January 2023

VBB on Belgian Business Law

Issue Highlights

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

Legal 500, 2019

Topics covered in this issue

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COMMERCIAL LAW

Book 1 ("General Provisions") and Book 5 ("Obligations") of Civil Code Enter Into Force

On 1 January 2023, Book 1 on "General provisions" of the Civil Code (*Boek 1 "Algemene bepalingen" van het Burgerlijk Wetboek / Livre 1er "Dispositions générales" du Code civil* – the ***Book on General Provisions***) and Book 5 on "Obligations" (*Boek 5 "Verbintenissen" van het Burgerlijk Wetboek / Livre 5 "Les obligations" du Code civil* – the ***Book on Obligations***) entered into force.

The Book on General Provisions (available in Dutch here and in French here) contains cross-sectional rules that are not specifically associated with one of the other Books of the New Civil Code. It includes generally applicable principles of civil law, such as the rules governing the temporal application of laws. Additionally, it covers the general theory of representation, the rules on the calculation of time periods and the prohibition of abuse of rights.

The Book on Obligations (available in Dutch here and in French here) contains the general rules that govern all obligations, as well as the general regime for contracts, legal facts (*rechtsfeiten / faits juridiques*) and quasi-contracts. The rules set out in this Book will apply to all legal acts (*rechtshandelingen / actes juridiques*) and legal facts as of 1 January 2023, subject to two exceptions that provide for the application of the old regime unless the parties agree otherwise:

1. future consequences of legal acts and legal facts which took place before 1 January 2023; and

2. legal acts and legal facts which took place after 1 January 2023 but relate to an obligation arising from a legal act or legal fact that took place before 1 January 2023.

For a discussion of both Books, *see*, this Newsletter, Volume 2022, No. 4 and Volume 2021, No. 2.

Statutory Interest Rates Increase Significantly

On 31 January 2023, the 2023 statutory interest rate applicable to civil matters and commercial relations with private individuals/natural persons was published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*).

The statutory interest rate will amount to 5.25% in 2023, and has thus increased sharply compared to 2022, when it amounted to 1.50% (*See*, this Newsletter, Volume 2022, No. 2). The statutory interest rate applies unless otherwise agreed by contract.

In addition, the statutory interest rate for late payment in commercial transactions amounts to 10.5% during the first semester of 2023.

COMPETITION LAW

Belgian Competition Authority Fines Novartis for Warning against Off-label Use of Competing Ophthalmological Product and for Running Free Goods Programme

On 23 January 2023, the Belgian Competition Authority (***BCA***) imposed a fine of EUR 2,782,808 on Novartis for allegedly abusive behaviour. The BCA took the view that Novartis had abused a collective dominant position which it allegedly held with Roche in relation to therapies for wet age-related macular degeneration (***AMD***).

Novartis was found guilty of misleading ophthalmologists, hospitals and public authorities in warning against the off-label use of Avastin®, an oncology medicine of Roche, for the benefit of its own, more expensive product Lucentis® which, unlike Avastin®, is indicated for the treatment of AMD. According to the BCA, the position taken by Novartis was not supported by scientific evidence and is therefore misleading and abusive.

Novartis was also found to have abused its dominant position by running a "Free Goods Programme" of Lucentis® in the hospital channel. That programme went beyond what would have been possible under applicable sample rules. While the BCA did not address this issue, the programme may also have been in breach of the rules curbing the inducement of health professionals to prescribe contained in Article 10 of the Belgian Medicines Law of 25 March 1964.

The BCA thus partially emulated the proceedings which the French competition authority had pursued in 2020 against Genentech, Novartis and Roche in a case that gave rise to an aggregate fine of EUR 444 million (*see*, Van Bael & Bellis Life Sciences News and Insights of 9 September 2020). The BCA actually relied in part on theories of harm and evidence used by the French "*Autorité de la Concurrence*". At first sight, this may cast doubt on the fate of the Belgian decision, following the annulment of the French decision by the Paris Court of Appeal on 16 February 2023.

However, despite the ostensible similarities between the Belgian and French decisions, there are also important differences. First, notwithstanding the finding that both companies occupied a collective dominant position on the Belgian market for AMD medicines, the BCA only fined Novartis and not Roche (Genentech was not involved in the Belgian procedure). This is because the file contained no incriminating evidence against Roche.

Second, the BCA determined the period of infringement as extending between May 2011 and 31 December 2015. This is because, starting in May 2011, several clinical study outcomes saw the light of day which demonstrated that the off-label use of Avastin® for the treatment of AMD did not carry more risk than the use of Lucentis®. Before May 2011, the degree of risk associated with the off-label use of Avastin® was still uncertain, which caused communications pointing to that risk in a measured tone to be legitimate and not abusive. Interestingly, the BCA's approach would not seem to contradict the verdict of the Paris Court of Appeal which decided only to focus on the conduct of Novartis and Roche before the entry into force of the "loi Bertrand" of 29 December 2011 which had restricted the off-label use of medicines. The resulting cut-off date therefore caused the Paris Court of Appeal also to look only at the very period during which doubts regarding the safety of the off-label use of Avastin® were legitimate. The regulatory obstacle for scrutinising the behaviour of Novartis and Roche in France after that date did not exist in Belgium and arguably allowed the BCA to review the messages of Novartis towards physicians and towards the authorities in the light of the new scientific evidence that had since emerged.

Third, the fine levied in Belgium is only a fraction of that imposed in France. As a matter of fact, the fine which the competition college (the decision-making body of the BCA) eventually adopted is also dramatically lower

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than the fine which the competition prosecutor had proposed, and which fell in a bracket between EUR 60,000,000 and EUR 70,000,000. This is because the competition college reduced the period of infringement (considered, as noted, to have started only in May 2011) and accepted a variety of mitigating circumstances in favour of Novartis.

Supreme Court Overturns Markets Court's Judgment Annulling Decision of Belgian Competition Authority to Reject Complaint by Football Club Virton

On 5 January 2023, the Supreme Court (*Hof van Cassatie / Cour de cassation*) overturned a judgment delivered on 23 September 2020 by the Markets Court (*Marktenhof / Cour des marchés* - the ***Markets Court***) of the Brussels Court of Appeal, which had itself annulled a decision by which the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) had denied interim measures sought by football club Royal Excelsior Virton (***Virton***) against the Royal Belgian Football Association (the ***RFBA***).

This case started in 2020, when the RBFA refused to renew Virton's operating licence because that club had failed to comply with the continuity principle. The decision of the RBFA caused Virton to be relegated to a lower tier in the competition. Virton complained to the BCA that the RBFA had restricted competition and requested interim measures. The BCA denied Virton's request for interim measures, finding that, while it could not be "*prima facie excluded*" that some of the criteria applied by the RBFA were problematic, Virton did not establish that it would have satisfied the conditions to obtain a licence absent the application of these problematic criteria.

Virton appealed the BCA's refusal to grant interim measures to the Markets Court which held that the BCA had failed to consider evidence showing that Virton complied with the continuity principle and had therefore not provided adequate reasons for its decision. As a result, the Markets Court annulled the BCA's decision (*See*, this Newsletter, Volume 2020, No. 10).

The RBFA and the BCA then appealed to the Supreme Court which observed that the documents relied upon by the Markets Court had been submitted by Virton during the hearing before the BCA. However, Article IV.72, § 4, third indent of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* - ***CEL***), provides that a party seeking interim measures must not rely on any written observations or documents at the hearing before the BCA other than those attached to the request for interim measures. The BCA could therefore not consider the documents filed by Virton after its request for interim measures and the Markets Court, in turn, could not hold that the BCA should have reached a different conclusion on the basis of these documents.

Interestingly, the Supreme Court's conclusion was not altered by the fact that Virton had submitted these documents at the suggestion of the BCA, or by the Markets Court's finding that these documents had been submitted "with full respect for the RBFA's rights of defence and the adversarial principle".

As a result, the Supreme Court overturned the Markets Court's judgment and referred the case to a differently composed Markets Court.

The judgment of the Supreme Court is available here.

Belgian Competition Authority Fines Caudalie Again after Annulment of First Infringement Decision

On 18 January 2023, the Competition College (*College van mededinging / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) imposed a fine of EUR 859,310 on French cosmetics company Caudalie on account of resale price maintenance and restrictions of online sales.

This was the second time that the BCA imposed this exact fine on Caudalie for the same conduct. On 6 May 2021, the BCA had imposed a fine of EUR 859,310 on Caudalie and had made a series of commitments

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offered by Caudalie binding in an attempt to obtain the closure of the case. Caudalie successfully appealed this decision to the Markets Court (*Marktenhof / Cour des marchés*) of the Court of Appeal of Brussels (*Hof van Beroep te Brussel / Cour d'appel de Bruxelles*). In a judgment dated 30 June 2021, the Markets Court first suspended the BCA decision before annulling it on 1 December 2021. It held that the BCA had erroneously included in an infringement decision the commitments which Caudalie had offered with the sole purpose of obtaining that the BCA would drop all charges against it (*see*, this Newsletter, Volume 2021, No. 11).

A newly composed Competition College took over the case. After Caudalie's attempt to challenge the designation of the new members of the Competition College, which the Markets Court denied in a judgment of 26 October 2022, the Competition College adopted the second decision, imposing again a fine of EUR 859,310 and qualifying in a press release the practices as "hardcore restrictions by object".

Jacques Steenbergen Retires after Ten Years as President of Belgian Competition Authority

On 31 January 2023, Jacques Steenbergen stepped down from the Presidency of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***). Mr. Steenbergen had been the President of the BCA since its establishment as an independent competition authority in 2013.

Mr. Steenbergen had been due to retire for three years and was waiting for the government to appoint his successor before resigning. However, the government has been struggling to reach an agreement for a long time. While Axel Desmedt, member of the Institute for Postal Services and Telecommunications (***BIPT***) and head of the BIPT's Telecommunications and Media department, was once a leading contender (*see*, this Newsletter, Volume 2021, No. 7), but his application is currently blocked for political considerations on the balance between Dutch and French speaking officials within the BCA. Discussions appear to be at a standstill, which reportedly caused Mr. Steenbergen finally to resign without further delay.

Until the government appoints a successor for Mr. Steenbergen, the Managing Board (*Directiecomité / Comité de direction*) will exercise the duties of President of the BCA. The Managing Board is chaired by Yves Van Gerven, General Counsel of the BCA. Additionally, the decision-making body of the BCA, the Competition College (*College van mededinging / Collège de la concurrence*), will be chaired by the eldest assessor of the language group corresponding to the language applied in the case at hand. This means that Kris Dekeyser will chair the Competition College in Dutch-language cases, while Christian Huveneers will preside over French-language cases.

Belgian Competition Authority Dismisses Telenet's Complaint against RAN-sharing Agreement between Orange and Proximus

On 30 January 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) announced that it had dismissed telecommunications operator Telenet's complaint against the mobile network sharing agreement concluded in July 2019 by the telecommunications operators Orange and Proximus (the ***Agreement***).

The Agreement concerns the Radio Access Network (RAN), *i.e.*, the part of the network located between the mobile devices and the core network which implements the functionality necessary to establish wireless communications between the mobile devices and the mobile network. Its objective is to enable Orange and Proximus to save costs by combining their 2G, 3G and 4G networks and jointly rolling out their 5G network (*see*, this Newsletter, Volume 2019, No 11). The Agreement concerns not only passive assets (basic infrastructure such as space on a building roof or on a telecommunications tower, antenna masts and air conditioning systems) but also active radio equipment, *i.e.*, the base station, the antennas and, for 2G and 3G, the controller nodes.

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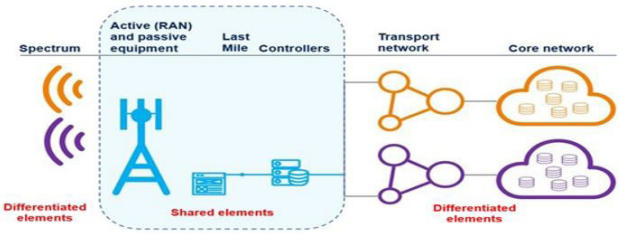

Source: press release issued by Proximus on 11 July 2019, "Proximus and Orange Belgium join forces to develop the mobile access networks of the future"

In October 2019, Telenet filed a complaint with the BCA against the Agreement. Telenet's objections were twofold. First, Telenet considered that the Agreement would restrict competition between Orange and Proximus in the planned spectrum auction as (i) it would entail an exchange of information between Orange and Proximus that may affect their behaviour during the auction or reduce the uncertainty of each other's behaviour; and (ii) it would mitigate the consequences of any failure of the parties to secure specific parts of the spectrum, which would reduce their incentives to compete aggressively. Second, Telenet feared that the Agreement would restrict competition on the wholesale and retail markets for mobile telecommunications services by (i) limiting competition on key parameters; (ii) reducing incentives to innovate and invest in new technologies and infrastructure; and (iii) increasing the risk of coordination due to the increased common costs of both parties.

However, the BCA dismissed Telenet's complaint. The BCA considered that, despite the Agreement, Orange and Proximus remain technically and commercially independent and determined their spectrum strategy based on their own commercial interests. The BCA also noted that there are appropriate mechanisms to ensure that no spectrum-sensitive information is exchanged between parties. The BCA added that the organisation of the auction for the 1400 MHz band, which was completed in July 2022, was subject to the acceptance by the federal telecommunications regulator BIPT of the candidates' joint proposal.

Second, the BCA also considered that the Agreement does not restrict the parties' incentives to invest and innovate. Under the Agreement, each party retains the freedom to invest in new sites without sharing active equipment. The sharing of active radio equipment infrastructure will only occur at radio sites where a common interest has been identified through the joint venture created between the parties. As a result, each party is developing its network according to its own expectations and budgets. In terms of capacity, each party in the shared network operates independently within the spectrum it acquired.

Moreover, the BCA found no evidence of any restriction of competition on key parameters:

- Since Orange and Proximus retain the ability to invest independently in their networks, there is sufficient price competition between them and vis-à-vis Telenet which is a close competitor.
- There is no reduction in the number of services offered by the parties.
- Since the parties invest independently in their network, the Agreement does not restrict competition on network coverage. Also, the regulatory framework includes a coverage requirement and coverage is mainly important at the deployment phase of the 5G network.
- The parties remain independent on the three factors determining network capacity (the number of sites, the amount of activated spectrum and the implemented technology).

The BCA also excluded the risk of collusion between the parties. The BCA found that the parties' share of common costs is not large enough to lead to such an outcome. Also, there are no direct contacts between the parties regarding the Agreement since they operate in a joint venture through which all information flows.

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Following the investigation and recommendations made by the BIPT, the parties also incorporated additional safeguards to avoid exchanging sensitive information. Other concerns raised by Telenet were also rejected.

Therefore, the BCA decided that there was no evidence that the Agreement was likely to restrict competition in the retail or wholesale markets for mobile telecommunications services and dismissed Telenet's complaint.

CONSUMER LAW

Belgium to Receive Letter of Formal Notice for Failure to Implement Representative Actions Directive in Timely Manner

The European Commission (***Commission***) announced on 27 January 2023 that Belgium, together with 23 other EU Member States, would receive a letter of formal notice for failure to implement in a timely manner Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers (the ***Directive***).

The letter of formal notice, urging Belgium to implement the Directive fully, constitutes the first step in an infringement procedure. Failure to comply may result in a reasoned opinion by the Commission formally requesting Belgium to ensure compliance with EU law within a period of two months. In the event the Directive is still not fully implemented, the Commission may refer Belgium to the Court of Justice of the European Union.

The Directive introduces a procedural mechanism enabling qualified entities (*e.g.*, consumer organisations) to bring representative actions with the aim of protecting the collective interests of consumers across the EU. The EU Member States had until 25 December 2022 to implement the Directive into their national laws.

Prior to the entry into force of the Directive, the Belgian Code of Economic Law (***CEL***) already provided for collective actions for injunctions and collective redress that are in line with the Directive. However, the Directive is broader in scope in that it:

- provides for a more extensive range of legal grounds for bringing collective actions than the CEL;
- provides for the suspension or interruption of the statutory limitation period pending the collective action; and
- contains rules on the financing of collective actions.

On 13 October 2022, the federal Minister of Economic Affairs and Work, Pierre-Yves Dermagne, submitted a draft bill implementing the Directive for opinion to the Central Economic Council (*Centrale Raad voor het Bedrijfsleven / Conseil Central de l'Economie*) which issued its opinion on 21 November 2022 (available in Dutch here and in French here).

The press release announcing the Commission's infringement decision is available here.

Screening Shows Use of Manipulative Practices in Almost 40% of Online Shopping Websites

On 30 January 2023, the European Commission (***Commission***) and the Consumer Protection Cooperation (***CPC***) network published the results of a sweep which revealed that 148 out of a total of 399 inspected online retail shops selling products for their own account make use of manipulative practices that breach consumer law.

Sweeps are a set of checks conducted by the Commission and the CPC network with the aim of identifying breaches of EU consumer law in a specific sector. In 2022, the CPC network (i.e., the national authorities of 23 EU Member States as well as Iceland and Norway) decided to direct their attention to so-called "dark patterns", a concept used to refer to practices on digital interfaces that manipulate consumers into making choices that are often not in their best interests. Under the coordination of the Commission, the CPC network screened the websites and applications of online retail shops, looking for the following categories of dark patterns:

1. fake countdown timers, *i.e.*, indicating a fake deadline that would pressure consumers into purchasing specific products, even though the offer would remain valid following the expiration of the deadline;

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2. false hierarchy, *i.e.*, directing consumers (directly) towards particular choices by means of the design of the website or application; and

3. hidden information, *i.e.*, hiding essential information regarding a product or service by using very small fonts and/or non-contrasting colours, or by placing information in a less visible location.

The findings of the sweep can be summarised as follows:

1. 10,53% of all websites and applications screened used fake countdown timers;

2. 13,53% of all websites and applications screened included false hierarchies, and:

3. 17,54% of all websites and applications screened were found to be hiding important information, or at least making them less visible for consumers.

Thus, nearly 40% of the interfaces checked could be in violation of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (***Unfair Commercial Practices Directive***) given the use of at least one of the three dark patterns checked.

The first step of the sweep will be followed by enforcement actions of national authorities, which will request the traders concerned to rectify their interfaces. National authorities may take further action, if necessary, in accordance with their national procedures.

For background, the Commission opened a public consultation in November 2022 (open until 20 February 2023) to assess whether the current consumer protection rules in the digital environment, including the Unfair Commercial Practices Directive, are adequate.

More information on the results of the sweep can be found here.

CONTRACT LAW

Supreme Court Holds That Simple Reference to Terms and Conditions Does Not Adequately Prove Consent

On 22 December 2022, the Supreme Court (*Hof van Cassatie/Cour de cassation*) delivered a judgment regarding the expression of consent necessary to create binding contractual terms and conditions (Case No. C.22.0082.F – the ***judgment***). The Supreme Court held that the simple reference to the terms and conditions of an insurance contract is inadequate to prove the consent of the party supposedly bound by these terms and conditions.

Background

The judgment concerns a dispute between an insured party and an insurer regarding the legal basis applicable to the compensation provided for in the insurance contract. While the insured party referred to the general law on compensation (*vergoeding / indemnisation*) as the legal basis applicable to the dispute, the insurance company indicated that the terms and conditions of the insurance contract applied. However, the insured party claimed that these terms and conditions had neither been brought to his knowledge nor accepted by him.

The dispute came before the Court of Appeal of Liège, which held that it was up to the insurance company to prove that the terms and conditions had been brought to the knowledge of the insured party or, at least, that he had had a reasonable opportunity to become aware of them and that he had accepted them expressly or implicitly. The Court of Appeal further found that the insurer had satisfied its burden of proof and concluded that the insured party had implicitly, but certainly, accepted these terms and conditions. The insured party challenged this appeal judgment before the Supreme Court.

Judgment

The Supreme Court first observed that, according to Article 1108 of the old Civil Code, the consent of the party who incurs obligations is an essential condition of a contract. Such consent, whether explicit or implicit, requires the actual knowledge or, at the very least, the possibility to effectively become aware of the clauses to which the consent relates.

The Supreme Court added that the simple reference to terms and conditions before or at the moment of the conclusion of the contract is not sufficient.

On this basis, the Supreme Court found that the Court of Appeal had violated Article 1108 of the old Civil Code by considering that the insured party had had the possibility to become aware of the insurer's terms and conditions before the conclusion of the insurance contract. It further held that the Court of Appeal also violated this provision by holding that, in the absence of a reservation on the application of these terms and conditions, it must be considered that the insured party tacitly but certainly accepted these terms and conditions. The Supreme Court referred the case to the Court of Appeal of Mons.

The judgment of the Supreme Court is available here (in French only).

Parties' Behaviour Can Prove Existence of Contract for Works

On 5 December 2022, the Supreme Court (*Hof van Cassatie/Cour de cassation*) delivered a short judgment in which it held that the existence of a contract for works (*aannemingsovereenkomst / contrat d'entreprise*) can be proven by the behaviour of the parties.

Background

The dispute concerned a painting company (claimant) and two individuals (defendants). The latter refused the payment of an invoice issued by the painting company because they had not signed the original contractual offer. The painting company argued that the payment

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price only reflected the additional work that had been ordered by the defendants.

On appeal, the Court of Appeal of Ghent held that the painting company, in the absence of written evidence of a work contract between the parties, was unsuccessfully seeking payment of its invoice.

Judgment

The Supreme Court first noted the following provisions of the new Civil Code:

- Article 8.3, first indent, according to which facts or legal acts must be proven when they are alleged and disputed;
- Article 8.31, according to which extrajudicial confession (which has the same probative value as a judicial confession) may result from the behaviour of one of the parties, such as the performance of the contract. Such behaviour can be established by any means of proof;
- Article 8.32, second indent, according to which a confession is binding on the person making it, unless it is insincere.

On this basis, the Supreme Court held that a contract for works can be proven by the behaviour of one of the parties, such as the ordering of additional work.

Accordingly, the Supreme Court found that the Court of Appeal had erred in law by ruling that the defendants had not performed any legal act that had to be considered as the performance of a contract for works. The Supreme Court referred the case to the Court of Appeal of Brussels.

The full judgment of the Supreme Court is available here (in Dutch only).

CORPORATE LAW

Belgium Misses Implementation Deadline of European Mobility Directive

Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers, and divisions (***Mobility Directive*** - here) entered into force on 1 January 2020. The Member States had until 31 January 2023 to implement the Mobility Directive into national law. Belgium failed to meet this deadline.

Importance of EU Mobility Directive

The Mobility Directive aims to harmonise the national rules governing cross-border conversions, mergers and divisions in order to improve the freedom of establishment and mobility within the EU. It provides structuring tools allowing companies to organise their group structure with operations around the EU in an efficient manner. In addition, the Mobility Directive introduces various safeguards and measures to protect minority shareholders, creditors and employees.

Status of Implementation in Belgium

Prior to the entry into force of the Mobility Directive, Belgium had already established rules and procedures for cross-border mergers, conversions and divisions when adopting the Belgian Code of Companies and Associations (***BCAC***) in 2019. For the implementation of a harmonised EU framework, the federal Parliament must now review Books 12 and 14 of the BCAC. The federal Council of Ministers approved a draft bill on 23 December 2022 (*see*, here (Dutch) and here (French)) which was then submitted to the Council of State for advice (*Raad van State / Conseil d'État*).

Consequences

The question arises as to how the implementation of the Mobility Directive will be effected given the existing rules of the BCAC governing issues such as the exit right for shareholders who voted against a proposed conversion; the right to challenge the proposed exchange ratio before the competent authority; and the mechanism to block cross-border conversions which a notary public suspects to be motivated by unlawful, fraudulent or criminal purposes.

DATA PROTECTION

Constitutional Court Allows Third Parties to Appeal Data Protection Authority's Decisions

In a judgment of 12 January 2023, the Constitutional Court (*Grondwettelijk Hof/Cour constitutionnelle*) ruled on the right for third parties to appeal decisions of the litigation chamber of the Data Protection Authority (***DPA***) (case 5/2023). The Constitutional Court confirmed that natural or legal persons who are not a party to the procedure before the litigation chamber but who are directly affected by the decision can appeal against the DPA's decision.

Background

The Belgian Crossroad Bank for Vehicles (***CBV***) is a database established by the Federal Public Service Mobility which holds information about vehicles and their owners in Belgium. The purpose of the CBV is to keep track of the vehicle's lifecycle. Informex SA (***Informex***) is a private company running an online platform that grants insurance companies access to the CBV. Back in 2019, the DPA launched an investigation regarding the alleged use of personal data from the CBV by insurance companies for commercial purposes. After the investigation, the Litigation Chamber of the DPA issued a warning against the Federal Public Service Mobility and ordered corrective measures. Informex was not a party to that procedure.

Informex lodged an appeal against the decision of the DPA before the Markets Court of Brussels which was declared inadmissible because Informex had not been a party to the procedure before the DPA while the current regulatory framework does not provide for the possibility for third parties to appeal the DPA's decisions. Informex also brought an appeal for annulment of the DPA's decision before the Administrative Supreme Court (*Conseil d'Etat / Raad van State*), which requested a preliminary ruling from the Constitutional Court.

Constitutional Court's Judgment

The Administrative Supreme Court requested the Constitutional Court to decide whether the fact that interested third parties cannot appeal the DPA's decisions should be considered as a prohibited form of discrimination.

In response, the Constitutional Court first observed that when the legislator creates a right to appeal a given decision, it cannot exclude categories of persons from the possibility to exercise that right without reasonable justification.

Based on the preparatory works of the Law creating the DPA, the Court noted that the legislator chose the Markets Court instead of the Administrative Supreme Court for appeals against the decisions of the Litigation Chamber of the DPA because the Markets Court is specialised in economic matters and was hence thought more suited to handle data protection related cases.

However, the legislator's objective was still to provide an "objective" appeal, similar to that existing before the Administrative Supreme Court, which means that the appeal is intended to challenge the decision of the authority and ask for its annulment, and not to protect the subjective (patrimonial or moral) rights of a person.

Given that objective, the Constitutional Court considered that there is no reasonable justification to deny third parties who incur personal, direct, certain, current and legitimate harm because of the DPA's decision the right to appeal that decision. The Court therefore ordered the legislator to adopt an appropriate provision to close this gap.

DATA PROTECTION

In the meantime, third parties that can show an interest can already appeal the decisions of the Litigation Chamber of the DPA before the Markets Court, within 30 days after the day they are considered to be aware of the decision.

The Constitutional Court's judgment can be read here.

European Data Protection Board Decisions on Facebook and Instagram Call into Question Contractual Necessity as a Legal Basis for Behavioural Advertising

Introduction

On 5 December 2022, the European Data Protection Board (***EDPB***) issued two binding decisions in cases concerning Facebook and Instagram, two social media platforms owned by Meta Platforms Ireland (***Meta***). The binding decisions were taken by virtue of the one-stop-shop mechanism pursuant to Article 65(1)(a) of the General Data Protection Regulation (***GDPR***), following complaints brought against both services for their processing of personal data for the purposes of behavioural advertising. The EDPB decided that contractual necessity does not constitute a valid legal basis for such a processing and this could have important consequences for online services relying on behavioural advertising as a business model.

Procedural Background

Under the one-stop-shop mechanism (Articles 60-66 GDPR), the EDPB is responsible for the correct and consistent application of the GDPR. The mechanism allows companies operating in multiple countries within the European Economic Area (***EEA***, i.e., the European Union (***EU***), Iceland, Norway, and Liechtenstein) to deal with a single data protection authority (***DPA***). The main DPA, also known as the Lead Supervisory Authority (***LSA***), is responsible for coordinating and cooperating with other DPAs, known as Concerned Supervisory Authorities (***CSAs***). To conclude an enforcement action, the LSA proposes a draft decision, but if the CSAs do not agree with the proposed decision and a mediated solution cannot be found, the LSA must submit its draft decision to the EDPB for consideration. The EDPB then takes a binding decision which the LSA must implement.

Factual Background

The decisions at hand relate to complaints that were filed on 25 May 2018, the day the GDPR started to apply. With regard to Facebook, the initial complaint had been submitted to the Austrian DPA. The complainant claimed that the data controller had violated the right to personal data protection by relying on 'forced consent'. As for Instagram, the complaint had been filed with the Belgian DPA and argued that the controller relied on 'forced consent' and misrepresented its legal basis under the GDPR. In both cases, the complainants requested an investigation and corrective action.

After reviewing the draft decisions of the LSA, several CSAs raised reasoned and relevant objections (***RRO***). As the LSA and the CSAs did not find a mediated solution, the matter was referred to the EDPB which issued binding decisions on the basis of Article 65 GDPR.

Legal Aspects

Principle of Lawfulness

First, of particular importance in these EDPB decisions is the finding that the performance of a contract to which a data subject is a party (Article 6(1)(b) GDPR) does not – or at least not always – constitute a valid legal basis for the processing of personal data for the purposes of behavioural advertising on social media platforms.

The EDPB and the LSA had opposing views on this matter. In its draft decision, the LSA held that the data controller could lawfully rely on the performance of a contract as a legal basis, considering that behavioural advertising is a "*distinguishing characteristic of the service*" offered by Meta in both its Facebook and

DATA PROTECTION

Instagram services. The EDPB disagreed, noting that the "*mutual perspectives and expectations of the parties to the contract*" must be considered, and not only those of Meta. In assessing the expectations of the users, the EDPB held that it is important to consider the "*complexity, massive scale and intrusiveness*" of the processing of personal data for behavioural advertising.

The EDPB further stated that there is no hierarchy between the legal bases for data processing. However, this does not mean that a data controller has total discretion in selecting the legal basis that best fits its (commercial) interests. In fact, the EDPB asserted that a data controller may only rely on one of the legal bases, set forth in Article 6 GDPR, if this particular legal basis is relevant for the processing at hand and, furthermore, if it does not deprive the principles of personal data protection of their "*effet utile*".

Indeed, the EDPB was of the opinion that the principle of lawfulness (Article 5(1)(a) GDPR) obliges the controller to adapt its business model to comply with the GDPR requirements and not the other way around. Hence, the EDPB concluded that a data controller's business model, which consists of providing free services in exchange for behavioural advertising, does not make the data processing of personal data for providing the behavioural advertising necessary for the performance of the contract. In this context, the EDPB observed that under EU law personal data involves a fundamental right and "*not a commodity data subjects can trade away through a contract*".

In both cases, the EDPB concluded that the data controller lacked a legal basis for the processing. As a result, the EDPB directed the LSA to revise its initial finding and add a violation of Article 6(1) GDPR.

Principle of Fairness

Second, the EDPB decided that the practices at hand are also in breach of the fairness principle (Article 5(1)(a) GDPR), due to the "*imbalanced nature*" of the relationship between data controller and data subjects given "*the lack of alternative services in the market and the lack of options allowing* [users] *to adjust or opt out from a particular processing under the contract*".

This was in addition to the breach of the transparency principle (also set out in Article 5(1)(a) GDPR), as the data controller "*has presented its service to* [its] *users in a misleading manner*". The EDPB ordered the LSA to take these two additional violations into account in its final decision.

Administrative Fines

Third, the EDPB requested the LSA to increase its fines for the infringements as the fines initially proposed did "*not adequately reflect the seriousness and severity of the infringements nor* [had] *a dissuasive effect*". The LSA was also ordered to include in its calculation the violation of the fairness principle.

As a result, the LSA increased the fines from a proposed maximum of EUR 36 million (for the Facebook service) and EUR 23 million (for the Instagram service) to fines of EUR 210 million and EUR 180 million, respectively.

Ensuring Compliance

Finally, the EDPB instructed the LSA to include in its final decision an order for the data controller to bring its processing of personal data into compliance with the GDPR within three months. In particular, the LSA was requested to order the data controller to clearly inform the data subjects about the legal bases of processing for each purpose for which it processes personal data (Article 13(1)(c) GDPR).

The LSA adopted its final decision implementing the EDPB's binding decisions on 31 December 2022. Meta can challenge the decision of the LSA as well as the EDPB's binding decisions.

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Consequences

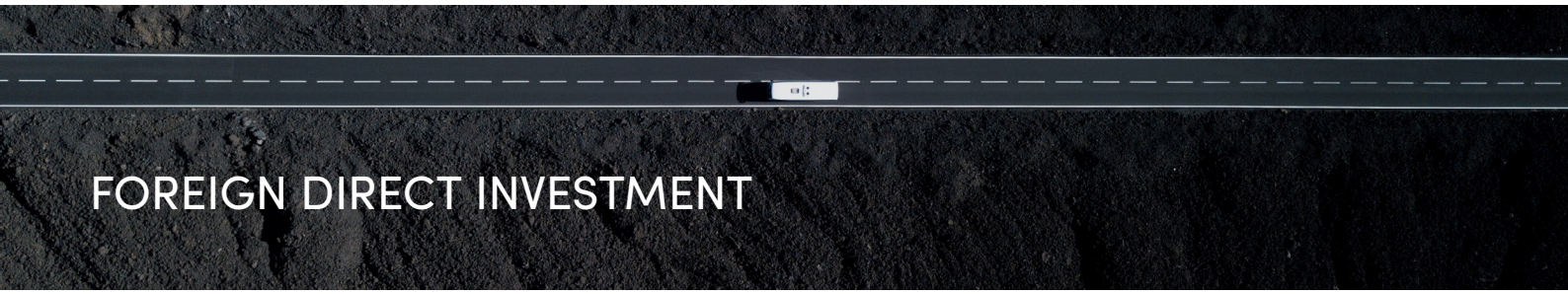
On the basis of the EDPB decisions, it will be now more difficult for data controllers to process personal data for behavioural advertising purposes on the legal ground that such processing is necessary for the performance of a contract to which a data subject is a party (Article 6(1)(b) GDPR). This touches upon the permissibility of using behavioural advertising as a mechanism to monetise the 'free' services. Clearly, if a data controller wants to rely on consent as a legal basis for its 'free' services, and under the GDPR this consent can be easily refused or withdrawn, this may have a significant impact on the number of data subjects for whom it can offer behavioural advertising.

In addition, these decisions show how the question of the appropriate legal basis may be connected to the fairness and transparency requirements.

Furthermore, more broadly, the disagreement between the EDPB and the LSA once again highlights the challenges that arise when a balance is sought between the individual right to data protection and the commercial interests of technology companies.

Shortly after these decisions, the EDPB issued another binding decision concerning Meta – this time regarding its WhatsApp service – in which it struck a similar chord and held that Meta could not rely on contractual necessity (Article 6(1)(b) GDPR) as a legal basis for processing personal data for "IT security" and "service improvement" purposes.

The EDPB's decision regarding Facebook can be found here and the decision regarding Instagram can be found here. The Irish decisions implementing the EDPB decisions can be found here (Facebook and Instagram).



FOREIGN DIRECT INVESTMENT

Federal Chamber of Representatives Adopts Bill Approving Cooperation Agreement Introducing Foreign Direct Investment Screening Mechanism

On 9 January 2023, the federal government submitted a bill to the federal Chamber of Representatives approving the cooperation agreement of 30 November 2022 (the ***Agreement***) between the federal government, the regional governments and the communities establishing a foreign direct investment (***FDI***) screening mechanism (*Wetsontwerp houdende instemming met het samenwerkingsakkoord van 30 november 2022 tussen de Federale Staat, het Vlaamse Gewest, het Waals Gewest, het Brussels Hoofdstedelijk Gewest, de Vlaamse Gemeenschap, de Franse Gemeenschap, de Duitstalige Gemeenschap, de Franse Gemeenschapscommissie en de Gemeenschappelijke Gemeenschapscommissie tot het invoeren van een mechanisme voor de screening van buitenlandse directe investeringen / Projet de loi portant assentiment de l'accord de coopération du 30 novembre 2022 entre l'État fédéral, la Région flamande, la Région wallonne, la Région de BruxellesCapitale, la Communauté flamande, la Communauté française, la Communauté germanophone, la Commission communautaire française et la Commission communautaire commune visant à instaurer un mécanisme de filtrage des investissements directs étrangers* – the ***Bill***).

The Agreement creates terms and procedures for the screening of FDI and regulates the cooperation between the federal government and the various other governments in the joint exercise of their competencies in the field.

FDI Regulation (EU Regulation 2019/45)

The Agreement is part of the implementation process of EU Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (the ***FDI Regulation***), which entered into force on 11 October 2020. The FDI Regulation defined minimum requirements for EU Member States' FDI screening mechanisms, such as that being introduced in Belgium, and established a mechanism for coordinating FDI reviews within the EU.

Agreement

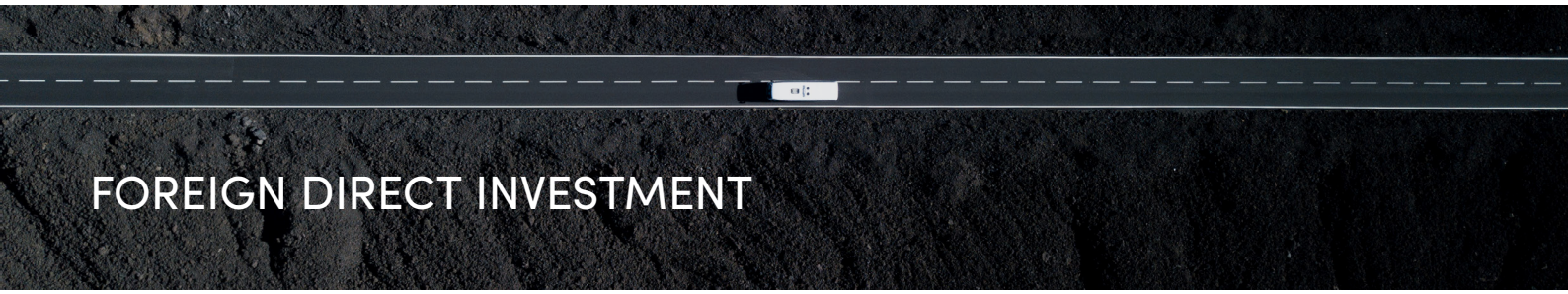
Scope

The Agreement applies to FDI by foreign investors that can affect national security, public order or the strategic interests of the regional governments and communities.

- FDI is defined as any investment by a foreign investor aimed at obtaining or maintaining long-term direct relations between the foreign investor and a business, including investments that enable effective participation in the management or control over the business. "Control" is interpreted in accordance with Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the ***EU Merger Regulation***).

- Foreign investors are defined as (i) non-EU private individuals (*i.e.*, private individuals with a principal residence outside the EU), (ii) non-EU businesses (*i.e.*, businesses incorporated under the law of a non-EU country or otherwise organised and having their registered office or principal activity in a country outside the EU), and (iii) companies whose ultimate beneficial owners have their principal residence outside the EU. This also includes governments and public institutions.

The Agreement explicitly excludes from its scope of application investments solely aimed at creating new economic activities.



FOREIGN DIRECT INVESTMENT

Interfederal Screening Committee

The Agreement provides for the creation of an Interfederal Screening Committee (*Interfederale Screeningscommissie / Comité de Filtrage Interfédéral* – the ***ISC***).

The ISC will be responsible for coordinating the application of the FDI screening mechanism. It will be composed of representatives of the federal and regional governments and the communities.

Notification Thresholds

The Agreement provides that foreign investors must notify FDI to the ISC when they, actively or passively, directly or indirectly, through their FDI acquire:

- at least 10% of voting rights in businesses or entities established in Belgium whose activities relate to defence, including dual use products, energy, cybersecurity, electronic communications or digital infrastructure and whose turnover in the financial year preceding the acquisition amounts to at least EUR 100 million; or
- at least 25% of voting rights in businesses or entities established in Belgium and whose activities relate to:
    - physical or digital critical infrastructure for energy, transport, water, health, electronic communications, digital infrastructure, media, data processing or storage, aerospace and defence, electoral infrastructure, financial infrastructure, and terrain and real estate crucial to these sectors;
    - technology and raw materials of crucial importance to (health) safety, defence, public order, military equipment, dual use products and technology (and related IP rights) of strategic importance (e.g., artificial intelligence, robotics, semi-conductors, cybersecurity, air and space travel, defence, energy storage, quantum and nuclear technology);
    - provision of critical inputs, including energy or raw materials or food security;
    - access to sensitive information, personal data, or the opportunity to control such information;
    - private security;
    - media pluralism; or
    - technology of strategic importance in the biotechnology industry, provided that the turnover of the business in the financial year preceding the acquisition amounted to at least EUR 25 million; or
- control in any of the above sectors.

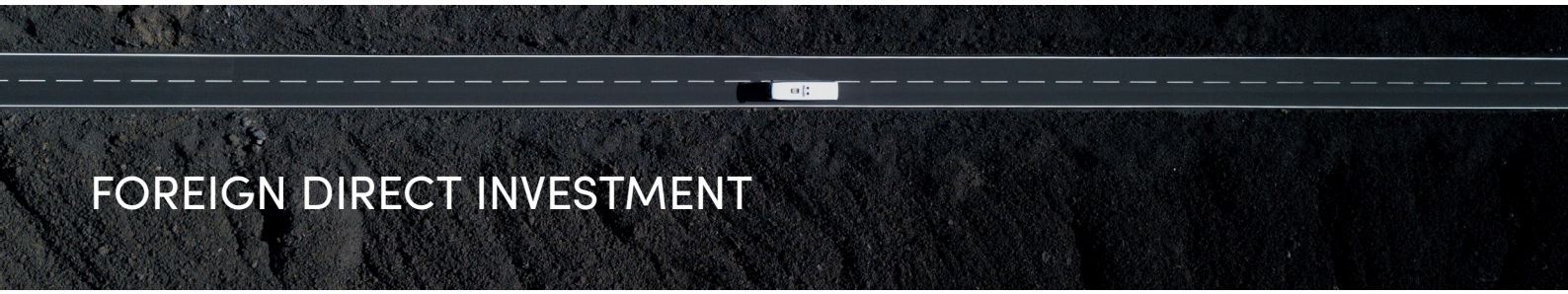
FDI Screening Mechanism

Foreign investors whose FDI meet the notification threshold are required to notify their investment to the ISC. The notification must take place following the conclusion of the agreement but prior to its implementation (*i.e.*, following signing and prior to closing). Foreign investors also have the possibility to notify near-final draft agreements provided that the relevant parties submit a specific declaration confirming their intention to sign the draft without material changes.

The ISC can also launch an *ex officio* review of FDI should one of its members so request. Such *ex officio* review can be launched up to two years following the completion of the FDI, or up to five years in case of indications of bad faith.

The screening mechanism consists of two stages:

- *Verification stage*: during this stage, the members of the ISC review the FDI and verify any indications that the FDI may affect public order, national security or strategic interests. If any member identifies any such indication, the notification will proceed to the second stage of more thorough screening. If no such indication is identified or



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absent a decision to proceed to the second stage prior to the statutory deadlines, the FDI is approved.

- *Screening stage*: The second stage builds on the verification stage. The relevant members of the ISC each prepare a risk analysis and an opinion for their competent minister regarding the final decision. During this stage, the foreign investor can make comments on the draft opinion both in writing and during a hearing before the ISC. In addition, the foreign investor and the members of the ISC concerned may negotiate remedies to mitigate the expected impact of the FDI with a view to its approval.

The screening mechanism is subject to the deadlines introduced by the FDI Regulation. As a rule, the verification and screening stages will take thirty and twenty-eight days. However, these terms are subject to extension or suspension. Should no decision be notified to the foreign investor within the applicable deadline, the FDI is approved.

Following the screening phase, the members of the ISC may either (i) unconditionally approve the FDI; or (ii) approve the FDI subject to remedies; or (iii) prohibit the FDI.

Administrative Fines

Foreign investors may be fined up to 10% of the amount of the FDI if:

- no or incomplete information was provided in the notification or following a request for information by the ISC;
- the requested information was not timely provided; or
- FDI is notified spontaneously within twelve months following its implementation or the ISC has launched an *ex officio* review within that period.

In addition, foreign investors may be fined up to 30% of the amount of the FDI if they:

- fail to notify the FDI (and fail to notify the FDI spontaneously within twelve months following its implementation);
- provide incorrect, distorted, or misleading information in a notification or response to a request for information by the ISC;
- implement or complete the FDI prior to its approval; or
- fail to observe the mitigating remedies.

Judicial Review

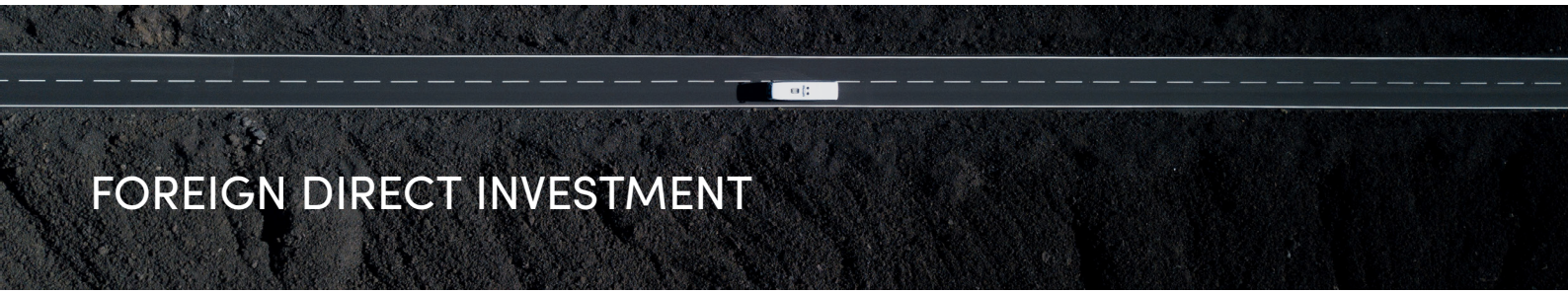
Decisions of the members of the ISC are subject to appeal to the Markets Court (*Marktenhof / Cour des Marchés*) of the Brussels Court of Appeals. Such an appeal does not suspend the decision.

If the Markets Court annuls the decision, the case will be referred back to the ISC where the FDI will be re-examined in a new screening procedure. The Markets Court will have full jurisdiction in decisions imposing administrative fines.

Next Steps

The Bill has been adopted in plenary session of the federal Chamber of Representatives on 9 February 2023. The Agreement still has to be approved by the parliaments of the regions and communities. It will enter into force on the day of publication in the Belgian Official Journal (*Belgische Staatsblad / Moniteur belge*) of the last act by the relevant parliament approving the Agreement (*instemmingsakte / acte d'assentiment*).

The Agreement provides that the obligation to notify FDI will apply as of 1 July 2023 or as of the first day of the month following the entry into force of the Agreement if this happens after 30 June 2023.



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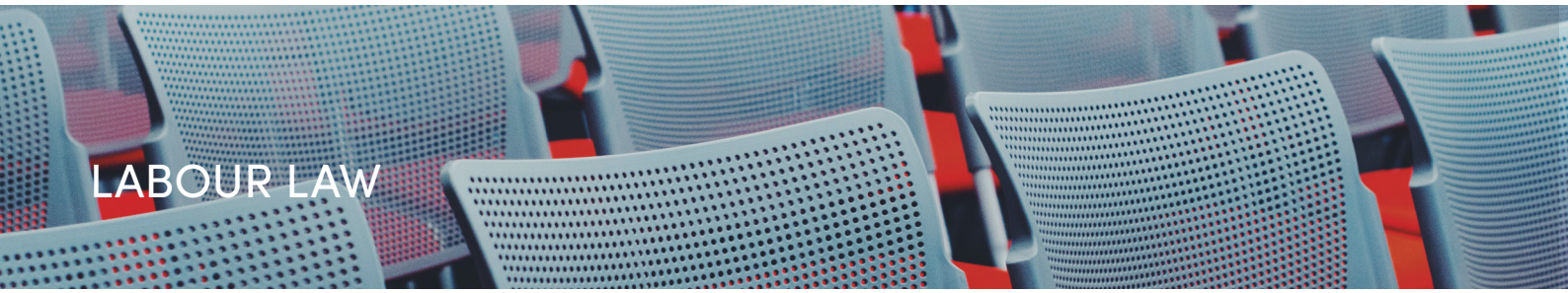
Importantly, the Agreement allows the ISC to launch an *ex officio* review of FDI completed prior to these dates and up to two years following the completion of the FDI, or up to five years in case of indications of bad faith.

The text of the Bill can be found here.



LABOUR LAW

Brussels Labour Court Finds That No Employment Agreement Exists Between Uber and its Drivers

In an 82-page judgment of 21 December 2022, the French language chamber of the Brussels Labour Court (the ***Court***) held that a driver providing services over the online platform Uber does not qualify as an employee, but rather as a self-employed contractor.

Background

On 22 June 2020, Mr. X filed a unilateral request with the Administrative Committee for Regulating Employment Relations (*Administratieve Commissie ter regeling van de Arbeidsrelatie / Commission administrative de règlement de la relation de travail* – the ***Committee***) in view of the uncertainty regarding his contractual relationship with Uber. Mr. X worked as a driver for Uber on the basis an independent services agreement, while he was of the opinion that he was actually employed as an employee. The Committee declared Mr. X's application admissible and well-founded. Uber appealed the Committee's decision to the Court.

Mr. X and the Belgian State acted as defendants in this procedure, while the Belgian Social Security Office (*Rijksdienst voor Sociale Zekerheid / Office national de Sécurité sociale*) voluntarily joined the case, all requesting that the Court should agree with the Committee and qualify the contractual relationship between Uber and Mr. X as an employment agreement.

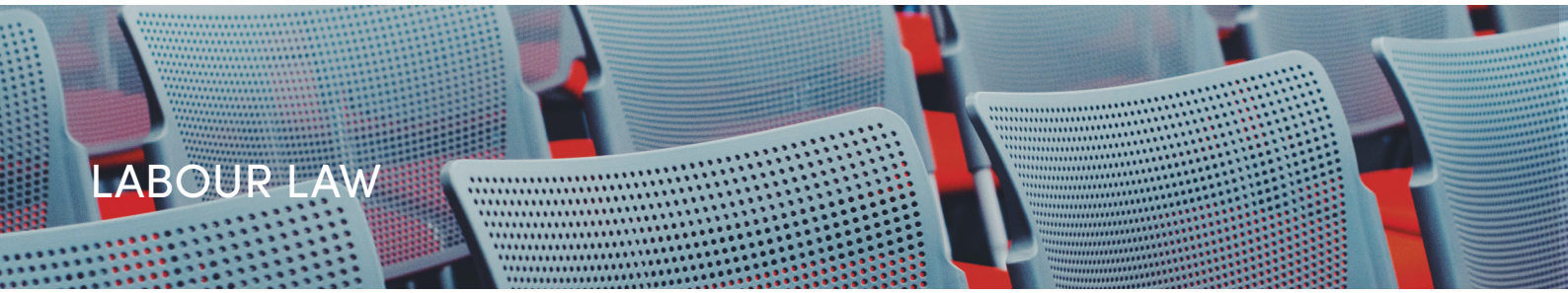
Uber requested that the Committee's decision should be reformed and that the contractual relationship between Uber and Mr. X should be declared to be of an independent nature.

Assessment of Brussels Labour Court – No Employment Agreement

The Court observed that the Law of 27 December 2006 (*Arbeidsrelatiewet / Loi sur la nature des relations de travail* – the ***Law***), as modified by the Law of 25 August 2012, provides that in specific sectors, such as that for passenger transport, the contractual relationship is presumed to be an employment agreement if it is found that more than half of the socio-economic criteria provided for in Article 372/2, §1 of the Law are satisfied. That presumption is rebuttable.

In this case, the Court found that the minimum of five out of the nine criteria were met, so that Mr. X's services were presumed to be performed under an employment agreement until proof to the contrary. The Court noted that:

- Mr. X bears no financial or economic risk given the lack of any personal investment in Uber or any participation in Uber's profit and losses;
- Mr. X has no responsibility or decision-making power regarding Uber's financial resources: the fact that Uber drivers are able to decide in which locations they drive, and thus are able to influence indirectly the service fees accruing to Uber, is insufficient to establish that Mr. X has a responsibility or decision-making power over Uber's financial resources;
- Mr. X has no decision-making power regarding Uber's purchasing policy;
- Mr. X has no decision-making power regarding Uber's pricing policy: according to the service agreement between Uber and Mr. X, Uber determines the 'User Fee' on the basis of a base rate and according to distance travelled. Uber also has the right to change those fees at any time in its sole discretion;
- The mobile application "Uber" should be considered as equipment made available to Mr. X to perform his work.



LABOUR LAW

The Court then went on to establish whether the resulting presumption of employment could be rebutted. It looked for that purpose at the general criteria of Article 333 of the Law. On that basis, the Court found that:

- Mr. X and Uber had expressed their desire to enter into an agreement for self-employed work;
- Mr. X is free to organise his working time: the driver is completely free to log in and out of the Uber platform and to accept or refuse transport services whenever he wants. The fact that an algorithm assigns offers to drivers does not restrict their freedom to manage their working time. Drivers can see and determine the exact distance of the route, while always having the option to cancel an accepted ride;
- Mr. X is free to organise his work: drivers are free to accept or decline any offer and can even cancel an offer after acceptance. Moreover, drivers can freely decide the route they want to take.
- The fact that Uber sets the prices is of no relevance, considering that drivers are free to accept or refuse offers.
- It is necessary for Uber to track drivers to provide the transport services.
- Drivers are not bound by any exclusivity towards Uber and are free to perform services elsewhere.
- Uber does not exercise hierarchical control over Mr. X: it is logical that Uber follows up with evaluations provided for by customers so as to maintain the level of professionalism and to adhere to safety requirements that drivers knew and accepted. Therefore, terminating the employment relationship in case of non-compliance does not amount to a disciplinary sanction and a form of hierarchical control.

On this basis, the Court considered that the presumption of the existence of an employment agreement had been rebutted. Accordingly, the Court declared that the nature of the contractual relationship between Mr. X and Uber is one of an independent nature.

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