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February 2018

VBB on Belgian Business Law

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COMPETITION LAW

BCA Conditionally Clears Volvo Trucks Merger

On 31 January 2018, the Competition College (*Mededingingscollege/Collège de la Concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/ Autorité belge de la Concurrence*) (the "Competition College") conditionally authorised the acquisition by Volvo Group Belgium of specific business activities from Kant. Kant is an authorised distributor and maintenance service provider for Volvo and Renault vehicles in Belgium and The Netherlands. Volvo Group Belgium agreed to acquire the following business activities from Kant: all activities relating to Volvo trucks and buses in Belgium; all activities relating to Volvo and Renault trucks and buses in The Netherlands; the repair of trailers in Belgium; the rental of trucks in Belgium; and the activities relating to Volvo Penta motors (marine engines, industrial engines and generators).

The Competition College found that the concentration would limit intra-brand competition on the market for repair and maintenance services of Volvo commercial vehicles in the local areas of the Kant garages in Antwerp, Beerse and Mechelen.

In order to remedy this concern, Volvo Group Belgium offered two main commitments. First, it committed to appoint an additional authorised Volvo repairer in the area of Mechelen. The appointment of an additional authorised dealer would create a credible independent alternative to Kant's Volvo Truck Centre in Mechelen. The second commitment offered by Volvo Group Belgium is the cessation of all repair and maintenance activities relating to Volvo trucks in the Kant garage of Sint-Niklaas. It further committed not to open a new garage within a 15 kilometre radius of Sint-Niklaas.

Subject to these commitments, the Competition College approved the acquisition.

CONSUMER LAW

Court of Justice of European Union Clears Belgian Prohibition on Advertising in Relation to Plastic Surgery under Unfair Commercial Practices Directive

By order of 26 October 2017, the Court of Justice of the European Union (the "ECJ") ruled that the Belgian prohibition on advertising for procedures relating to plastic surgery or non-surgical plastic medicine is compatible with Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the "Directive") (ECJ, 26 October 2017, Case C-356/16, *Wamo BVBA and Luc Cecile Jozef Van Mol*).

The ECJ delivered its order in response to a request for a preliminary ruling from the Dutch-language Brussels Court of First Instance (*Nederlandstalige Rechtbank van Eerste Aanleg te Brussel/Tribunal de Première Instance néerlandophone de Bruxelles* – the "Court"). The Court had addressed the ECJ in criminal proceedings brought against Wamo BVBA, an operator of clothing stores under the commercial name ZEB ("ZEB"), and its managing director. ZEB was accused of having disseminated advertising for procedures relating to plastic surgery to its customers (both online and in paper format) in breach of Article 20/1 of the Law of 23 May 2013 regulating the qualifications required to perform procedures relating to non-surgical plastic medicine and plastic surgery and regulating the advertising and information relating to such procedures (*Wet van 23 mei 2013 tot regeling van de vereiste kwalificaties om ingrepen van niet heelkundige esthetische geneeskunde en esthetische heelkunde uit te voeren en tot regeling van de reclame en informatie betreffende die ingrepen/Loi du 23 mai 2013 réglementant les qualifications requises pour poser des actes de médecine esthétique non chirurgicale et de chirurgie esthétique et réglementant la publicité et l'information relative à ces actes* - the "Law"). Article 20/1 of the Law provides for a general prohibition on disseminating advertising for procedures relating to plastic surgery or non-surgical plastic medicine.

The Court had requested the ECJ to assess whether Article 20/1 of the Law, which seeks to protect public health and the dignity and integrity of the professions of plastic surgeon and plastic doctor, is compatible with the Directive.

Reiterating the terms of its *Vanderborght* judgment of 4 May 2017, in which the ECJ had ruled that the Belgian prohibition on advertising for dental care is compatible with the Directive (*See, this Newsletter, Volume 2017, No. 5, p. 3*), the ECJ answered in the affirmative. It started its analysis by repeating that the term "*commercial practice*", as defined in Directive 2005/29/EC, has a very broad scope and that the advertising of procedures relating to plastic surgery qualifies as a "*commercial practice*". However, it continued that, pursuant to Articles 3(3) and (8) of the Directive, this Directive is without prejudice to: (i) EU or national rules relating to the health and safety aspects of products and services; and (ii) the ethical codes of conduct or other specific rules governing regulated professions. Noting that the Belgian general prohibition on disseminating advertising for procedures relating to plastic surgery or non-surgical plastic medicine seeks to protect public health and the dignity and integrity of the professions of plastic surgeon and plastic doctor, the ECJ concluded that the prohibition is compatible with the Directive.

It is important to note that, contrary to what was the case in the *Vanderborght* case and somewhat surprisingly, the ECJ was not asked to examine whether the prohibition is compatible with: (i) Directive 2000/31/EC of 8 June 2000 on specific legal aspects of information society services, in particular electronic commerce in the Internal Market; and (ii) the freedom to provide services. In view of the *Vanderborght* judgment, it is questionable whether the prohibition at issue here is compatible with these sets of rules (*See, this Newsletter, Volume 2017, No. 5, p. 3*).

DATA PROTECTION

Brussels Court Finds Facebook Cookies in Breach of Data Protection Laws and Imposes EUR 250,000 Daily Penalty to End Infringement

On 16 February 2018, the Dutch-language Brussels Court of First Instance (*Nederlandstalige Rechtbank van Eerste Aanleg te Brussel/Tribunal de Première Instance néerlandophone de Bruxelles* – the "Court") handed down a significant judgment finding Facebook's use of cookies to be in breach of Belgian privacy laws. The Court ordered Facebook to: (i) stop placing various infringing cookies on users' devices; (ii) stop collecting information from these cookies; and (iii) cease providing any 'misleading' information on how the company uses cookies. In addition, the Court demanded that Facebook should delete any infringing information that had already been collected. If Facebook fails to comply with the order, it will have to pay a daily penalty of EUR 250,000.

The case pitted Willem Debeuckelaere, in his capacity as President of the Belgian Privacy Commission (*Commissie voor de bescherming van de persoonlijke levenssfeer/ Commission de la protection de la vie privée* - the "claimant") against Facebook Ireland Limited, Facebook Inc. and Facebook Belgium BVBA ("Facebook"). The Privacy Commission intervened in the case to support the position of its President.

This case on the merits follows earlier summary proceedings between the parties. In these summary proceedings, the injunction imposed on Facebook at first instance (which caused Facebook to close its website to all non-registered users in Belgium) was overturned on appeal, largely on procedural grounds (*See, this Newsletter, Volume 2016, No. 7, p.7*). However, the scope of the new proceedings on the merits is broader than that which was at issue during the summary proceedings and concerns not only the registration by Facebook of the browsing histories of non-members, but also of its members. In addition, these proceedings concern the use of the so-called "c_user", "xs", "sb", "fr" and "lu" cookies and "pixels", in addition to the "datr" cookie, which was the main subject of the summary proceedings.

Territorial Competence of Court

In the summary proceedings, the Court of Appeal had refused the territorial competence of the court to rule over Facebook Inc. and Facebook Ireland. By contrast, the Court in the case on the merits accepted territorial jurisdiction over the three Facebook entities. The Court held that it was necessary for the Privacy Commission to be able to bring an action before the national court in order to have effective supervisory powers. Under Article 32, §3 of the Belgian Law of 8 December 1992 protecting privacy regarding processing of personal data (*Wet tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens/ Loi relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel* - the "DPL"), the President of the Privacy Commission can bring actions for infringement of the DPL before the Court.

Relying on the *Google Spain* case (C-131/12) (*See, this Newsletter, Volume 2014, No. 5, p. 6*), the Court added that the activities of the Facebook group were linked with those of Facebook Belgium BVBA. The Court concluded that the processing of personal data took place in the context of the activities of Facebook in Belgium, and as a result, falls within the territorial scope of the DPL. Since the DPL authorises the President of the Privacy Commission to bring an action before the Court, the Court accepted territorial jurisdiction for this case.

Merits: No Informed Consent

In assessing the merits of the case, the Court held that Facebook could only place its cookies (and similar technologies, such as pixels) and access the information collected through the use of these cookies, subject to the prior informed consent of the data subjects. The Court added that Facebook bears the burden of proving that such informed consent has been secured.

In the case at hand, the data subjects are users as well as non-users of the Facebook social network. This is because Facebook also places cookies on devices of visitors of third party websites which use Facebook plugins, such as news websites featuring Facebook "like" buttons.

In its defence, Facebook referred to its use of a cookie banner on its own website. As regards cookies (and similar technologies) placed on third party websites, it explained that it relies on these third parties' cookie acceptance mechanisms.

However, in assessing the information provided by Facebook through its own cookie banner, and the cookie policy to which this banner refers, the Court found that the policy was insufficiently clear on the processing operations. Indeed, the Court held that users could not reasonably be expected to understand that their behaviour would be tracked to the extent that it was based on the information provided. Furthermore, the Court held that the information was incomplete as it failed to inform data subjects about their rights to access and rectify their data.

In addition, the Court considered that the mechanism for collecting consent did not ensure "free, specific and unambiguous" consent from the data subject. The Court found that Internet users only had a choice to accept all cookies or none at all. Moreover, users who had opted out of cookies through their browser settings could still be targeted by Facebook.

As regards third party websites, the Court followed the reasoning of the Privacy Commission that Facebook determines the "purposes and means" of its use of cookies on third party websites and that Facebook therefore must be regarded as a "controller" of these cookies. The Court held that, as a controller, Facebook had taken insufficient measures to ensure that the third party website holders obtained consent for the use of Facebook's cookies.

All of this formed the basis for the Court's order which Facebook said it would appeal.

INTELLECTUAL PROPERTY

Second Advocate General Opinion in Louboutin Red Sole Trade Mark Case

On 6 February 2018, Advocate General Szpunar (the "AG") issued a second opinion in the dispute opposing Christian Louboutin ("Louboutin") against Van Haeren Schoenen BV ("Van Haeren") (*See, this Newsletter, Volume 2017, No. 6, pp. 10 and 11*) (the "Opinion").

The question referred to the Court of Justice of the European Union (the "ECJ") in this case is that of the validity of the Louboutin red sole as a trade mark. In particular, the referring court asked the ECJ whether the notion of 'shape' within the meaning of Article 3(1)(e)(iii) of Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks (the "Directive") is limited to the three-dimensional properties of the goods or if it includes other, non three-dimensional properties of the goods such as their colour. The issue is of importance as this provision states that signs consisting exclusively of the shape which gives substantial value to the goods do not qualify for registration or are liable to be declared invalid.

After the AG's first opinion, the case was in October 2017 assigned to the Grand Chamber of the ECJ. After hearing the interested parties, the ECJ invited the AG to present a new opinion on the issue.

In the Opinion, the AG maintained his original position that the Louboutin trade mark should be considered as a sign consisting of the shape of the goods (so that protection is sought for a colour in relation to that shape), rather than as a trade mark consisting of a colour *per se*.

The AG reasoned that, first, the shape of the sole is not wholly abstract but limited in space. Second, the colour red can hardly perform the essential function of identifying its proprietor when that colour is used *separately* from the shape of the sole. Hence, the shape matches the spatial delimitation of the colour.

The AG then clarified that the above conclusion is not altered by the new classification of "position marks" provided for in Implementing Regulation 2017/1431 on the applicability of Article 3(1)(e)(iii) of Directive 2008/95 (applicable as of 1 October 2017). A position mark is a trade mark consisting of the specific way in which the mark is placed or affixed on the product. For the AG, the classification of a sign as a 'position mark' does not exclude that mark from falling within the scope of a ground for refusal or invalidity contained in Article 3(1)(e)(iii) of the Directive.

Similarly, the AG reiterated his previous view that the reference to "another characteristic of the product" added to Article 3(1)(e)(iii) of the Directive by Article 4(1)(e)(iii) of Directive 2015/2436 to approximate the laws of the Member States relating to trade marks (whose deadline for implementation is 14 January 2019) is merely a formal indication clarifying the law as it was. The AG added that the legal regime applicable to signs under both instruments is, according to the European legislator, identical.

Additionally, the AG replied to the argument put forward by Louboutin that because aesthetic characteristics vary in line with fashion trends, it is not essential that they remain available on a lasting basis. The AG considered that the inherent dynamic of the aesthetic characteristics of a product which give substantial value to that product does not impact his conclusion. The AG added that, although the public's perception of a shape could potentially be relevant in assessing whether the shape gives substantial value to the product at issue, the reputation of the trade mark or its owner does not.

The AG then offered additional considerations in the event that Article 3(1)(e)(iii) of the Directive 2008/95 would not apply. Referring to the *Libertel* case of the ECJ (case C-104/01), the AG explained that, when analysing the distinctive character of a sign inseparable from the appearance of a product, attention must be paid to the general interest that the availability of colours should not be unduly restricted, especially since the number of colours (and shades) that can be applied to the sole of a shoe in order to identify its origin is limited.

Lastly, the AG reiterated that the concept of a shape which 'gives substantial value' to a product only relates to the intrinsic value of the shape, so that no account has to be taken of the attractiveness of the product flowing from the reputation of the trade mark or its owner. However, the AG

also specified that the classification of the trade mark at issue, and in particular whether the red colour of the sole gives substantial value to the Louboutin shoe, is a factual assessment to be made by the referring court.

The ECJ is expected to hand down its judgment in a few months' time.

LABOUR LAW

Employment Law Reforms Following Implementation of Summer Agreement (Part II)

The measures contained in the so-called Summer Agreement ("the Agreement") were incorporated in part in the Programme Law of 25 December 2017 ("the Programme Law") (*See, this Newsletter, Volume 2017, No.12*). On 15 January 2018, Parliament adopted a second law incorporating additional measures of the Agreement, *i.e.* the Law regarding Various Provisions in Relation to Work (the "Law of 15 January 2018") (*Wet van 15 januari 2018 houdende diverse bepalingen inzake werk/ Loi portant des dispositions diverses en matière d'emploi*).

The Law of 15 January 2018 was published on 5 February 2018 and contains the following noteworthy items:

1. Law regarding Collective Bargaining Agreements (CBA's)

The Law of 15 January 2018 provides for a guaranteed continuation of the wage and working conditions for employers and employees in case of a transfer from one Joint (sub) Committee ("J(S)C") to another. The conditions will continue to apply in the following events: (i) a change in the scope of the competent J(S)C; (ii) the abolition of the competent J(S)C; or (iii) the creation of a new joint JC.

This guarantee of continuity of sectoral wage and employment conditions applies to employees employed before the transfer as well as employees recruited after the transfer, until a special CBA is entered into on this subject by the new J(S)C. This should happen before 1 January 2023.

2. Economic Unemployment

The performance of the employment contract can only be suspended for economic reasons if the lack of work is independent from the employer's will. As a result, if the employer outsources the work to third parties, the performance of the employment contract cannot be suspended for economic reasons. Pursuant to the Law of 15 January 2018, the non-compliant employer must pay normal compensation to the employee for the days during which it outsourced the work that is normally performed by the employee.

3. Electronic Signature for Conclusion of Employment Contracts and Electronic Archiving of Social Documents

As the rules governing the conclusion of electronic employment contracts is too limited in the light of the requirements of the eIDAS Regulation (only an employment contract signed by means of the electronic identity card is considered equivalent to a paper employment contract), Parliament extended the circumstances under which an employment contract can be signed electronically.

The electronically signed employment contract will be equated to a paper employment contract, signed by means of a handwritten signature, on condition that the electronic signing takes place:

- by a qualified electronic signature or a qualified electronic seal that meets the conditions of the eIDAS Regulation; or

- by another electronic signature that ensures the identity of the parties, their consent to the content of the agreement and the continuing integrity of that agreement. In the event of a dispute, the burden of proof lies with the employer who must demonstrate that the electronic signature satisfies these requirements.

In addition, the electronically signed employment contracts and specific social documents can be stored and sent electronically as part of an individual employment relationship. This is to be effected by either an electronic archiving service or an employer who operates such a service.

The date of entry into force of these provisions will be determined by Royal Decree and will depend on the availability on the market of qualifying services.

4. Replacement of Incapacitated Employee who Gradually Resumes Work

The Law of 15 January 2018 introduces the possibility of partially replacing an incapacitated employee by an employee with a replacement contract if, upon the advice of the advising physician of his health insurance fund, the first employee resumes work on a part-time basis.

5. Mystery Calls

Social inspectors are given specific powers to identify "discriminatory practices" (e.g. discrimination in recruitment) through data mining and data matching techniques. The social inspectors will be able to carry out anonymous tests at companies where there appear to be objective indications of discrimination. Mystery calls are intended to reveal instances of discrimination by the suspected perpetrator, but not to provoke or reinforce them. In order to prevent a witch hunt, the prior permission of the Labor Auditor or the Public Prosecutor will be a condition for the use of mystery calls.

6. Outplacement

It is already the rule for employees with a notice period of at least 30 weeks who receive an indemnity in lieu of notice, that 4 weeks' salary is deducted from their indemnity in lieu of notice as compensation for a right to outplacement (current system). For employees for whom outplacement provides no added value (*i.e.*, employees whose state of health prevents them from participating in the outplacement), the employer must no longer offer outplacement. These employees will therefore be entitled to the full indemnity in lieu of notice.

LITIGATION

Royal Decree Grants Jurisdiction to BIPT to Hear Disputes between Telecommunications Operators

On 18 February 2018, a new Royal Decree on dispute resolution between telecommunications operators entered into force (*Koninklijk Besluit van 26 januari 2018 tot vastlegging van de procedure voor geschillenbeslechting vermeld in artikel 4 van de wet van 17 januari 2003 betreffende de rechtsmiddelen en de geschillenbehandeling naar aanleiding van de wet met betrekking tot het statuut van de regulator van de Belgische post- en telecommunicatiesector/Arrêté royal du 26 janvier 2018 fixant la procédure de règlement de litiges mentionnée à l'article 4 de la loi du 17 janvier 2003 concernant les recours et le traitement des litiges à l'occasion de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges* – the "Royal Decree").

The Royal Decree now grants the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie/Institut belge des services postaux et des télécommunications* - the "BIPT") jurisdiction to hear disputes between telecommunications operators with respect to interconnection issues, leased lines and access to the local loop. This task was previously within the remit of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence*).

The Royal Decree details the procedure before the BIPT. The BIPT should give its decision within four months following the filing of an application by a plaintiff. Its decision can be subject to an appeal before the Market Court within the Brussels Court of Appeal.

Bill to Promote Alternative Dispute Resolution Mechanisms

On 5 February 2018, the Belgian government submitted to Parliament a draft bill (the "Bill") to promote alternative dispute resolution mechanisms (*Wetsontwerp houdende diverse bepalingen inzake burgerlijk recht en houdende wijziging van het Gerechtelijk Wetboek met het oog op de bevordering van alternatieve vormen van geschillenoplossing/Projet de loi portant dispositions diverses en matière de droit civil et portant modification du Code judiciaire en vue de promouvoir des formes alternatives de résolution des litiges*).

The promotion of alternative dispute resolution mechanisms is seen by the Belgian government as a way to decrease the caseload of the courts. If the Bill is adopted, mediation will occur more frequently.

The key aspects of the Bill are as follows:

- Judges, lawyers and bailiffs will be compelled to act in ways that ensure the promotion of amicable settlements. In particular, lawyers will be required to inform their clients of the alternative dispute resolution mechanisms available to them;
- Judges will be allowed to inquire whether the parties to a dispute have attempted to settle their dispute amicably;
- Judges will be allowed to order the parties to a dispute to attempt to solve their dispute through mediation and they will have the power to impose on such parties a requirement to attend an information session on mediation;
- Mediators will be better recognised and protected and disciplinary measures as well as the Mediators' Code of Ethics will be reinforced;
- The role of the Federal Mediation Commission will be strengthened in order to allow this Commission to promote mediation and oversee the accreditation process for mediators;

Finally, the Bill aims to promote a new form of alternative dispute mechanism known as collaborative law. A new dedicated section in the Judicial Code will bolster the voluntary and confidential settlement of disputes through interest-based negotiation.

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