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

Legal 500 2019

February 2020

VBB on Belgian Business Law

Highlights

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

IFLR1000, 2019

Topics covered in this issue

vbb@vbb.com
www.vbb.com

Table of contents

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

Phone: +32 (0)2 647 73 50 vbb@vbb.com
Fax: +32 (0)2 640 64 99 www.vbb.com

COMPETITION LAW

Belgian Competition Authority Determines Transition Period for Partial Removal of Kinepolis Merger Commitments

On 11 February 2020, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) (the ***BCA***) handed down a decision determining the transition period for the removal of the merger commitments imposed on Kinepolis which the Brussels Court of Appeal (the ***Court***) had partially lifted in October of last year.

Background

This case started over 20 years ago, when, on 17 November 1997, the former Belgian Competition Council (later replaced by the BCA) cleared the concentration between the Bert and Claeys cinema groups to establish the Kinepolis group (***Kinepolis***). The decision was conditional on Kinepolis respecting the following commitments:

1. a prohibition against obtaining exclusive or priority rights for movies from distributors, as well as from its own distribution affiliate, together with a general prohibition against otherwise favouring movies distributed by its own distribution affiliate;

2. a prohibition against concluding programming agreements with other cinemas;

3. a prohibition against limiting a former shareholder's investments or financial support to Kinepolis' competitors; and

4. an obligation to obtain the BCA's prior approval for any form of growth, including organic growth or takeovers, expansions, renovations and replacements resulting in a 20% increase in the capacity of the affected cinema complex.

Nearly ten years after the merger decision was adopted, Kinepolis made an initial attempt to have the merger commitments lifted. On 11 March 2010, Kinepolis managed to obtain the removal of part of the commitments following a four-year legal battle (*i.e.*, commitments (iii) and (iv) as regards expansions, renovations and replacements; *See,* this Newsletter, Volume 2010, No. 4). On 31 March 2017, Kinepolis requested the BCA to lift the remaining commitments. On 31 May 2017, the BCA decided to lift the restriction on organic growth subject to a two-year transition period, while leaving the other commitments in place. The remaining commitments prevented Kinepolis from: (i) growing through acquisitions without the BCA's prior approval; (ii) obtaining exclusive or priority rights to distribute films; and (iii) concluding programming agreements with independent cinema owners (*See*, this Newsletter, Volume 2017, No. 5, pp. 7-8).

This decision was appealed by two competing cinema firms, Euroscoop and I-Magix. On 28 February 2018, the Court found that the Competition College – the BCA's decision-making body – had insufficiently justified entirely lifting the commitment preventing Kinepolis from growing organically, while the College of Competition Prosecutors – the BCA's investigatory arm – had proposed to lift the commitment for small organic growth only. According to the Court, the Competition College had also provided insufficient reasoning for its decision to create a two-year transition period (*See*, this Newsletter, Volume 2018, No. 3, pp. 4-5).

Following the Court's annulment of the 31 May 2017 decision, the BCA reopened the case and adopted a new decision on 26 April 2018. This decision was again appealed by Euroscoop and annulled by the Court on 21 November 2018. In that instance, the Court held that the BCA should have adhered to the full procedural framework of the Code of Economic Law to adopt a new decision instead of limiting itself to adopting an amending decision (*See*, this Newsletter, Volume 2018, No. 12, pp. 5-6).

On 28 January 2019, Kinepolis attempted once again to have the remaining commitments removed. On 25 March 2019, the BCA decided to lift in part the commitment preventing Kinepolis from growing organically to the extent

it concerns the establishment of new cinema complexes with less than seven movie theatre halls and less than 1,125 seats. In order to prevent Kinepolis from circumventing these limits, the BCA added that Kinepolis was not allowed to: (i) establish any new cinema complex within a 10 km range of its other cinema complexes; and (ii) expand such new cinema complexes beyond the above thresholds without the prior approval of the BCA (*See*, this Newsletter, Volume 2019, No. 3, pp. 3-4).

Kinepolis appealed this latest decision, while Euroscoop and I-Magix subsequently filed an appeal of their own. On 23 October 2019, the Court found that the BCA had failed to review in a consistent, satisfactory and separate way whether the partial preservation of the commitment preventing Kinepolis from growing organically was necessary in order to safeguard effective competition. The Court added that the commitment preventing organic growth was intrusive and, in certain situations, even anti-competitive and discriminatory. In addition, the Court held that the BCA had erred in its analysis whether Kinepolis had maintained or reinforced its dominant position. The Court lifted the commitment regarding organic growth and referred the case to the BCA to determine an appropriate transition period in order to allow Kinepolis' competitors to prepare for the removal of this condition.

Decision of 11 February 2020

On 11 February 2020, the BCA decided on a transition period of 18 months. As a result, from 12 August 2021, Kinepolis will be allowed to open new cinema complexes without the BCA's prior approval for the first time in over two decades. The BCA added that in the meantime Kinepolis can take all preparatory actions and measures as long as new cinema complexes do not become operational prior to 12 August 2021.

The BCA took into account the different market circumstances of the current Belgian cinema sector (which, following the acquisition of Euroscoop by Pathé, now includes at least two competitors – UGC and Pathé – that are internationally larger than Kinepolis), the different measures that Kinepolis' competitors can take on fairly short notice to prepare to compete with Kinepolis, the judgment of the Court of 23 October 2019 to remove the fourth commitment, the importance of clear and consistent decisions by the BCA and the fact that Kinepolis' competitors have been able to reasonably foresee the removal of the fourth commitment for some time already. The BCA further held that no additional commitments would be required during the transition period, contrary to the proposals put forward by the College of Competition Prosecutors and I-Magix.

Kinepolis issued a press release welcoming the latest decision of the BCA (available here).

European Commission Opens In-Depth Investigation into Allegations of State Aid in the Form of Tax Breaks for Waste-Management Company Renewi

On 6 February 2020, the European Commission opened an in-depth investigation into allegations of illegal State aid for the collection, treatment and disposal of non-hazardous waste in Belgium over concerns that specific tax benefits are giving waste management company Renewi an advantage over its competitors.

The investigation was launched following a complaint that Renewi had benefitted from regional tax reductions for waste recovery operations, while its activities allegedly only involve waste disposal. Belgian authorities thus allegedly violated European environmental legislation, which distinguishes recovery from disposal.

The investigation reference number is SA.43147.

Belgian Competition Authority Hands Down Proposed Decision Regarding Anticompetitive Practices Between Brussels Airlines and Thomas Cook Belgium

On 12 February 2020, the College of Competition Prosecutors (*Auditoraat / Auditorat*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) (the ***BCA***) transmitted a proposed decision (the ***Proposal***) to the President of the BCA regarding alleged anticompetitive practices between Brussels Airlines NV (***Brussels Airlines***) and Thomas Cook Belgium NV (***Thomas Cook***).

The Proposal concerns an investigation that was launched by the BCA on 21 August 2017 into potentially anticompetitive clauses in a commercial service agreement (the ***Agreement***) entered into between Brussels Airlines and Thomas Cook on 8 June 2017. The Agreement included an obligation imposed on Thomas Cook Belgium to pur-

chase a specified number of airplane seats for specific destinations from Brussels Airlines. The Agreement also prohibited Brussels Airlines from selling airplane seats to third party tour operators on specific flights. This prohibition was combined with an adjustment mechanism affecting Thomas Cook's purchase obligation should Brussels Airlines sell seats to third party tour operators. Moreover, the Agreement required Brussels Airlines to disclose new rotations and new destinations of third party tour operators to Thomas Cook Belgium.

According to the College of Competition Prosecutors, the Agreement has foreclosure effects and provides for the exchange of commercially sensitive information. Additionally, the duration of the Agreement would lead to customer foreclosure in the wholesale market of airplane seats. As a result, the relevant provisions of the Agreement supposedly constitute a competition law infringement both by object and by effect.

The College of Competition Prosecutors indicated that the allegedly problematic provisions of the Agreement were never applied and that Brussels Airlines terminated the Agreement following the bankruptcy of Thomas Cook Belgium.

Brussels Court of Appeal Refers Preliminary Questions to Court of Justice of European Union in bpost Case

In mid-February 2020, the Brussels Court of Appeal (the ***Court***) referred two preliminary questions to the Court of Justice of the European Union (the ***CJEU***) regarding the double-jeopardy defence that had been raised by bpost to challenge the fines imposed on it by both the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications* - ***BIPT***) and the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***).

Background

On 20 July 2011, the BIPT imposed a fine of EUR 2.3 million on bpost for applying a discriminatory rebate system in its 2010 contractual tariffs. In addition, on 10 December 2012, the BCA imposed a fine in the amount of EUR 37.4 million on bpost for the same reason, arguing that bpost had abused its dominant position (*See*, this Newsletter, Volume 2012, No. 12, p. 3-4).

On 23 September 2011, bpost sought the annulment of BIPT's fine. On 12 June 2013, the Court referred a request for a preliminary ruling to the CJEU relating to the interpretation of the principle of non-discrimination laid down in Article 12 of Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (the ***Directive***) (Case C-340/13). On 11 February 2015, the CJEU held that the application of a system of quantity discounts per sender, as introduced in 2010 by bpost, did not amount to a form of discrimination prohibited by the Directive (*See*, this Newsletter, Volume 2015, No. 2, pp. 3-4).

Following the CJEU's judgment, the Court annulled the BIPT's fine on 10 March 2016 as it found that there was no discrimination. Eight months later, on 10 November 2016, the Court also annulled the BCA's fine, this time on double jeopardy grounds (*See,* this Newsletter, Volume 2016, No. 12, p. 5).

The BCA appealed the annulment of its fine to the Belgian Supreme Court (*Hof van Cassatie / Cour de Cassation* - the ***Supreme Court***). On 22 November 2018, the Supreme Court annulled the Court's judgment regarding the BCA's fine. The Supreme Court held that the prohibition of double jeopardy does not prevent the imposition of two fines for the same behaviour if these fines pursue two complementary objectives in the general interest. As a result, the Court could not annul the BCA's decision without first determining whether the prosecution carried out by the BIPT and the prosecution led by the BCA had complementary objectives and concerned different aspects of the same infringing behaviour. The Supreme Court referred the case back to a differently composed Court.

Referral

The Court now has to determine whether bpost could rely on the prohibition of double jeopardy to challenge the BCA's fine.

The European Commission has been invited to give its opinion in support of the BCA. It argued that the double jeopardy principle does not apply to this case given the

different nature of the procedures pursued by the BIPT and the BCA and the different types of alleged misconduct which these procedures targeted.

The Court decided to refer two preliminary questions to the CJEU regarding the application of the double jeopardy principle. The exact nature of these questions is not yet public.

The case reference number is C-117/20.

CORPORATE LAW

Supreme Court Rules on Valuation of Shares when Shareholder Is Excluded

On 16 January 2020, the Supreme Court (*Hof van Cassatie / Cour de cassation* - the ***Court***) held that, in the context of the exclusion of a shareholder from a company, the transferred shares must be valued at a going-concern value. The shares may only be valued at liquidation value if it can be determined that the company is making losses and that, as a result, the company's continued existence is uncertain.

Pursuant to Article 636, §1, of the (previous) Belgian Companies' Code, shareholder(s) holding 30% of the voting rights, 20% of the voting rights if the company has issued securities that do not represent the company's share capital, or holding securities representing 30% of the company's share capital, may launch an action to exclude another shareholder for due cause. If the action is successful, the excluded shareholder will be obliged to transfer its shares and convertible securities to the claimant(s). Pursuant to Article 640, first paragraph of the Companies' Code, the court will have to determine the transfer price which the claimants should pay in consideration of the transferred securities.

The Court held that courts must determine the value of the shares to be transferred in view of the continuity of the company's business. The Court continued that shares may only be valued at liquidation value if the business of the company is loss-making and if the continuity of the business is uncertain. The Court reasoned that Parliament had introduced the action to exclude a shareholder in order to resolve conflicts within companies operating as a going concern, while minimising any negative impacts on the company's continuity.

As a result, the Court held that the appealed judgment was erroneous in assessing the shares on the basis of their liquidation value without having established that the business of the company was indeed loss-making and that the continuity of its business was uncertain.

While the judgment of the Court concerned the exclusion of a shareholder under the old Belgian Companies' Code, the relevant provisions are still in place under the new Belgian Companies and Associations' Code and the judgment of the Court will thus retain its relevance.

Updated Administrative Filing Charges

On 13 February 2020, the updated fees for filing documents of legal persons with the clerk's office (*neerlegging ter griffie / dépôt au greffe*) were published in the Belgian Official Journal. As of 1 March 2020, the administrative costs of filing and publication are as follows (inclusive of VAT).

- For enterprises

Incorporation		Modifications	
Paper filing	EUR 284.71	Paper and electronic filing	EUR 166.98
Electronic filing	EUR 230.02		

- For associations and foundations

Incorporation		Modifications	
Paper filing	EUR 197.11	Paper and electronic filing	EUR 133.58
Electronic filing	EUR 142.42		

DATA PROTECTION

European Data Protection Board Adopts Draft Guidelines on Transfers of Personal Data between EEA and non-EEA Public Authorities and Bodies

On 18 January 2020, the European Data Protection Board (***EDPB***) published draft guidelines (the ***Guidelines***) regarding Articles 46(2)(a) and 46(3)(b) of the General Data Protection Regulation (***GDPR***) for transfers of personal data between EEA and non-EEA public authorities and bodies. The Guidelines offer guidance to the extent such transfers are not covered by an adequacy finding adopted by the European Commission.

Purpose of Guidelines

While the GDPR does not define what constitutes a 'public authority or body', the EDPB considers this notion to be broad enough to cover both public bodies in third countries and international organisations. The Guidelines refer, for example, to US public bodies which are not covered by the EU-US Privacy Shield which only applies to private sector organisations. With respect to public bodies in third countries, the notion is to be determined under domestic law. Accordingly, public bodies include government authorities at different levels (*e.g.*, national, regional and local authorities), but also other bodies governed by public law (*e.g.*, executive agencies).

The Guidelines are intended to give an indication as to the EDPB's expectations on the safeguards required to be put in place by a legally binding and enforceable instrument between public bodies pursuant to Article 46(2)(a) of the GDPR or, subject to authorisation from the competent supervisory authority, by provisions to be inserted into administrative arrangements between public bodies pursuant to Article 46(3)(b) of the GDPR. These instruments and arrangements may be of a bilateral or multilateral nature. EEA public authorities or bodies may choose to use these mechanisms but remain free to rely on other relevant tools that offer appropriate safeguards in accordance with Article 46 of the GDPR.

In addition to Article 46 of the GDPR and in the absence of appropriate safeguards, Article 49 of the GDPR lists a limited number of specific situations in which international data transfers may take place even if there is no adequacy finding by the European Commission. One exemption covers transfers necessary for important reasons of public interest recognised in Union law or in the law of the Member State to which the controller is subject. The spirit of reciprocity of international cooperation forms part of these reasons of public interest. However, the derogations provided for by Article 49 of the GDPR must be interpreted restrictively and mainly relate to processing activities that are occasional and non-repetitive.

Scope of Guidelines

The Guidelines cover international data transfers between public bodies occurring for various administrative cooperation purposes falling within the scope of the GDPR. As a consequence, and in accordance with Article 2(2) of the GDPR, they do not cover transfers in the areas of public security, defence or state security. In addition, they do not deal with data processing and transfers by competent authorities for criminal law enforcement purposes, since these are governed separately by Directive (EU) 2016/680 of 27 April 2016 on law enforcement. Finally, the Guidelines only focus on transfers between public bodies and do not cover transfers of personal data from a public body to a private entity or vice versa.

General Recommendations

The EDPB offers the following general recommendations on the appropriate safeguards under both Article 46(2)(a) ("legally binding and enforceable instruments") and Article 46(3)(b) ("provisions to be inserted into administrative arrangements"):

- to include specific wording requiring that the core data protection principles are observed by both parties, *e.g.,* use of a data retention clause;

- to list the rights available to the data subjects, including the specific commitments taken by the parties to

provide for such rights, e.g., the data subject's right to obtain information about and access to all personal data, the right to rectification, erasure and restriction of processing and the right to object to data processing on grounds relating to the data subject's particular situation;

- to exclude as a rule onward transfers by the receiving public body to recipients not bound by the legally binding instrument or administrative arrangement;

- to provide for a system that enables data subjects to continue benefitting from redress mechanisms after their data has been transferred to a non-EEA country or an international organisation; and

- to provide for independent supervision of the application of the rights provided for under the legally binding instrument or administrative arrangement.

A copy of the EDPB's Guidelines can be found here. Stakeholders can submit comments on the draft until 6 April 2020.

European Data Protection Board Contributes to General Data Protection Regulation Evaluation

On 18 February 2020, the European Data Protection Board (the ***EDPB***) adopted general policy messages and a summary of the contributions and replies by its members, the EEA Supervisory Authorities (the ***SAs***), to the questionnaire sent by the European Commission on the evaluation and review of the General Data Protection Regulation (the ***GDPR***).

Article 97 of the GDPR requires the European Commission to submit a report on the evaluation and review of the GDPR to the European Parliament and to the Council by 25 May 2020. In its report, the European Commission must examine the application and functioning of: (a) the international data transfer tools and (b) the cooperation and consistency mechanisms under the GDPR. For this purpose, the European Commission may request information from SAs.

In general, the EDPB takes a positive view of the implementation of the GDPR and is of the opinion that it is premature to revise the GDPR now. But the EDPB also:

- calls upon the EU legislators, in particular the European Commission, to intensify efforts towards the adoption of the ePrivacy Regulation;

- acknowledges that SAs have identified challenges while implementing the cooperation and consistency mechanism, mainly due to differences in complaint handling procedures, the position of the parties in the proceedings, admissibility criteria, duration of proceedings, deadlines, etc.;

- highlights the pressing need for the European Commission to update the existing Standard Contractual Clauses (***SCCs***) in the light of the GDPR and the need to draft additional SCCs to cover new data transfer scenarios such as those occurring in a processor-to-processor relationship;

- acknowledges that the implementation of the GDPR has been challenging, in particular for Small and Medium Enterprises (***SMEs***); and

- points out that the need for sufficient resources for all SAs is still a significant concern.

The EDPB's contribution also provides statistics relating to the cooperation and consistency mechanisms, the human and financial resources of SAs, enforcement of the GDPR and data breach notifications at national level. Some of the key statistics are as follows:

- As regards enforcement of the GDPR at national level: 30 EU/EEA SAs received approximately 275,557 complaints in total between 25 May 2018 and 31 December 2019;

- As regards administrative fines: 22 EU/EEA SAs made use of their corrective power, issuing approximately 785 fines altogether. Only eight SAs have not yet imposed any administrative fines, although most of these have pending proceedings;

- As regards data breach notifications: 160,040 personal data breaches were notified to 29 EU/EEA SAs between 25 May 2018 and 30 November 2019.

The full contribution can be found here.

Presidency of EU Council Publishes Proposed Amendments to Draft ePrivacy Regulation

On 21 February 2020, the Presidency of the EU Council published the proposed amendments to the Draft Regulation concerning the respect for private life and the protection of personal data in electronic communications (the ***Draft ePrivacy Regulation***).

The Draft ePrivacy Regulation was presented in 2017 by the European Commission to replace Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. The Draft ePrivacy Regulation is intended to bring the current rules governing electronic communications in line with the General Data Protection Regulation (***GDPR***) and address sector-specific privacy-related issues. It seeks to harmonise differences in areas such as consent to the use of cookies. The proposed amendments follow a call by Members States for substantial changes to Articles 6 and 8 of the Draft ePrivacy Regulation. These provisions set out the rules governing the processing of metadata and use of cookies or similar technologies.

The amendments proposed by the Presidency include the possibility to have recourse on the legitimate interest ground to process electronic communications' metadata and place cookies or similar technologies on end-users' terminals, subject to strict conditions.

The document with the proposed amendments to the Draft ePrivacy Regulation can be consulted here.

INTELLECTUAL PROPERTY

Specialist Public Cannot Remedy Low Degree of Distinctiveness of Balmain's Trade Mark

On 5 February 2020, the EU General Court (the ***Court***) handed down a judgment on the appeal initiated by Balmain against the decision of the EU Intellectual Property Office (***EUIPO***) not to register a trade mark for specific goods and services. The Court confirmed the decision of the EUIPO Board of Appeal in Cases T-331/19 and T-332/19.

Balmain, a renowned fashion luxury brand, filed a request with EUIPO in 2017 to register a figurative trade mark. The mark consisted of a lion's head encircled by rings forming a chain.

Balmain requested the mark to be registered in product classes 9 (including scientific and cinematographic instruments), 14 (including cufflinks and jewellery), 18 (including leather products), 25 (including clothing), and 26 (including buttons and press-studs for shoes).

The EUIPO examiner refused registration for products in classes 14 and 26, including cufflinks, jewellery, and buttons, based on the lack of distinctive character of the mark for those products (Article 7(1)(b) of Regulation 2017/1001). By contrast, the trade mark was accepted for the other goods and products, as the sign was found to deviate significantly from the norms in those classes and was therefore distinctive.

The EUIPO Board of Appeal confirmed the examiner's decision, and the Court has now confirmed the Board of Appeal's decision. Balmain argued before the Court that the relevant public for some of the rejected categories of products was a professional public that pays a higher degree of attention than the general public and would therefore be able to distinguish products featuring the mark. The Court only agreed that press-studs for footwear were aimed at a professional public. However, more crucially, the Court stated that the attention level of the relevant public and the specialised nature of the relevant public does not offset the lack of distinctive character.

Moreover, Balmain argued in multiple ways that the sign constituted a fanciful and original graphic representation of a lion's head, resulting from artistic creation, and therefore should be distinctive. The Court rejected this argument and held that the artistic creation does not play a role in the determination of distinctive character. Instead, it established that a lion's head is a figure that is common in the relevant categories of products. As a result, the Court held that the mark did not diverge sufficiently from the norms and habits in that sector to be distinctive.

LABOUR LAW

New Protected Grounds to Invoke Gender Discrimination

Legislative Background

The Law of 4 February 2020 (*Wet van 4 februari 2020 tot wijziging van de wet van 10 mei 2007 ter bestrijding van discriminatie tussen vrouwen en mannen wat het discriminatieverbod op vaderschap of meemoederschap betreft / Loi du 4 février 2020 modifiant la loi du 10 mai 2007 modifiant, en ce qui concerne l'interdiction de discrimination relative à la paternité ou à la comaternité, la loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes*) that entered into force on 9 March 2020 introduces six new protected anti-discrimination grounds in the Law of 10 May 2007 against discrimination between men and women (*Wet van 10 mei 2007 ter bestrijding van discriminatie tussen vrouwen en mannen / Loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes* - the ***Gender Law***).

These new anti-discrimination grounds are: breastfeeding, adoption, use of assisted reproductive technology, gender characteristics, paternity and co-motherhood. They are added to the existing list of protected grounds provided for by the Gender Law (*i.e.*, pregnancy, childbirth, maternity, gender change, gender identity and gender expression).

Implications for Workplace

In the workplace, protection against unlawful discrimination applies during the recruitment phase (*e.g.*, for questions asked during interviews or the CV selection process), the employment phase (*e.g.*, whilst determining the remuneration, whilst assessing access to benefits or promotion or when determining the selection criteria for dismissal) and the post-employment phase (*e.g.*, the issuance of a reference letter).

An employee who considers himself/herself to be a victim of unlawful discrimination can bring an action before the competent labour court against the employer. If the claim is successful, the employer may be held liable for six months' gross salary as lump sum compensation or higher damages if the employee can prove the amount.

To this end, the employee will have to prove direct discrimination (*i.e.*, if the employer treated him/her less favourably than he treated (or would treat) others on the basis of a protected ground, without such difference of treatment being justified) or indirect discrimination (*i.e.*, if the employer adopts an apparently neutral practice or rule that nonetheless puts the employee, without justification, at a disadvantage compared to other employees due to one of the protected grounds).

To mitigate the risk of a discrimination claim, the employer should avoid any behaviour and/or decision that could be regarded as showing discriminatory intent. Examples include:

- not hiring a co-mother applicant in a same sex couple because she announces her co-motherhood during the recruitment process;
- denying a promotion to a male employee because he requested paternity leave; or
- providing information to a prospective employer about the fact that a former female employee took breastfeeding breaks during her former employment.

TECHNOLOGY

European Commission Publishes White Paper on Artificial Intelligence

On 19 February 2020, the European Commission published its white paper on artificial intelligence (***AI***) – "A European approach to excellence and trust" (the ***White Paper***). According to the White Paper, AI is a collection of tech-nologies that combine data, algorithms and computing power for the benefit of citizens, businesses and the pub-lic in general. In essence, the White Paper sets out policy options on how to achieve a balance between encourag-ing the uptake of AI and addressing the associated risks through potential regulation.

First, the White Paper recognises the importance of encouraging the uptake of AI in the EU. The Commission notes that in order to optimise the opportunities pre-sented by AI, Europe will have to "align efforts at European, national and regional level" and create an "ecosystem of excellence" along the entire value chain, starting with research and innovation. It will also have to create the right incentives to accelerate the adoption of solutions based on AI.

The White Paper maintains that the risks associated with AI cannot be disregarded. AI can be harmful, both in material terms (safety and health of individuals, damage to property) and in immaterial terms (loss or privacy, limitations to the right of freedom of expression). Additionally, the use of AI can affect the values on which the EU is founded and lead to breaches of fundamental rights. To address these risks, the uptake of AI must be accompanied by a regula-tory framework addressing the associated risks through the creation of an "ecosystem of trust".

Other suggestions include the introduction of a mandatory pre-marketing conformity assessment for "high-risk" AI applications. The Commission considers that "high-risk" should be defined in the light of what is at stake. The fol-lowing criteria should define a "high-risk" AI application:

- The AI application is employed in a sector where, given the characteristics of the activities typically undertaken, significant risks can be expected to occur. Any future legislation should "specifically and exhaustively" list these sectors.

- The AI application in the sector in question is used in such a manner that significant risks are likely to arise.

In addition, the Commission considers that there may be exceptional instances (*e.g.*, remote biometric identification and other intrusive surveillance technologies) where, due to the risks at stake, the use of AI applications for specific purposes is to be considered as high-risk as such, irrespective of the sector concerned.

When designing the future regulatory framework for AI, specific requirements will be assessed under the mandatory pre-marketing conformity assessment, including:

- Training data

- Data and record keeping

- Information to be provided

- Robustness and accuracy

- Human oversight

As regards the legal requirements that would apply in relation to the "high-risk" AI applications, the Commission considers that the obligations will fall on the parties who are "best placed to address risks" depending on who is involved in development or use.

From a geographic perspective, the Commission considers it paramount that "the requirements apply to all relevant economic operators providing AI-enabled products or services in the EU, regardless of whether they are established in the EU or not."

In addition to the mandatory pre-marketing conformity assessment, the Commission also envisages a "voluntary labelling for non-high risk AI applications" for interested economic operators not covered by the mandatory requirements. Such voluntary labelling would signal that their "AI-enabled products and services are trustworthy", thereby enhancing the trust of users in AI systems and promoting the overall uptake of technology.

The White Paper can be consulted here and is open for public consultation until 19 May 2020.

European Commission Unveils Data Strategy

On the day of publication of its white paper on artificial intelligence, the European Commission also unveiled a new European data strategy. With this five-year plan, the Commission wants to create a single European data space, which is a single market for data that will be open to data from across the world. The European data strategy and the white paper on artificial intelligence are the first pillars of broader policy initiatives that involve a digital strategy and a framework for the development of Artificial Intelligence.

To achieve its European data space, the Commission will both pursue a regulatory approach and deploy the competition rules.

On the regulatory front, the Commission will develop new rules with regard to data governance, access and data re-use in various relationships involving businesses, businesses and government, and within administrations. This implies creating incentives for data sharing and establishing clear rules on data access and use. It also means making public sector data more widely available and thus going beyond the limits of existing rules, such as Directive 2019/1024 on open data and the re-use of public sector information. All of this will have to be achieved in compliance with other European rules governing the protection of personal data and consumer rights.

The Commission plans to support the establishment of what it refers to as nine common European data spaces across a range of industries. One such space will be called the "common European health data space" and will serve to secure advances in preventing, detecting and curing diseases and inform evidence-based decisions in healthcare. Another one will be called the "common European energy data space" and will serve to facilitate innovative solutions and support the decarbonisation of the energy system.

In the competition arena, the Commission says it will:

- provide more guidance on the compatibility of data sharing and pooling arrangements with EU competition law;
- offer individual guidance on the compatibility of specific projects with EU competition rules;
- in the area of merger control, look at the possible effects on competition of large-scale data accumulation through acquisitions and at the utility of data-access or data-sharing remedies to resolve possible concerns;
- examine the relationship between public aid to businesses (for example for digital transformation) and the minimisation of competition distortions through data-sharing requirements imposed on beneficiaries of such aid; and
- consider how best to address systemic issues related to platforms and data and possibly introduce *ex ante* regulation to ensure that markets stay open and fair.

The new European data strategy can be consulted here and is open for consultation until 31 May 2020.

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