"Van Bael & Bellis' 'responsive and knowledgeable team' gives very good advice, both at EU and domestic level."

Legal 500 2017

February 2019

VBB on Belgian Business Law

Highlights

COMPETITION LAW
Abuse of Significant Dominant Position Involving Economic Dependence Will Soon be Actionable in Belgium
Page 3

CONSUMER LAW
Court of Justice of European Union Clarifies Duty to Provide Information on Consumer's Right of Withdrawal in Distance Contracts
Page 6

CORPORATE LAW
Adoption of New Belgian Companies' and Associations' Code
Page 8

DATA PROTECTION
European Data Protection Board Issues Guidelines on Codes of Conduct under General Data Protection Regulation
Page 9

INTELLECTUAL PROPERTY
Further Modernisation of Benelux Trade Mark Law
Page 15

LABOUR LAW
Draft Interprofessional Agreement 2019 – 2020
Page 16

STATE AID
General Court Annuls Commission Decision Classifying Belgian "Excess Profit" Tax System as Illegal Tax Scheme
Page 17

Renowned competition and trade boutique which continues to gain visibility in M&A and private equity transactions, with strong cross-border capabilities, earning praise for its commitment and management of global transactions.

Chambers Europe 2017

Topics covered in this issue

COMPETITION LAW 3
CONSUMER LAW 6
CORPORATE LAW 8
DATA PROTECTION 9
INTELLECTUAL PROPERTY 12
LABOUR LAW 16
STATE AID 17

vbb@vbb.com
www.vbb.com

VAN BAEL & BELLIS

Table of contents

COMPETITION LAW 3

Abuse of Significant Dominant Position Involving Economic Dependence Will Soon be Actionable in Belgium 3

Belgian Competition Authority Closes Several Investigations into Allegedly Restrictive Practices in Travel Sector and Cargo Handling Sector of Flemish Ports 4

Draft Bill on Reform of Belgian Competition Law Moves Forward 4

CONSUMER LAW 6

Court of Justice of European Union Clarifies Duty to Provide Information on Consumer's Right of Withdrawal in Distance Contracts 6

CORPORATE LAW 8

Adoption of New Belgian Companies' and Associations' Code 8

DATA PROTECTION 9

European Data Protection Board Issues Guidelines on Codes of Conduct under General Data Protection Regulation 9

European Data Protection Board clarifies consent under Clinical Trial Regulation and General Data Protection Regulation 10

INTELLECTUAL PROPERTY 12

Trade Mark Registration of STREAMS Rejected for Being Descriptive 12

General Court Annuls EUIPO'S Refusal to Register Figurative Mark 'Chiara Ferragni' as EU Trade Mark 13

Further Modernisation of Benelux Trade Mark Law 15

LABOUR LAW 16

Draft Interprofessional Agreement 2019 – 2020 16

STATE AID 17

General Court Annuls Commission Decision Classifying Belgian "Excess Profit" Tax System as Illegal Tax Scheme 17

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

COMPETITION LAW

Abuse of Significant Dominant Position Involving Economic Dependence Will Soon be Actionable in Belgium

On 7 March 2019, the Committee for Economic Affairs of the federal Chamber of Representatives adopted a draft bill modifying the Code of Economic Law to introduce as an actionable offence the abuse of a significant dominant position in a situation of economic dependence (*Wetsvoorstel houdende wijziging van het Wetboek van Economisch Recht met betrekking tot misbruiken van economische afhankelijkheid, onrechtmatige bedingen en oneerlijke marktpraktijken tussen ondernemingen / Proposition de loi modifiant le Code de droit économique en ce qui concerne les abus de dépendence économique, les clauses abusives et les pratiques du marché déloyales entre entreprises* – the "Bill").

The Bill was introduced more than three years ago (in November 2015) and seeks to establish an additional competition law infringement (*See, this Newsletter, Volume 2015, No. 11, p. 7*). The Bill has since been subject to important changes and its scope has been significantly extended. The latest version of the Bill contains the following novelties:

- *Abuse of a significant dominant position* - The notion of abuse of a significant dominant position is defined as abusing a situation of economic dependence of a business that could affect competition on the Belgian market or a significant part thereof.

- *A situation of economic dependence* - in turn means a position in which a business is subject to one or more businesses able to impose obligations or conditions on the latter that would not prevail in normal circumstances, due to the absence of a reasonable and equivalent alternative, within a reasonable time period and under reasonable conditions and costs.

  The Bill lists the following situations that could constitute *abuses*:

  - refusing to sell, buy or apply other transactional conditions;
  - directly or indirectly imposing unreasonable purchase or sales prices or other unreasonable contractual conditions;
  - limiting production, distribution or technical development;
  - applying different conditions to equivalent services affecting the competitive position of the other party;
  - tying certain performances to the conclusion of agreements which are not connected thereto according to their nature or market practices.

- *Fines and penalty payments* - The Bill specifies that businesses which abuse their significant dominant position can be subject to fines of up to 2% of their yearly turnover and penalty payments up to 2% of their daily turnover.

- *Protection against unfair practices in a business to business ("B2B") relationship* - The recent amendments considerably extend the scope of the Bill. In addition to introducing the abuse of a significant dominant position into Belgian competition law, the Bill includes the following protection mechanisms for businesses against unfair practices in a B2B context:

  - Significantly unbalanced contract terms - Provisions in contracts that, solely or together with other provisions in the contract, create a significant unbalance in the rights and obligations of the parties will be unlawful and void. In this respect, the Bill introduces blacklists and grey lists of contractual provisions that are always unlawful or that are presumed to be unlawful in B2B contracts.

  - Unfair, misleading and aggressive practices - The Bill extends the scope of unfair practices in a B2B context to misleading practices which go beyond the current notion of misleading comparative advertising. Practices are considered misleading if they are based on incorrect information, falsehoods, or if they in actual fact mislead the other party, while correct.

In addition, the Bill extends the scope of unfair practices in a B2B context to aggressive practices. Practices are considered aggressive if they significantly limit businesses' freedom of action in relation to a product using intimidation, force, violence or inappropriate manipulation.

- *Mandatory law and criminal sanctions* - Businesses which engage in unfair practices in a B2B context can be subject to injunctions and criminal fines of up to EUR 80,000. These protection mechanisms are expressly identified as overriding mandatory provisions within the meaning of the Rome I Regulation, which implies that the parties cannot depart from them in their contract.

The Bill is scheduled to be adopted in the plenary session of the Chamber of Representatives on 21 March 2019. An initial vote has already taken place on 14 March 2019.

Belgian Competition Authority Closes Several Investigations into Allegedly Restrictive Practices in Travel Sector and Cargo Handling Sector of Flemish Ports

In the course of 2006, the Service of Competition Prosecutors (*Auditoraat / Auditorat*) of the Belgian Competition Authority ("BCA") opened several investigations into (i) the cargo handling sector in the Flemish ports for the use of a common cost index allegedly leading to price coordination; and (ii) the travel agency sector for alleged agreements between travel agents regarding fuel admissions, service fees, cooperation conditions between tour operators and travel agents and cancellation conditions, fees and insurance.

Several dawn raids took place in the context of these investigations. In the course of 2011-2012, the Service of Competition Prosecutors submitted so-called "reasoned reports" (the equivalent of the current statement of objections) to the former Competition College (*Mededingingscollege / Collège de la concurrence*) under the old Belgian Competition Act. Following the reform of Belgian competition law in 2013 (which, inter alia, now allows for direct appeals against dawn raid decisions – see Article IV.79 CEL), several of the undertakings and associations concerned filed an appeal to the Brussels Court of Appeal to challenge the conditions in which the dawn raids had been organised.

On 18 February 2015, the Brussels Court of Appeal held that the dawn raids were illegal since they had taken place without prior judicial authorisation. Consequently, the results of the dawn raids could not be used for the purpose of the investigations. On 26 April 2018 the Supreme Court confirmed the judgment of the Brussels Court of Appeal.

In view of these judgments, the BCA has now closed its investigation because of a lack of evidence and the application of the statute of limitations.

Draft Bill on Reform of Belgian Competition Law Moves Forward

On 16 November 2018, the Council of Ministers adopted a draft Bill (the "Draft Bill") bringing about a wholesale change of the competition law provisions of the Code of Economic Law ("CEL") (*see, this Newsletter, Volume 2018, n° 11, p. 3*). When the government became a caretaker government a few weeks later, the Draft Bill seemed moribund. However, members of parliament recently converted it into a private members' bill which was introduced in the federal Chamber of Representatives at the end of February 2019. It is scheduled for review by the Chamber's committee for economic affairs on 19 March 2019 and may still be adopted and become law before the Chamber will be dissolved.

The Draft Bill will not bring about major substantive or procedural changes to the current competition rules and will also maintain the prevailing institutional architecture. Still, a new text will replace in full Book IV of the CEL entitled "Protection of Competition". New definitions will also be added to Book I of the CEL. Finally, the Draft Bill will modify Book XV of the CEL which governs the enforcement of laws.

Despite its ostensibly modest objective, the Draft Bill thus constitutes another major change of the Belgian competition rules and the question arises whether the legislative zeal at its basis is really justified by the practical problems which the Draft Bill is said to address. Time will tell.

The following novelties are noteworthy:

- *Increased cap on fine* – The maximum amount of fines that the BCA can impose will be increased from 10% of the Belgian turnover of the firm concerned to 10% of its worldwide turnover. This is in line with a requirement imposed by the new "ECN+ Directive" which recently became law. The new ceiling for fines will only apply in future on the basis of a cessation of the competition law infringement before the date of entry into force of the Draft Bill. Additionally, a specific transitory regime will be provided for.

- *Competition infringements by individuals* – Unless the individual should be regarded as a firm, an individual will only be found in breach of the competition rules if there is a finding of infringement against the firm as well. An exception applies if that firm no longer exists. Additionally, the competition rules applying to natural persons only extend to cartel-like conduct and also expressly cover negotiations, including aborted discussions.

- *Commitments in behavioural cases* – The competition prosecutor ("*auditeur*"/ "*auditeur*") will have the power to terminate formally proceedings in response to commitments offered by the party under investigation or a defence mounted (this is currently the exclusive right of the Competition College).

- *New rules governing request for interim measures* – The Competition College will be expressly required to balance all interests at stake when assessing the merits of a request for interim measures. The new rules also address lacunae in the existing rules, such as a ban on the plaintiff to submit further arguments and exhibits except if expressly authorised to do so in order to respond to specific arguments in support of the defence.

- *Dawn Raids* – The investigating magistrate for Brussels (Dutch- or French-language court of first instance) will be exclusively competent to authorise on-site inspections on the entire Belgian territory.

- *New rules governing confidentiality before the Brussels Court of Appeal (Market Court)* – The Market Court will be given the express task to protect confidential information. It will have a number of instruments to achieve this goal, including the power to require the parties to produce non-confidential versions of exhibits and expert summaries of reports; and the ability to hold non-public hearings and create access to documents on a need-to-know basis.

- *Detailed new language rules.*

CONSUMER LAW

Court of Justice of European Union Clarifies Duty to Provide Information on Consumer's Right of Withdrawal in Distance Contracts

On 23 January 2019, the Court of Justice of the European Union ("ECJ") handed down its judgment in case C-430/17, *Walbusch Walter Busch*, in which it clarifies the scope of a trader's duty of information in distance contracts with consumers pursuant to Directive 2011/83/EU of 25 October 2011 on consumer rights (the "Consumer Rights Directive").

The facts of the case date back to 2014 when Walbusch Walter Busch ("Walbusch"), a clothing retailer, distributed an advertising leaflet with a detachable mail order coupon as a supplement to various newspapers and magazines. The coupon contained specific information about the trader, as well as information about the consumer's right of withdrawal coupled with a reference to a website link giving access to the model withdrawal form.

The Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV, a consumer association, submitted an application to the Landgericht Wuppertal (Wuppertal Regional Court, Germany) for an order stopping the publication of that leaflet as it considered that the information provided for on the leaflet did not satisfy the formal information requirements relating to the consumer's right of withdrawal in distance contracts as set out in Article 6(h) of the Consumer Rights Directive.

Having made its way up through the national court system, the dispute eventually reached the Bundesgerichtshof (Federal Court of Justice, Germany) which stayed the proceedings and referred several questions on the scope of the duty to provide information in distance contracts to the ECJ in order to obtain a preliminary ruling.

Article 6(1) of the Consumer Rights Directive provides that in distance or off-premises contracts, or any corresponding offers, the trader must provide the consumer with specific pre-contractual information relating to that contract or offer in a clear and comprehensible manner. If there is a right of withdrawal, Article 6(1)(h) of the Consumer Rights Directive requires the trader to provide the consumer with the model withdrawal form set out in Annex I(B) to the Directive.

However, in the event that the contract is concluded through a means of distance communication which allows for only limited space or time to display the information, Article 8(4) of the Consumer Rights Directive only requires the trader to provide the consumer in plain and intelligible language with specific pre-contractual information, including the information concerning the right of withdrawal, in a way that is appropriate to the means of distance communication used.

The key question in the case before the ECJ was whether Walbusch was obliged to provide all information listed in Article 6(1)(h) of the Consumer Rights Directive in relation to the consumer's right of withdrawal or whether it could benefit from the less stringent regime of Article 8(4). In other words, does limited space mean that traders can just mention the existence of the right of withdrawal, without including any information on the contents and exercise of that right and without attaching the model withdrawal form?

The ECJ pointed out that the purpose of the Consumer Rights Directive is to afford consumers, in distance contracts, extensive protection by ensuring that they are informed and by conferring on them a number of rights. According to the ECJ, the pre-contractual information is of fundamental importance for a consumer since it is on the basis of that information that the consumer decides whether he or she wishes to be contractually bound to the trader.

Referring to recital 36 of the Consumer Rights Directive, the ECJ held that, in the case of distance contracts, the information requirements should be adapted to take into account the technical constraints of specific media, such as restrictions on the number of characters on specific mobile telephone screens or the time constraint on television sales spots. Such a situation arises "*as a result of either the inherent characteristics of the means concerned or limitations arising from the trader's economic choice relating, in particular, to the duration and space of the mar*keting *communication.*" The ECJ ultimately found that, if there is limited space, the trader should comply with a minimum set of information requirements and refer the consumer to another source of information, for instance by providing a toll free telephone number or a hypertext link to a webpage of the trader where the relevant information is directly available and easily accessible.

In assessing whether, in a specific case, the means of communication allows limited space or time to display the information, the ECJ favoured a case by case approach having regard to all of the technical features of the trader's marketing communication, such as the space and time occupied by the communication and the minimum size of the typeface which is appropriate for the average consumer targeted by that communication.

According to the ECJ, the underlying rationale of this approach ensures "*the right balance between a high level of consumer protection and the competitiveness of undertakings*" and refrains from imposing a disproportionate burden on the trader. Furthermore, the ECJ emphasised that what really matters is that the consumer is "*aware of the conditions, time limits and procedures for exercising the right of withdrawal*" because "*being in possession of the withdrawal form before the conclusion of the contract is not a circumstance that could influence the consumer's decision on whether or not to conclude a distance contract*". It follows that the communication of that model by another source, in plain and intelligible language, will suffice.

CORPORATE LAW

Adoption of New Belgian Companies' and Associations' Code

On 28 February 2019, the federal Chamber of Representatives adopted the final bill introducing the new Companies' and Associations' Code (*Wetsontwerp tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen / Projet de loi introduisant le Code des sociétés et des associations et portant des dispositions diverses* – the "BCAC").

The BCAC will enter into force on 1 May 2019. Companies and associations which are incorporated on or after 1 May 2019 will immediately be subject to all provisions of the BCAC.

By contrast, companies and associations already existing on 1 May 2019 will benefit from a transitional regime and a deferred application of the BCAC as from 1 January 2020:

- all mandatory provisions of the BCAC will apply. Non-mandatory provisions of the BCAC will also apply to existing companies as from 1 January 2020, unless the provisions of the existing articles of association provide otherwise; and

- existing companies and associations are required to amend their articles of association by 1 January 2024. Companies the company form of which is abolished under the BCAC, will transfer automatically to the closest new company form.

Should existing companies or associations so choose, they can subject themselves to the BCAC prior to 1 January 2020. This is possible as from the publication of the BCAC in the Belgian Official Journal and will require amending the articles of association. The amended articles of association will subsequently apply to the existing companies and associations as of their publication and at the earliest on 1 May 2019.

DATA PROTECTION

European Data Protection Board Issues Guidelines on Codes of Conduct under General Data Protection Regulation

On 12 February 2019, the European Data Protection Board ("EDPB") published for public consultation Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679 ("GDPR"). The Guidelines seek to provide practical guidance and interpretative assistance in relation to the application of Articles 40 (codes of conduct) and 41 (monitoring of codes) of the GDPR.

The creation of a code is open to all trade associations or bodies representing a sector and can provide more specific information on how to comply with the GDPR. Codes can be national or transnational, the latter meaning that the code covers processing activities in more than one Member State.

From a compliance perspective, codes can be a useful and effective accountability tool, providing a detailed description of what is the most appropriate, legal and ethical set of behaviours of a sector. In this regard, codes can be drawn up to reflect the specific characteristics of processing carried out in specific sectors.

From an enforcement perspective, codes also benefit supervisory authorities by allowing them to gain a better understanding of and insight in the data processing activities of a specific profession, industry or other sector.

The Guidelines thus act as a framework for all Competent Supervisory Authorities ("CompSAs"), the EDPB and the Commission in the assessment of the procedures and the rules involved in the admissibility, submission, acceptance, approval and publication of codes at both the national and European levels.

Minimum Requirements for Codes of Conduct

While processors and controllers in all sectors are free to establish codes of conduct, there are minimum requirements set out which a CompSA must evaluate. A code can only be submitted by an association/consortium of associations or other bodies representing categories of controllers or processors (code owners) in accordance with Article 40(2) GDPR.

Furthermore, every draft code submitted for approval must contain a clear and concise explanatory statement which provides details as to the purpose of the code, the scope of the code both in terms of processing operations and territorial scope and how it will facilitate the effective application of the GDPR. In line with Recital 99 of the GDPR, a draft code must also contain information gathered through the consultation of the relevant stakeholders, including data subjects, where feasible.

Most importantly, a code should not just re-state the GDPR. Instead, it should aim to codify how the GDPR will apply in a specific, practical and precise manner. It should have added value, for example by employing terminology that is unique and relevant to the industry and providing concrete case scenarios or specific examples of 'best practice'.

The Guidelines provide the criteria for approving codes. Code authors have to demonstrate that their draft code (i) meets a particular need of that sector or processing activity; (ii) facilitates the application of the GDPR; (iii) specifies the application of the GDPR; (iv) provides sufficient safeguards; and (v) creates effective mechanisms for monitoring compliance with a code. The Guidelines also foresee more information on the submission, acceptance and approval of a code.

Monitoring Compliance with Code of Conduct

The Guidelines also set out the requirements for the monitoring of compliance with a code of conduct. The Guidelines discuss two main models of monitoring: external and internal monitoring bodies, which give code owners the flexibility to choose an approach that is appropriate in the context of the code. Examples of internal monitoring bodies could include an *ad hoc* internal committee or a distinct, independent department within the code owner.

According to the Guidelines, such bodies must be independent and impartial and must possess the requisite level of expertise. Independence could imply that an external counsel or other party be involved to demonstrate that there are appropriate safeguards to mitigate a risk a conflict of interest. In the case of internal bodies, independence could be demonstrated by showing full autonomy for the management of the budget and other resources.

A monitoring body will have to establish effective procedures to deal with complaints that are handled in an impartial and transparent manner. It needs to have a publicly accessible complaints handling process which is sufficiently resourced to manage complaints and to ensure that decisions of the body are made publicly available. A monitoring body should also have effective procedures to ensure compliance with the code by controllers or processors. An example would be to give the monitoring body powers to suspend or exclude a controller or processor from the code when it acts outside the terms of the code (*i.e.*, corrective measures).

A copy of the Guidelines which are open for public consultation can be found here. Comments on the Guidelines should reach the EDPB by 2 April 2019.

European Data Protection Board clarifies consent under Clinical Trial Regulation and General Data Protection Regulation

In its opinion of 23 January 2019 (the "Opinion"), the European Data Protection Board ("EDPB") clarifies the interplay between Clinical Trial Regulation 536/2014 (the "CTR") and the General Data Protection Regulation ("GDPR"). In particular, the EDPB provides guidance on the legal basis for (i) the use of personal data in the context of the clinical trial protocol; and (ii) the secondary use of clinical data outside the clinical trial protocol for scientific purposes. The Opinion was requested by the European Commission for its Q & A on the interplay between the CTR and the GDPR.

The entry into force of the CTR depends on the development of the EU clinical trial portal and database. When it starts to apply, the CTR will replace current Directive 2001/20/EC. The simultaneous application of the CTR and the GDPR causes practical difficulties for companies and researchers, including the questions of when and for what purposes consent is required. The EDPB explains that 'informed consent' under the CTR is different and distinct from the consent that may be required under the GDPR.

Under the GDPR, consent is one of various options ('legal bases') permitting the processing of personal data. By contrast, to determine the appropriate legal basis for clinical trial data, the Opinion distinguishes between the processing of personal data in the course of the clinical trial protocol (primary use) and various secondary uses of clinical trial data outside the clinical trial protocol for scientific purposes.

Primary Use

The EDPB explains that within the primary use of clinical trial data, not all processing operations fall under the same legal basis. As regards the data that are used for reliability and safety purposes, the Opinion explains that such processing must be based on the requirement to comply with legal obligations to which the controller is subject (Article 6(1)(c) of the GDPR), or the regime governing categories of sensitive data (Article 9(2)(a) of the GDPR).

On the other hand, the EDPB suggests that the processing that is purely related to research activities can either be based on the explicit consent of the data subjects, or as an alternative option, the necessity to perform a task carried out in the public interest or the legitimate interest of the controller. In the case of sensitive data, the processing should be based on the necessity for the processing in view of the public interest in the area of public health (Article 9(2)(i) of the GDPR) or scientific purposes based on Union or Member State law (Article 9(2)(j) of the GDPR). The controllers therefore have a choice, depending on the facts at hand, which they have to consider when setting up their clinical trial and organise their processing activities accordingly.

Secondary Use

Clinical trial data is increasingly used for secondary purposes that fall outside the clinical trial protocol. For such uses, Article 28(2) of the CTR requires consent. The EDPB explains that the consent that is required under the CTR offers a safeguard under that specific regulatory framework, and is not the same as consent referred to in the GDPR as one of the legal bases. The EDPB does not offer a conclusive solution as regards the legal basis for secondary uses, but indicates that controllers may be able to rely on the presumption of compatibility under Article 5(1)(b) of the GDPR. This means that if the secondary use is deemed compatible with the primary (clinical trial) purpose, the data can be further processed without the need for a new legal basis.

The EDPB thus recommends that the European Commission should update its guidance in line with the above principles.

Determining the applicable legal basis is an important preliminary step when setting up a clinical trial and it is strongly recommended that controllers in clinical trials should document this assessment on the basis of the EDPB guidance. The content of the trial documentation, including the protocol and the informed consent form, will depend on this assessment.

A copy of the Opinion can be found here.

INTELLECTUAL PROPERTY

Trade Mark Registration of STREAMS Rejected for Being Descriptive

On 31 January 2019, the General Court handed down its judgment in case T-97/18, *DeepMind Technologies Ltd.v EUIPO*, in which it denied the registration of the sign STREAMS as a trade mark for being descriptive and for lacking distinctive character under Regulation 2017/1001 of 14 June 2017 on the European Union trade mark (the "Trade Mark Regulation").

On 29 February 2016, Google Inc. had filed an application with the European Union Intellectual Property Office (the "EUIPO") for registration of the sign STREAMS as an EU trade mark. Streams is a mobile app that supports physicians and nurses to deliver care to patients. The application for registration was subsequently transferred to DeepMind Technologies Ltd ("DeepMind") on 11 October 2016. Registration was sought for the sign Streams in respect of the goods and services in classes 9 (computer software for accessing and viewing patient medical information) and 42 (application service provider (ASP) featuring computer software for accessing and viewing patient medical information) of the Nice Classification.

DeepMind's application was provisionally refused by the examiner on the basis of Articles 7(1)(b) and 7(1)(c) of the Trade Mark Regulation. According to these provisions, registration must be refused if the trade mark is devoid of any distinctive character or if the trade mark is descriptive, *i.e.*, consists exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service.

The examiner's decision became final on 8 November 2016 and was subsequently appealed to the EUIPO where DeepMind sought to limit the goods and services covered by the mark applied for by 'excluding computer software for use in streaming media, video content or data over the Internet.'

The appeal was nonetheless dismissed on 27 November 2017 by the First Board of Appeal of EUIPO since the applicant's limitation of the goods and services covered by the mark was considered inadmissible because it was unconditional. Furthermore, it was found that the trade mark applied for could not be registered since it designated the characteristics, kind and quality of the goods and services concerned, while also being devoid of any distinctive character. For the First Board of Appeal of EUIPO, this finding could not be put into question by the mere fact that the words "stream" and "streams" had been previously validly registered as trade marks.

DeepMind appealed the Board of Appeal decision before the General Court, seeking either to vary the contested decision or to have it annulled.

The Court acknowledged that a claim for variation could only be taken in limited situations, such as where the Court "*after reviewing the assessment made by the Board of Appeal, is in a position to determine, on the basis of the matters of fact and of law as established, what decision the Board of Appeal was required to take*". However, assessing the Board of Appeal decision necessarily required first assessing the applicant's pleas for annulment.

DeepMind argued that the Board of Appeal was wrong to conclude that the trade mark applied for would be perceived immediately, without further thought, as a description of the characteristics of the goods/services in respect of which registration was sought, because, *inter alia*:

- The relevant public would understand that the Streams app is not a data streaming device or service since it does not provide transient access to data;
- The Board of Appeal failed to distinguish between the singular and plural forms of the word "stream".

The General Court first examined whether the Board of Appeal had infringed Article 7(1)(c) of the Trade Mark Regulation by finding that the mark applied for had a descriptive character.

The General Court dismissed DeepMind's arguments. It held that the descriptive character of a sign may be assessed only, first in relation to the understanding of the mark by the relevant public and, second in relation to the goods and services concerned. In the case at hand, as previously held by the Board of Appeal, the relevant public is composed of health care professionals located in the European Union who have a sufficient knowledge of English terminology in the field of information technology.

Furthermore, the General Court held that a word must be refused registration if at least one of its possible meanings designates a characteristic of the goods or services concerned. The General Court noted that the mark applied for was the plural form of the word 'stream', which, in computing terms, means a continuous flow of data or instructions, in particular a flow with a constant or predictable rate. The General Court also relied on the Board of Appeal's finding that the entry for 'stream' in the Oxford Dictionary showed the use of that word in its plural form and with the same meaning. The General Court also found that, although the app does not provide a continuous flow of data (known as streaming), the applicant failed to provide the Court with evidence that the relevant public understands this technical aspect of the app and therefore will not associate the mark "streams" with the goods and services provided by the app.

The General Court did not examine the arguments on distinctiveness under Article 7(1)(b) of the Trade Mark Regulation as it is sufficient that one of the absolute grounds for refusal provided for by Article 7 is found to apply to disqualify a sign as a EU trade mark.

DeepMind also denounced the Board of Appeal's failure to take into account existing EU word marks, namely STREAMS and STREAM+, which had previously been accepted for the registration of goods and services belonging to Classes 9 and 42. The General Court held that even if EUIPO must take into account its previous decisions with regard to similar applications, the examination of a sign must be stringent and comprehensive and must be undertaken in each individual case. Furthermore, the General Court clarified that "*the decisions concerning registration of a sign as an EU trade mark which the Boards of Appeal of EUIPO are called on to take under Regulation 2017/1001 are adopted in the exercise of circumscribed powers and are not a matter of discretion. Therefore, the legality of those decisions must be assessed solely on the basis of that regulation, as interpreted by the European Union Courts and not on the basis of EUIPO's previous decision-making practice*".

General Court Annuls EUIPO'S Refusal to Register Figurative Mark 'Chiara Ferragni' as EU Trade Mark

On 8 February 2019, the General Court annulled the decision of the European Intellectual Property Office (the 'EUIPO') which had refused the registration of the figurative mark "Chiara Ferragni" as an EU trade mark (case T-647/17).

In 2015, Serendipity Srl., a group of companies that includes fashion company Chiara Ferragni, filed an application with the EUIPO for the registration of a EU trade mark for goods in Classes 18 (bags, haversacks, duffel bags; animal skins, imitation leather, valises, leather purses, key cases and umbrellas) and 25 (clothing, shirts; sweaters; trousers; skirts; denim jeans; bathing suits; undershirts; tee-shirts; shorts; sportswear, lingerie, hats and footwear) of the Nice Classification. The sign looks as follows:

A Dutch company, CKL Holdings NV, filed a notice of opposition to the registration of that figurative mark, claiming that there was a likelihood of confusion with the mark 'Chiara', which had been registered in the Benelux only two weeks after publication of the Chiara Ferragni mark application, for Class 25 products. Consequently, in 2017, the EUIPO refused to register the newer sign as a EU trade mark.

Serendipity filed an appeal before the EUIPO Fourth Board of Appeal but was unsuccessful. The Board of Appeal found that the signs at issue had an 'average' degree of visual similarity, had an 'above average' degree of phonetic similarity and had a 'neutral' conceptual similarity. In addition, the Board of Appeal noted that the mark 'Chiara' possessed a 'normal' intrinsic distinctiveness. In conclusion, the Board of Appeal found a likelihood of confusion between the two signs with respect to the relevant products of Classes 18 and 25.

Serendipity then brought an action before the General Court, seeking the annulment of the EUIPO's decision on three main grounds: (i) they objected to the finding of a likelihood of confusion although the EU word mark 'Chiara Ferragni' had already been registered for the same classes as the contested figurative mark; (ii) the decision was wrong in its findings with respect to the visual, phonetic and conceptual similarities; and (iii) the decision was wrong in the overall appreciation of the likelihood of confusion.

In its judgment, the General Court started by noting that the average consumer usually perceives a mark as a whole and does not go on to examine the different details involved. The figurative mark 'Chiara Ferragni' is a composite of both verbal and visual components. The mark is composed of the two words 'Chiara' and 'Ferragni', in black capital letters, with the letters 'i' in bold, and a figurative component positioned above those words and consisting of a drawing representing an eye of light blue colour with long black lashes. The applicants claimed those lashes looked like the letters 'i' in 'Chiara' and 'Ferragni'. In contrast, the initial 'Chiara' mark is made up of the single word 'Chiara'.

The General Court disagreed with the decision of the Board of Appeal that the wording component was more important than the figurative component. It noted that the highly stylised nature, colour, position and size of the mark are likely to divert the public's attention away from the word components which are placed in a lower position. According to the General Court, the figurative component of the mark applied for was at least as distinctive as the word components of the mark taken as a whole. The General Court also considered that the visual component of the eye had no relevance to the Class 18 and 25 products concerned and, therefore, could not be regarded as descriptive of those products.

The General Court then assessed the visual, phonetic and conceptual similarity of the marks.

The General Court first observed that the figurative component had a significant impact on the overall visual impression of the mark. The General Court then noted, first, that the mark applied for contained two verbal components, while the initial 'Chiara' mark only contained one and, second, that the longer component 'Ferragni' was visually more important than the shorter one 'Chiara'. In conclusion, the General Court only found a slight amount of visual similarity, notwithstanding the fact that the word component 'Chiara' of the initial mark is entirely reproduced in the mark applied for.

Phonetically, the General Court again attributed more importance to the longer, distinguishing component 'Ferragni' than to the shorter, similar component 'Chiara', even though the former was positioned after the latter. The General Court concluded that the two signs at issue had an 'average' or even 'slight' amount of phonetic similarity.

With respect to the issue of conceptual similarity, the General Court held that, although both marks refer to the female first name Chiara, the mark 'Chiara Ferragni" identified a specific person, while the initial 'Chiara' mark only consisted of a first name. Noting that Ferragni is not a common family name in the Benelux and that Chiara would be perceived as a common Italian first name by the general public, the General Court considered that 'Ferragni' would be remembered by the consumer as the more distinctive component of the two. According to the General Court, a consumer recognising the name Chiara as a first name will not associate the initial 'Chiara' mark as belonging to the same family of product designers, i.e., the Ferragni family. For those reasons, the General Court concluded that the brands involved could not be considered conceptually similar.

Concerning the overall likelihood of confusion, the General Court stated that, despite the fact that the goods concerned were identical or similar, the differences between the marks, especially the visual differences, ruled out any likelihood of confusion.

Accordingly, the General Court held that the Board of Appeal erred in confirming the original refusal on the grounds of a likelihood of confusion between the two marks, and annulled its decision.

Further Modernisation of Benelux Trade Mark Law

As part of the ongoing Benelux Trade Mark Reform, the Benelux countries adopted in December 2017 a new Protocol amending the Benelux Convention on Intellectual Property (Trade marks and Designs) (the "BCIP") (the "Protocol") (*See, this Newsletter, Volume 2018, No. 3, p. 11*).

As a result, on 1 March 2019, the following changes will be implemented:

- Replacement of the requirement of graphic representation by a more flexible requirement allowing the representation of trade marks of a less conventional type (like sound and colour marks);

- Introduction of a specific regime for certification marks;

- Further alignment of the main procedural rules with the trade mark systems applied in the EU in order to make trade mark registration and its management easier.

LABOUR LAW

Draft Interprofessional Agreement 2019 – 2020

On 26 February 2019, the so-called "Group of Ten" (composed of employers' and employees' associations) concluded a draft interprofessional agreement which contains a series of important employment measures.

These measures still have to be converted into collective bargaining agreements or other compulsory rules prior to entering into force.

Wage Norm

The wage norm for 2019 and 2020 was determined at 1.1%. The wage norm is a percentage expressing the maximum increase in salary costs to be observed by an employer over a period of two years, based on the evolution since 1996 of the salary costs in Belgium's neighbouring countries France, Germany and The Netherlands. Any salary indexations which apply to employers according to the relevant industry sector come on top of the wage norm.

The 1.1% wage norm applies over a period of two years. However, industries have the possibility not to use the 1.1% entirely, if this were justified in the light of specific economic circumstances.

Minimum Wage

The national monthly minimum wage will be increased by 1.1% on 1 July 2019.

In addition, a distinct task force will be installed in order to introduce a significant increase of the guaranteed monthly minimum wage as from 30 September 2019.

Mobility

The social partners wish to encourage a shift to public transportation and alternative transportation by means of the following measures:

- an increase of the employer's intervention in train subscriptions for home-work traffic;
- as from 1 July 2020 the employees who rely on metro, bus or tram for home-work traffic will be entitled to a compensation of the employer as from the first kilometre, whereas currently a compensation only applies as from 5 kilometres; and
- a new regime will be implemented in order to encourage sustainable mobility resources, in particular for employees without a company car.

Voluntary Overtime

The threshold for voluntary overtime which can be performed by each employee without any particular justification by the employer will be increased from 100 hours to 120 hours per year.

End of Career Regimes

The age conditions for unemployment with company allowance (*stelsel van werkloosheid met bedrijfstoeslag/le regime de chômage avec complément d'entreprise*) and other end of career regimes will be further increased. The age condition for specific regimes of unemployment with company allowance (such as for demanding professions, night work, work in the construction industry, etc.) will be set at 60 years on 1 July 2021.

STATE AID

General Court Annuls Commission Decision Classifying Belgian "Excess Profit" Tax System as Illegal Tax Scheme

On 14 February 2019, the General Court ("GC") issued a judgment annulling the decision of the European Commission (the "Commission") concerning the Belgian "excess profit" tax rulings (Joined Cases T-131/16 and T-263/16, *Belgium and Magnetrol International v. Commission*).

Under Belgian law, Belgian entities of multinational corporate groups could obtain an advance ruling from the Belgian tax authorities exempting those entities from paying taxes on so-called "excess profits", *i.e.*, the difference between the actual recorded profit of a multinational compared with the hypothetical average profit of a stand-alone company in a comparable situation. On 11 January 2016, the European Commission decided that the excess profit exemption system constituted a state aid scheme that was incompatible with the internal market and unlawful. Hence, it ordered the recovery of the aid from 55 beneficiaries (*See, this Newsletter, Volume 2016, No. 1, p. 21 and Volume 2016, No. 5 and p. 17*).

The GC annulled the decision of the Commission as it found that the Commission had erroneously considered that the excess profit exemption system constituted an aid scheme. According to the GC, the acts identified by the Commission as the basis of the alleged aid scheme did not set out all the essential elements of the scheme, nor did they define in a general and abstract manner the beneficiaries of the alleged scheme. Rather, the Belgian tax authorities enjoyed a genuine margin of discretion over all the essential elements of the exemption system, which could therefore not be considered to be an aid scheme.

In the centre of Europe with a global reach

VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com