 (f) of the GDPR). During the proceedings, Google clarified that its use of personal data for personal advertising was based solely on the user's consent.

In its decision, CNIL refers to the Article 29 Working Party's "Guidelines on consent under Regulation 2016/679" (WP259), which explain that "*for consent to be informed it is necessary to inform the data subjects of certain elements that are crucial to make a choice. [...] [A]t least the following information is required for obtaining valid consent:*

1. *the controller's identity,*
2. *the purpose of each of the processing operations for which consent is sought,*
3. *what (type of) data will be collected and used,*
4. *the existence of the right to withdraw consent,*
5. *information about the use of the data for automated decision-making in accordance with Article 22 (2)(c) where relevant, and*
6. *on the possible risks of data transfers due to absence of an adequacy decision and of appropriate safeguards [...].*"

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As a result, CNIL held that the above shortcomings in terms of transparency also affect the validity of the consent that is obtained. It considered that users cannot have a clear idea about the nature and volume of the data that are collected about them.

CNIL furthermore held that the manner in which consent was collected failed to satisfy the requirements of specific and unambiguous consent. It noted that when a user creates an account, it is requested to accept the privacy settings. To see these settings, the user must click through to see "more options", where it will find that the various options, including personalised advertisements, are preticked. Users who do not click through to "more options" and just accept the settings, will obtain a pop-up window alerting them that their account will be set to accept personalisation. CNIL does not consider this to suffice for obtaining valid consent. It explains that, in order to be valid, consent must be obtained by means of an active step of the data subject, and that consent must be specific for each purpose. CNIL thus concluded that the consent for use of personal data for personalised advertisements, which was by default automatic and hidden behind a hyperlink, was unlawful.

CNIL Imposes First Significant Fine under GDPR

As noted, CNIL held that the facts at hand and the severity of the infringement justified a fine of EUR 50 million.

The facts relate to various data, including browsing information, use of mobile applications, geolocalisation of the device as well as purchases which give insight into the life, opinions and social interactions of the users. This information is obtained from various sources and combined to offer – according to CNIL – virtually limitless possibilities for the company.

The infringement was considered to be particularly severe since it concerned essential elements of the GDPR, such as the lawful basis and transparency requirements. CNIL also pointed out that Google drew considerable benefits from processing personal data for personal advertisements and should have paid particular attention to its compliance with the GDPR.

Google announced that it would appeal the decision.

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INTELLECTUAL PROPERTY

European Union Intellectual Property Office Protects Trade Mark of Beats Electronics Against Later Similar Trade Mark of Competitor

On 19 December 2018, the Fourth Board of Appeal (the "Board") of the European Union Intellectual Property Office (the "EIUPO") found in favour of Beats Electronics and annulled a decision of the EUIPO's Opposition Division of 29 March 2018.

The dispute arose after Disashop S.L. had sought to register a figurative trade mark on 26 March 2015 as a European Union trade mark for goods and services of Nice classes 9, 35 and 38, mostly consisting of apparatus for recording, transmission or reproduction of sound, telecommunication services and rental of telecommunication apparatus. The trade mark displays as follows:

On 29 October 2015, Beats Electronics LLC ("Beats Electronics") filed an opposition against all the goods and services applied for on the basis of five earlier trade marks, including the following figurative trade marks, registered for similar kinds of goods and services:

In its decision of 29 March 2018, the EUIPO's Opposition Division rejected the opposition of Beats Electronics in its entirety concluding that, visually, the signs differed in their overall layout, proportions, shapes and colours. It added that, aurally, the contested signs would be pronounced as the letters "d" and "b" respectively so that they were not similar. Finally, the decision noted that the signs were not similar from a conceptual point of view and that the signs taken as a whole created sufficiently different impressions. On this basis, the Opposition Division concluded that there was no likelihood of confusion between these signs and rejected the opposition. On 29 May 2018, Beats Electronics appealed this decision.

In its decision of 19 December 2018, the Board annulled the Opposition Division's decision. It found that there was a likelihood of confusion between the signs under Article 8(1)(b) of Regulation 2017/1001 of 14 June 2017 on the European Union trade mark (the "Regulation").

In its analysis, the Board first identified the relevant public from the perspective of which to assess the likelihood of confusion as both the general public (for items of little monetary value that did not require technical knowledge) and business customers (for items of greater value aiming to meet a particular technological need). Subsequently, the Board compared the signs at issue, focusing on potential visual, aural and conceptual similarities. The Board also clarified that the global appreciation of similarity had to be carried out on the basis of the overall impression created by both signs.

In that respect, the Board found that the overall impression left by the signs was that they mirrored each other. The signs have identical structure and composition as well as a highly similar graphic representation and stylisation. The differences between the signs (*i.e,* mainly that the vertical line is in one case placed on the left-hand side and flows into the outer circle and is in the other case placed on the right-hand side and does not flow into the outer circle) were, in the Board's opinion, minor and insufficient to counterbalance the high visual similarity between the two signs. The Board added that an assessment of the aural perception of the signs was not possible as these were purely figurative signs not subject to a phonetic assessment. Conceptually, the Board found that neither of those signs had any specific meaning and that, therefore, the conceptual comparison remained neutral.

Finally, the Board assessed, on the basis of the above elements, whether there was a likelihood of confusion between the signs. In that respect, it highlighted that (i) the visual similarity of the signs was established; (ii) that there was no phonetic comparison possible and that the signs did not have any conceptual meaning that could have helped distinguishing them; and (iii) that the goods and services covered by both trade marks were identical or similar at least to some degree.

The Board also took into consideration the notion of imperfect recollection, i.e., the fact that the average consumer usually places his/her trust in the imperfect picture of the trade marks that he/she has kept in his/her mind for the purposes of comparing these trade marks. On this basis, it concluded that, even taking into account an enhanced degree of attention, there was for the goods and services at issue a likelihood of confusion on the part of the relevant public within the meaning of Article 8(1)(b) of the Regulation.

Consequently, the Board declared the appeal successful and annulled the Opposition Division's decision for the part that had been appealed.

European Union Intellectual Property Office Allows Registration of Bacardi Bottle as Trade Mark

On 21 December 2018, the Fourth Board of Appeal (the "Board") of the European Union Intellectual Property Office (the "EUIPO") allowed the registration of the Bacardi bottle as a figurative European Union trade mark.

In first instance, the examiner had refused the trade mark application on the grounds that the mark was devoid of any distinctive character. The reasoning was that consumers are not used to presume the origin of goods based on the form of their container.

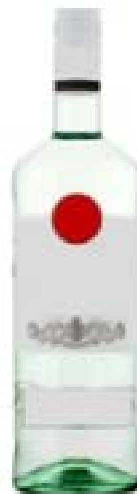
The Board annulled the decision of the examiner.

As a preliminary remark, the Board pointed out that the criteria laid down in Article 7(1)(b) of Regulation 2017/1001 of 14 June 2017 on the European Union Trade Mark for assessing the distinctive character of a trade mark applied indistinctly to all categories of trade marks, including figurative trade marks.

Hence, the Board proceeded to assess whether Bacardi bottles satisfied these criteria.

First, it recalled that the shape of a good is likely to be devoid of any distinctive character if it resembles the shape most likely to be taken by that product. It is therefore necessary for the shape to depart significantly from the norm or customs of the sector.

Second, it noted that the trade mark applied for did not confine itself to the shape and contours of the bottle, but encompassed various additional graphic elements such as a faint green colour, a bright-red seal and a white label with distinguishing ornaments. According to the Board, the combination of these elements, albeit in themselves possibly non-distinctive elements, conferred on the overall appearance of the mark at least a low degree of distinctiveness.



The Board added that the assessment of distinctive character did not amount to an examination of novelty. Accordingly, it is not sufficient to show that the mark, or one of its elements, is also used by others to refuse registration on the basis of a lack of distinctiveness, as long as this does not reflect a norm or custom on the sector.

Third, the Board found that the combination of the elements contained in the sign were not too complex to be memorised by customers.

In conclusion, the Board decided that the relevant consumers would be able to identify the origin of the good solely on the basis of the particular combination of the different elements of which the mark consisted. It therefore allowed the registration of the bottle as a trade mark.

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McDonald's 'Big Mac' Trade Mark Revoked by European Union Intellectual Property Office

On 11 January 2019, the Cancellation Division of the European Union Intellectual Property Office ("EUIPO") upheld the application for revocation filed by Supermac's Holdings Ltd ("Supermac's") against the "BIG MAC" trade mark registered by McDonald's International Property Company Ltd ("McDonald's").

McDonald's had registered its "BIG MAC" trade mark on 22 December 1998 for goods and services of Nice Classes 29, 30 and 42 covering, *inter alia*, sandwiches, desserts and services rendered or associated with operating and franchising restaurants, including the preparation of carry-out foods. Supermac's filed its request for revocation on 11 April 2017 and argued that McDonald's' trade mark had to be revoked in its entirety. Supermac's based its claim on Article 58(1)(a) of Regulation 2017/1001 of 14 June 2017 on the European Union trade mark (the "Regulation"), arguing that McDonald's had not, over a continuous period of five years, put the trade mark to genuine use in the European Union for the goods or services for which it was registered.

In response to the application for revocation, McDonald's submitted evidence of use such as advertising brochures, packaging, excerpts from websites and affidavits. While acknowledging that the evidence adduced was sufficient to prove genuine use of the trade mark for sandwiches, Supermac's claimed that it did not cover use for any other good or service.

In its decision of 11 January 2019, the EUIPO first recalled that genuine use of a trade mark required actual use of the trade mark on the market of the goods or services for which it is registered in accordance with the essential function of the trade mark, i.e., guaranteeing the identity and origin of such goods or services. The EUIPO added that it had to assess whether or not the commercial exploitation of the trade mark was real and that, in proceedings such as those at issue, it was for the trade mark proprietor to prove genuine use of its trade mark within the European Union or to submit proper reasons for non-use.

The EUIPO then moved on to analyse the evidence put forward by McDonald's to prove genuine use.

First, McDonald's had submitted 3 affidavits signed by representatives of McDonald's companies claiming significant sales figures for the BIG MAC sandwiches. In this respect, the EUIPO held that affidavits were insufficient in themselves to prove genuine use of a trade mark, especially since these affidavits emanated from interested parties. Such type of evidence, the EUIPO stated, had to be supported by other types of evidence.

In addition, McDonald's had produced printouts from the McDonald's websites. The EUIPO noted that while these websites' excerpts showed that products bearing the trade mark had been offered to the public, these were insufficient to prove the extent of the trade mark's use. In particular, the EUIPO specified that the evidentiary value of these excerpts could have been strengthened if they could show that the specific website had been visited or that orders were placed for the relevant products by a specific number of customers in the relevant period and in the relevant territory. However, none of these elements had been provided by McDonald's.

Similarly, McDonald's had submitted brochures and printouts of advertising posters as well as packaging for sandwiches (boxes). According to the EUIPO, the packaging materials and brochures, while depicting the trade mark, did not provide any information on how these brochures had been circulated, who they had been offered to and whether or not these had led to any purchases. Additionally, the EUIPO held that there was no independent evidence submitted that could show how many of the products for which the packaging had been used were actually offered for sale or sold. It therefore concluded that there were no sufficient details regarding the extent of use of the trade mark other than exhibitions of the sign. These did not give any data on the real commercial presence of the 'BIG MAC' trade mark for the goods and services concerned. The EUIPO furthermore did not consider the printout from the "Wikipedia" website as reliable because Wikipedia entries can be modified by any user.

Finally and remarkably, the EUIPO held that Supermac's acknowledgement of theevidence submitted by McDonald's was sufficient to establish genuine use of the trade

mark with respect to sandwiches was not relevant for its assessment and did not have any effect on its own findings. The EUIPO recalled that it had to conduct its assessment independently.

To conclude, the EUIPO held that the documents submitted by McDonald's did not constitute conclusive information that the products marketed under the trade mark were offered for actual sale, in the absence of any confirmation of any commercial transactions. According to the EUIPO, it followed that McDonald's did not prove that its 'BIG MAC' trade mark had been genuinely used during the relevant period for the relevant goods or services. As a consequence, the EUIPO decided to revoke the trade mark in its entirety.

McDonald's intends to appeal the decision to the EUIPO Board of Appeals.

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LABOUR LAW

New Wage Norm for Period 2019 – 2020: Central Economic Council Issues Report

The Belgian wage norm is a percentage expressing the maximum increase in salary costs to be applied by an employer over a period of two years, based on the evolution of the salary costs in France, Germany and the Netherlands. By limiting the increase in salary costs, Belgium wishes to preserve its competitive position compared to its neighbouring countries. Belgian employers should take the wage norm into account when envisaging salary increases for their employees.

Every two years, the so-called "Group of Ten" (composed of employers' and employees' associations) negotiates an agreement in which the wage norm is determined. In order to support these salary negotiations, the secretary of the Central Economic Council delivers to the Group of Ten a technical report, which includes its calculations underlying the maximum available wage norm.

On 17 January 2019, the secretary of the Central Economic Council published its technical report (https://ccecrb.fgov.be/dpics/fichiers/2019-01-17-03-39-52_doc190101nl.pdf/) determining that the maximum available margin for the development of salary costs for the period 2019-2020 is defined at 0.8 %. This authorised salary increase comes on top of the automatic salary indexations as determined on industry level.

If no agreement can be concluded, the government may determine the wage norm for 2019-2020 unilaterally.

Update on Employability Increasing Measures: No Specific Social Security Contribution Due by Employers For Time Being

Background and Regulatory Framework

The Law on the Unified Status of 26 December 2013 introduced the obligation for different industries to conclude an industry collective bargaining agreement by 1 January 2019 at the latest which would provide the employees with a right to a dismissal package in which employability increasing measures of 1/3th of the notice period or of the indemnity in lieu of notice would be included for employees being dismissed with a notice period (or indemnity in lieu of notice) of at least 30 weeks.

Parliament also provided for a penalty if, as of 1 January 2019, an employee who satisfies the conditions to be entitled to a dismissal package with employability increasing measures nevertheless works during the full notice period or receives the entire indemnity in lieu of notice. In such an event, a social security penalty applies equalling 3% of 1/3th of the indemnity in lieu of notice to be paid by the employer and a social security penalty equalling 1% of 1/3th of the indemnity in lieu of notice to be paid by the employee.

Current Status

To date, no collective bargaining agreement has been concluded in any industry. Hence, the question arises whether the specific social security penalty can be imposed on employers failing to provide employability increasing measures.

As it is the responsibility of the industries to conclude collective bargaining agreements regarding such measures, the National Social Security Office recently confirmed that the specific social security penalty is not due in case of a dismissal of an employee working in an industry in which no industry collective bargaining agreement regarding the matter has been concluded.

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LITIGATION

European Parliament Amends Proposal for Directive on Collective Representative Actions

On 7 December 2018, the European Parliament's Legal Affairs Committee adopted a Report (the "Report") on the proposal (the "Proposal") for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC. This Resolution amends the proposal published by the European Commission in April 2018 (*See, this Newsletter, Volume 2018, No. 4, p. 7 and p. 19*).

The Proposal enables collective redress actions against infringements of EU law with a broad consumer impact. Accordingly, it covers areas such as data protection, financial services, travel and tourism, energy, telecommunications, environment and health.

The features of the Proposal remain largely unchanged. However, in its Report, the Committee on Legal Affairs puts forward a number of interesting amendments to the initial Proposal.

The Report establishes stricter reputational and transparency requirements for qualified representatives and reinforces existing safeguards against frivolous and vexatious litigation. Importantly, it also provides that a final decision issued by the court of a Member State and determining the existence, or the non-existence, of an infringement should constitute a rebuttable presumption of the existence or the non-existence of the infringement for the purposes of any other actions seeking redress before the national courts of other Member States against the same trader. Finally, the Report mandates the European Commission to explore the possibility of establishing an EU-level collective redress action, as well as a European Ombudsman for collective redress.

The Proposal will be reviewed in plenary session on 13 March 2019.

Opinion 1/17: Advocate General Bot Finds the CETA Investment Court System Compatible with EU Law

On 29 January 2019, Advocate General Bot (the "AG") delivered his long-awaited Opinion (the "Opinion") on whether the investment court system ("ICS") in Chapter Eight, Section F, of the European Union-Canada Comprehensive Economic and Trade Agreement ("CETA") is compatible with European Union (EU) law, in particular with the autonomy of the EU legal order and fundamental rights. The next step in the proceedings before the Court of Justice of the European Union ("ECJ"), initiated by Belgium following complications in its ratification process, is for the ECJ to deliver its Opinion on the same question.

Questions at Issue

Belgium's request pursuant to Article 218(11) of the Treaty on the Functioning of the European Union ("TFEU") for an Opinion from the ECJ was broadly formulated. It asked the ECJ for an Opinion on whether Chapter Eight, Section F of CETA is "*compatible with the Treaties, including with fundamental rights*".

The AG understood that request to raise three distinct questions (para. 36), namely whether the ICS in CETA is compatible with: (i) the exclusive jurisdiction of the ECJ regarding the interpretation of EU law; (ii) the principle of equal treatment and the requirement that EU (competition) law be effective; and (iii) the right of access to an independent and impartial tribunal.

He added that the request does not concern the policy decision of whether or not to include ICS in agreements with third States or the economic impact of ICS on attracting foreign investment. Those are matters falling within the discretion of the EU institutions and resulting from a democratic debate within the European Union and the Member States (paras 32-33).

ICS in CETA Does Not Undermine Autonomy of EU Legal Order and Is Compatible with Exclusive Jurisdiction of ECJ

International agreements to which the European Union seeks to become a party must respect the autonomy of the EU legal order. This concept refers to the fact that the EU Treaties establish *"a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals"* (ECJ Opinion 2/13, para. 157). One important feature is that "*it is for the national courts and for the ECJ to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law*" (ECJ Opinion 2/13, para. 175). As a result, international agreements, and the dispute settlement systems for which they provide, should not adversely affect the jurisdiction of the ECJ to interpret EU law and to give preliminary rulings on the interpretation and the validity of EU acts. In Case C-284/16 *Achmea*, the ECJ found that that condition was not satisfied in case of a bilateral investment agreement between two Member States providing for the possibility that an Investor-State Dispute Settlement tribunal might interpret and apply EU law (*See, this Newsletter, Volume 2018, No. 3, p. 15*).

The AG found that the ICS in CETA does not affect the jurisdiction of the ECJ. His view was that, given the lack of direct effect of CETA (para. 62), the ICS offers judicial protection to investors through a legal system that is separate but co-existing with the judicial remedies available before the ECJ and the courts and tribunals of the Member States (para. 63). Thus, the ICS in CETA is distinct from the Investor-State Dispute Settlement mechanism at issue in *Achmea* in that the latter was a parallel dispute settlement mechanism with jurisdiction to interpret and apply EU law (para. 105).

He also emphasised that, unlike what was the case for the intra-EU agreement at issue in *Achmea*, international agreements with non-Member States such as CETA are not based on mutual trust between the parties. Instead, they are based on reciprocity between the European Union and a third State (paras 72-85, 107-109). Without adequate and reciprocal substantive and procedural protection of investments, the European Union might not be able to promote and encourage EU investors or attract foreign investment (para. 80). He signaled that requiring prior involvement of the ECJ might be difficult to reconcile with the reciprocity governing the mutual relations of parties such as the European Union and Canada (paras 179-182). The AG therefore recognised the importance of finding a balance between protecting the autonomy of the EU legal order and enabling the European Union to exercise an effective common commercial policy which allows for external review of the actions of the European Union and of its Member States and includes the development of a rules-based international legal order (paras 87, 118, 173-178, 212).

According to the AG, CETA offers "*sufficient guarantees to safeguard, first the role of the [ECJ] as the ultimate interpreter of EU law and, second, the cooperation mechanism between the national courts and tribunals and the [ECJ], which takes the form of the preliminary ruling procedure*" (para. 116). Those guarantees are as follows:

- The ICS's jurisdiction is limited to disputes regarding a breach of non-discriminatory treatment obligations and investment protection obligations (para. 120);

- In resolving disputes, the ICS may apply CETA and other rules and principles of international law applicable between the European Union and Canada, but not EU law (paras 110, 121, 122);

- The ICS may only review whether acts of either party comply with CETA with a view to granting compensation to investors. It has no jurisdiction to decide on the legality of an act adopted by a Member State or by the European Union or to annul such acts (paras 123-126). Nor can it rule on the reciprocal relations between the European Union and its Member States, between the Member States themselves or between an investor of one Member State and the other Member States (para 160);

- Before the ICS, EU law and the law of the Member States (which includes EU law) will be considered as a question of fact, notably in the context of assessing whether a particular measure is justified by legitimate objectives in the public interest. The ICS must take EU law as it stands and follow any ECJ interpretations of EU law. Furthermore, CETA offers the necessary safeguards in order to ensure that the ICS will interpret EU law as infrequently as possible (paras 128-136, 148-152, 154);

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- In the event that the ICS would need to interpret EU law in the absence of guidance from the ECJ in order to decide a particular dispute before it, that interpretation would, in any event, not bind the EU institutions (including the ECJ) (paras 137-143);

- Finally, the ICS does not prevent foreign investors from using judicial remedies available under domestic law. Although national courts of the Member States must not directly apply CETA, they remain an available alternative forum for judicial protection and their role in making references for a preliminary ruling from the ECJ remains intact (paras 168-172).

ICS in CETA Complies with General Principle of Equal Treatment and Requirement that EU (Competition) Law Be Effective

The AG found that CETA treats Canadian investors in the European Union more favourably by granting them judicial remedies (*i.e.*, allowing recourse to the ICS) that are not likewise available for EU companies investing in the European Union because these categories of investors are not comparable (para. 203). The only investors who are in a comparable situation are Canadian investors in the European Union and EU investors in Canada (paras 203-207). In any event, should the ECJ nonetheless find that Canadian and EU investors in the European Union are comparable, making the ICS available only to Canadian investors in the European Union would, according to the AG, be objectively justified by the purpose of promoting foreign investment (para. 209).

Belgium had also raised questions as to whether the ICS could nullify the effect of a competition law fine imposed by the European Commission or a competition authority of one of the EU Member States, by deciding to award damages in an amount equivalent to that fine. The analysis of the AG of those questions was limited. He took the view that several substantive and procedural guarantees in CETA (including in Chapter 17 on "Competition Policy") in fact limit the risk of the ICS having to decide that a fine imposed under EU competition law would infringe investment protection standards laid down in Chapter 8 of CETA (paras 214-218).

ICS in CETA Respects Right of Access to Independent and Impartial Tribunal

The final part of the Opinion responds to a number of objections raised by Belgium with respect to whether the ICS respects the right of access of especially small and medium-sized enterprises or "SMEs" to an independent and impartial court under Article 47 of the Charter of Fundamental Rights of the European Union.

In his assessment of those objections, the AG stressed the "*hybrid*" character of the ICS, which he considered to be "*a form of compromise between an arbitration tribunal and an international court*" (para. 242). He therefore disagreed with the premise of the objections raised by Belgium that the ICS was a genuine court (para. 244). His assessment also took into account that, pursuant to CETA, the parties (acting specifically in the context of the Joint Committee) are to adopt further detailed rules on the organisation and functioning of the ICS (para. 247).

The AG took the view that Section F of Chapter 8 of CETA "*guarantee*[s] *a level of protection of [the right of access to an independent and impartial tribunal] which is appropriate to the specific characteristics of the [Investor-State Dispute Settlement] mechanism provided for in that section*" (para. 271). That conclusion was based on the following considerations:

- The ICS does not have exclusive jurisdiction to decide on actions brought by foreign investors in the field of investment protection. It is merely an alternative method of dispute resolution (paras 252-253).

- The rule according to which the costs of the proceedings should be borne by the unsuccessful disputing party (Article 8.39.5 of CETA) serves a legitimate objective. The application of the rule may be tempered in the light of the circumstances of the claim (para. 255) or as a result of supplemental rules adopted by the Joint Committee (para. 257). Furthermore, costs may be reduced in case the parties agree to their case being heard by a sole adjudicator or reach an amicable settlement (para. 256).

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- The remuneration model, comprising a fixed component and a component related to the volume and the complexity of the case-load, is consistent with the hybrid character of the ICS and the fact that the adjudicators will be working, at least initially, on a part-time basis (para. 260);

The conditions relating to the appointment and possible removal of the adjudicators offer sufficient safeguards (in particular, in terms of rules of ethics) so as to guarantee their independence and impartiality (para. 262-270).

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MARKET PRACTICES

Brussels Enterprise Court Rules in Favour of UberX Services in Brussels

On 16 January 2019, the President of the French-language Brussels Enterprise Court (*Ondernemingsrechtbank/Tribunal de l'entreprise*) handed down his judgment in cease-and-desist proceedings regarding Uber's activities in Brussels initiated by the Belgian Federation of Taxis (FeBeT) and 23 taxi companies (together the "claimants") against Uber B.V., a Dutch company forming part of the Uber group, and nine providers of vehicle location services with driver operating through the UberX platform (the "UberX drivers") (President of the French-language Brussels Enterprise Court, 16 January 2019, *Fédération belge des taxis, SPRL Ben Thami, SCRL Mahdaoui, SPRL Taxis Lucas, SPRL Fylra, SPRL taxi Energie, SPRL Nioucha, SPRL Cabs 1030, SPRL Mk Tax, SPRL Youzak taxi, SPRL Phedonas, SPRL Marbel, SPRL Kara, SPRL Sadegh, SA T.M.T. Partner, SCS Taxi Tsatakis et Cie, SA Liberty Cars, SPRL Alraha, SPRL Stertax, SPRL Taxi City, SPRL E.L.H., SCS T.M.S. Limousine, SA Blue Cabs, SPRL Mol-Tax v. Uber B.V., SCS V&C Concept, SPRL Arman, SPRL Thomi-Autos, Mr. Chardoudi Tariq, Mr. Sahli Sofien, Mr. Haouari El Mostafa, SPRL K-Everest, SPRL Flambeau, Mr. Saba Antonio Rossario*).

The claimants argued that UberX and the UberX drivers infringed Articles 3 and 16 of the Ordinance of the Brussels Capital Region of 27 April 1995 on taxi services and vehicle location services with driver (*Ordonnantie van het Brussels Hoofdstedelijk Gewest van 27 april 1995 betreffende de taxidiensten en de diensten voor het verhuren van voertuigen met chauffeur/Ordonnance de la Région de Bruxelles-Capitale du 27 avril 1995 relative aux services de taxi et aux services de location de voiture avec chauffeur* – the "Ordinance"). Article 3 of the Ordinance prohibits the operation of taxi services without a "taxi" licence granted by the Brussels-Capital Region. Article 16 of the Ordinance in turn requires operators of "vehicle location services with driver" to hold a "limousine" licence, which is different from a "taxi" licence. According to the claimants, Article 3 was infringed in that the UberX drivers did not have a "taxi" licence but only a "limousine" licence, whereas Article 16 was infringed in that, allegedly, the drivers did not satisfy all conditions for obtaining a "limousine" licence. The claimants further maintained that, by relying on "limousine" licences without allegedly meeting all conditions, the UberX drivers had committed an unfair market practice within the meaning of Article VI.104 of the Code of Economic law (*Wetboek van Economisch Recht van 28 februari 2013/Code de droit économique du 28 février 2013* – the "CEL"). Article VI.104 CEL prohibits any act contrary to fair market practices by which a company harms or may harm the professional interests of at least one other company.

The President first examined the situation of Uber B.V. In this regard, the President dismissed Uber B.V.'s argument that it would not be subject to the Ordinance as its UberX service would qualify as an "information society service" within the meaning of Directive 2006/123 of 12 December 2006 on services in the internal market (the "Services Directive"). Referring to the judgments of the Court of Justice of the European Union in *Uber Spain* (Case C-434/15) and *Uber France* (Case C-320/16), the President held that the UberX service must be regarded as forming an integral part of an overall service the main component of which is a transport service and that, as a result, Uber B.V. offers a "*service in the field of transport*" within the meaning of Article 2(2)(d) of the Services Directive (*See, this Newsletter, Volume 2017, No. 12, pp. 7-8; this Newsletter, Volume 2018, No. 4, pp. 8-9*). Article 2(2)(d) of the Services Directive excludes services in the field of transport - including urban transport and taxis - from the scope of the Directive.

However, the President noted that a "*service in the field of transport*", such as the UberX service, should not be confused with a transport service per se. Since none of the vehicles are exploited by Uber B.V. itself given that it does not own any of the vehicles, the President found that Uber B.V. cannot be regarded as a transport services provider. According to the President, Uber B.V.'s services therefore fall outside the scope of the Ordinance.

Next, the President examined the situation of the UberX drivers. The claimants submitted that the UberX drivers are misleading both the public and the authorities by operating with "limousine" licences instead of "taxi" licences. More specifically, they argued that the contract for the pro-

vision of services between Uber B.V. and the UberX drivers is concluded with the sole aim of circumventing the prohibition on the provision of taxi services without holding a "taxi" licence.

The President dismissed this argument on the basis of Article 2,1° of the Ordinance which provides, *inter alia*, that a transport service can only be considered a taxi service when the vehicle is made available to the public either at a specific parking space on the public road or at any place which is not open to public traffic. The President noted that this condition was not satisfied as the contact between a passenger and an UberX vehicle can only occur through the UberX digital application developed by Uber. As passengers must register with Uber's "Platform Rider Association" ("PRA") before being able to order any rides, UberX vehicles are not accessible to the public, but only to the registered PRA users. In view of these elements, the President concluded that UberX drivers do not provide taxi services within the meaning of the Ordinance.

Finally, the President examined whether the UberX drivers meet the conditions for operating a limousine licence. While he rejected as unfounded all claims against UberX drivers holding a limousine licence granted by the Brussels Capital Region, the President found that one UberX driver (SPRL Thomi-Autos) holding a limousine licence granted by the Walloon Region had committed an unfair market practice by using a vehicle which failed to meet the passenger's comfort and quality expectations within the meaning of Article 73 of the Decree of 3 June 2009 implementing the Walloon Decree of 18 October 2007 on taxi services and vehicle location services with driver (*Arrêté du Gouvernement wallon du 3 juin 2009 portant execution du Décret wallon du 18 octobre 2007 relatif aux services de taxis et aux services de location de voitures avec chauffeur*). Accordingly, the President ordered Thomi-Autos to cease and desist from offering vehicle location services with driver with that specific vehicle subject to a penalty of EUR 5,000 per infringement.

This judgment confirms that the service provided by UberX drivers qualifies as a vehicle location service with driver for which a "limousine" licence is required. Uber B.V. may thus continue to operate its UberX service in Brussels provided that the UberX drivers satisfy the conditions for operating a "limousine" service. The claimants announced in the press that they intend to appeal the judgment.

The judgment follows a series of judgments prohibiting the UberPOP service in Brussels. The UberPOP service differs from the UberX service in that, contrary to UberX drivers who are professional drivers holding a "limousine" licence, UberPOP drivers are non-professional, unlicensed drivers (*See, this Newsletter, Volume 2015, No. 10, pp. 18-19 and this Newsletter, Volume 2018, No. 12, pp. 16-17*).

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