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Legal 500 2019

February 2022

VBB on Belgian Business Law

Highlights

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COMMERCIAL LAW

Default Commercial Interest Rate Remains Unchanged while Statutory Interest Rate Decreases

On 24 February 2022 and 1 March 2022 respectively, the default interest rate for commercial transactions and the statutory interest rate applicable to civil matters and commercial relations with private individuals/natural persons were published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*).

The default interest rate for commercial transactions which will be observed during the first semester of 2022 amounts to 8% and remains unchanged from that applied in 2021 (*See*, this Newsletter, Volume 2021, No. 2 and No. 7). Pursuant to the Law of 2 August 2002 on combating late payment in commercial transactions (*Wet van 2 augustus betreffende de bestrijding van de betalingsachterstand bij handelstransacties / Loi du 2 août 2022 concernant la lutte contre le retard de paiement dans les transactions commerciales*), it applies to compensatory payments in commercial transactions (*handelstransacties / transactions commerciales*), *i.e.*, transactions between companies or between companies and public authorities.

The statutory interest rate will amount to 1.50% in 2022 and has thus been reduced from 2021 (*See*, this Newsletter, Volume 2021, No. 2).

Both the default interest rate for commercial transactions and the statutory interest rate may be deviated from by contract.

Supreme Court Holds that Courts Should Determine Reasonable Notice Period and Corresponding Indemnity in Lieu of Notice at Time of Termination of Contract of Indefinite Duration and Lists Relevant Factors for Such Determination

In a judgment of 13 January 2022, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) shed light on the factors that a court should consider when assessing the duration of a reasonable notice period given to terminate a contract of indefinite duration and, if no such notice period is observed, the amount of the corresponding indemnity in lieu of notice (Case C.21.0357.N).

The underlying dispute concerned the terms of termination of a collaboration agreement concluded orally between a dentist (***DBG***) and a dental clinic (***KSML***). After 25 years of collaboration, KSML terminated its collaboration with DBG because of an incident that arose between the parties. When KSML terminated the agreement, it invited DBG to negotiate the terms of the termination. In turn, DBG agreed to a short-term termination with an indemnity in lieu of notice. However, KSML did not consent to the payment of an indemnity in lieu of notice. Against this backdrop, the Antwerp Court of Appeal refused to grant DBG such an indemnity (judgment of 1 March 2021). According to the Antwerp Court of Appeal, the dentist had offered a short-term termination, but failed to prove that he had suffered any significant harm due to the absence of a reasonable notice period.

The Supreme Court started by summarising the applicable legal principles:

- First, in the absence of an applicable statutory or contractual provision providing otherwise, a contract of indefinite duration may be terminated unilaterally by either party, subject to the application of a reasonable notice period. If no such reasonable notice period is observed, the terminating party must pay the terminated party an indemnity in lieu of notice, whose purpose is to compensate the terminated party for the absence of a reasonable notice period.

- Second, in the absence of an agreement between the parties on the duration of the reasonable notice period or on the amount of the indemnity in lieu of notice, it is for the courts to determine such a duration or such an amount. This judicial assessment must be carried out at the time of termination. Moreover, the courts must consider factors such as the duration of the agreement, the costs incurred by the terminated party and the extent of the harm caused by the terminated party.

The Supreme Court noted that, in the judgment under appeal, the Antwerp Court of Appeal had refused to grant DBG an indemnity in lieu of notice based on an ex post determination that the dentist had only suffered limited financial harm as a result of the termination. However, given the above principles, the Antwerp Court of Appeal should have placed itself at the time of termination to decide whether DBG would suffer any harm if no reasonable notice period were observed by the parties.

As a result, the Supreme Court held that the Antwerp Court of Appeal's judgment of 1 March 2021 lacked proper reasoning. It therefore quashed the judgment and referred the case to the Ghent Court of Appeal.

COMPETITION LAW

Belgian Competition Authority Adopts Settlement Decision Imposing fine of EUR 29.8 Million on Pharmaceutical Wholesaler Pharma Belgium Belmedis

On 18 February 2022, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) announced that it settled infringement proceedings with pharmaceutical wholesalers Febelco and Pharma Belgium-Belmedis (***PBB***) while continuing these proceedings against pharmaceutical wholesaler CERP. This case, which combines the settlement procedure and the standard infringement procedure, is the first "hybrid" settlement case in Belgium.

PBB, which is a McKesson subsidiary, acknowledged its participation in a cartel between 2003 and 2016. As a result, it received a fine of EUR 29.8 million. The other company that agreed to settle the case, Febelco, was not sanctioned as it had obtained immunity from fines after revealing the existence of the infringement to the BCA. By contrast, CERP denies any liability and therefore refused to settle. The BCA announced that it would continue pursuing the case against CERP.

According to the BCA, the alleged cartel had two components.

First, in what is known as the "transfer orders system" (***TOS***), medicine suppliers sell directly to pharmacists who are offered special terms for ordering large quantities of products, but the actual delivery and invoicing of the transaction are carried out by the wholesalers who rely on their own stock of medicines. In the context of the distribution of products via the TOS, certain wholesalers, including Febelco and PBB, reportedly agreed on the prices which they would charge for the services performed for medicine suppliers and on the nature of those services. The aim of the wholesalers was, according to the BCA, to limit direct sales to pharmacists by medicines suppliers and to fix their margin under the TOS.

Second, the wholesalers allegedly agreed on the application of uniform sales conditions for influenza vaccines, which are subject to a yearly pre-sales system to allow pharmacists to pre-order a quantity of influenza vaccines before they are placed on the market. The BCA considers that the wholesalers commonly decided on the duration of the pre-sales system and agreed not to grant discounts to pharmacists and not to allow pharmacists to return unsold vaccines ordered during that period.

The BCA noted that it had determined the fine imposed on PBB by considering the value of sales to pharmacists of the products concerned by the TOS as well as the value of sales to pharmacists of influenza vaccines during the pre-sales period. Since PBB was a leniency applicant (after Febelco), it was granted a 40% fine reduction. In addition, the BCA reduced the amount of the fine by a further 10% because PBB had agreed to settle the case.

The decision is not yet public but the BCA published a press release, which is available here.

CORPORATE LAW

Updated Administrative Costs for Publication in the Annexes to the Belgian Official Journal Apply

On 14 February 2022, the new administrative costs due for filing documents for legal persons with the clerk's office (neerlegging ter griffie/dépôt au greffe) for publication in the Annexes to the Belgian Official Journal were made public. On 1 March 2022, the administrative costs are as follows (inclusive of VAT):

- For enterprises

Incorporation		Modifications	
Paper filing	EUR 298.75	Paper and electronic filing	EUR 175.21
Electronic filing	EUR 241.27		

- For associations and foundations

Incorporation		Modifications	
Paper filing	EUR 206.91	Paper and electronic filing	EUR 140.24
Electronic filing	EUR 149.44		

DATA PROTECTION

Belgian Data Protection Authority Participates in First Action Coordinated by European Data Protection Board on Use of Cloud Services by Public Sector

On 15 February 2022, the European Data Protection Board (***EDPB***) kicked off its first coordinated enforcement action regarding the use of cloud-based services by the public sector. The Coordinated Enforcement Framework (the ***CEF***) was created in October 2020 and aims to coordinate joint actions of supervisory data protection authorities (*See*, this Newsletter, Volume 2020, No. 12). In the coming months, 22 supervisory authorities (***SAs***) across the EEA, including the European Data Protection Supervisor (***EDPS***), will launch investigations into cloud-based services. The results of the national actions will then be bundled and analysed within the CEF. This should generate deeper insight into the matter and allow a more targeted follow-up on both national and EU levels.

The Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) announced its participation in this first coordinated enforcement action in a press release of 15 February 2022 (available in English here).

The EDPB launched investigations in this area because of the doubled uptake of cloud-based services by business across the EU during the last six years. Additionally, the Covid-19 pandemic has sparked a digital transformation of organisations, with many public sector organisations turning to cloud technology. The EDPB wishes to make sure that the use of cloud-based services by the public sector complies with the General Data Protection Regulation 679/2016 (the ***GDPR***). Over 80 public bodies in total will be investigated across the EEA, including EU institutions. They will cover a wide range of sectors, including health, finance, tax, education, and central buyers or providers of IT services.

In the process, SAs will explore public bodies' challenges in efforts to comply with the GDPR when using cloud-based services, including the process and safeguards implemented when acquiring cloud services, problems with regard to international transfers, and provisions governing the controller-processor relationship.

The EDPB envisages to publish a report on the outcome of the analysis before the end of 2022.

The press release of the EDPB is available here.

Belgian Data Protection Authority Offers Additional Guidance Regarding Practical Use of Cookies

In a decision of 21 January 2022, the Litigation Chamber (*Geschillenkamer / Chambre Contentieuse* – the ***Litigation Chamber***) of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) confirmed and detailed several points of law regarding the use of cookies and related access to information, in particular in the case of "necessary cookies".

Transparency

An anonymous complainant had alleged two shortcomings under the transparency requirements as regards the use of cookies on a specific unidentified website: (i) the cookies had allegedly been placed on the website without providing prior sufficient information to the user; and (ii) a simple reference to the privacy policy page (or general conditions) allegedly did not offer sufficient information regarding the fate of personal data in cookies.

On the first alleged shortcoming, the DPA rejected the argument that the website had failed to feature the necessary prior information merely on the grounds that the information was not made available in a language chosen by the complainant. The DPA rather accepted the use of a widely understood language, such as English, to provide the data subjects with the requisite information when these have not yet been able to select a language on the website. On the other hand, the DPA considered that the controller's responsibility is not ruled out simply because the impact on the user's rights and freedoms is limited or the cookie is no longer in use.

With regard to the second shortcoming, the DPA considered that the defendant had failed to comply with the transparency obligation because the cookie box did not provide, at the very least, a direct link to the required information regarding the cookies used under Article 13 of the GDPR, instead of a general reference to the defendant's privacy policy. The DPA referred to guidelines of the French Data Protection Authority (*Commission Nationale Informatique & Libertés* – the ***CNIL***) regarding transparency of the information communicated prior to the user's consent (*Lignes directrices relatives à l'application de l'article 82 de la loi du 6 janvier 1978 modifiée aux opérations de lecture et écriture dans le terminal d'un utilisateur et abrogeant la délibération n° 2019-093 du 4 juillet 2019* – available here). These CNIL guidelines address a list of information criteria for communications reviewed before consent is given, such as the identity of the data controller, the purpose(s) of the processing and the right to withdraw consent.

But the DPA also held that the following elements cannot be considered as breaches of the principle of transparency: (i) the use of wording not provided for in the GDPR; (ii) the expression "undesirable consequences" to refer to the impossibility of using the website in case necessary cookies have not been accepted; and (iii) the expression "possibility to erase cookies" to indicate the possibility to withdraw consent.

The DPA strongly advised data controllers to mention the third countries to which data are transferred in their register of processing activities but also indicated that it would not (yet) punish controllers which fail to comply with this recommendation.

Necessary Cookies

The complainant alleged that the website required the user to accept cookies to be able to select advertising preferences. According to the complainant, the requirement to accept cookies if the user wishes to store its ad settings constitutes a "cookie wall" which is contrary to the GDPR.

In its assessment, the DPA started out by indicating that cookies can be classified in accordance with various criteria, including their purpose, the party placing the cookie (first party v third party cookies) or their duration (temporary v. permanent cookies). From a legal perspective, cookies whose use requires consent can be distinguished from those whose use does not necessitate consent. The latter category includes (i) cookies to store a choice on the use of trackers; (ii) authentication cookies; (iii) shopping baskets; and (iv) cookies permitting the personalisation of the user interface (e.g. choice of language or presentation of a service). The DPA added that all other cookies and trackers require prior consent, including choices on the use of personalised advertising, or functionalities for sharing on social networks.

The DPA stressed that this approach can only be followed insofar as the cookies require consent, and consent is not obligatory for strictly necessary cookies. Since the cookie under review was strictly necessary, the DPA did not uphold the complaint.

The DPA ordered the creation of a compliant data processing register mentioning the third countries to which data are transferred and reprimanded the defendant. The decision is available in French.

European Commission Proposes EU Declaration on Digital Rights and Principles

On 26 January 2022, the European Commission proposed a Declaration of rights and principles that aims to guide the digital transformation in the European Union (the ***Declaration***). The Declaration responds to the calls from the European Parliament and the Council for a uniform approach to the digital transition in line with fundamental rights, including data protection rules.

The Declaration's objective is threefold. First, it aims to serve as a clear reference point regarding the type of digital transformation which Europe promotes and defends. Second, it serves as a guideline for policymakers and companies when developing and deploying new technologies. Third, it will define the approach to the digital transformation that the EU will promote throughout the world.

The Commission proposes a set of key principles in its Declaration that serve as a guidance for a "*sustainable, human-centric and value-based digital transformation*". At the heart of the digital principles are the people and, by extension, their participation in the digital public space.

The Declaration endorses principles such as solidarity and inclusion; freedom of choice; safety; security and empowerment; and sustainability throughout the organisation and regulation of the European digital space. In terms of environmental sustainability, the Declaration is in line with the European Green Deal, the UN Sustainable Development Goals and the Paris Agreement.

The Commission included various provisions to ensure protection of fundamental rights and give individuals control over their data. For instance, it provides that no one should be subjected to unlawful online surveillance or interception measures. In addition, the Declaration states that everyone should be able to determine what happens with the publicly available information that concerns them after their death.

The Declaration also sets out requirements for interactions with algorithms and artificial intelligence systems. A commitment is made to ensure transparency about the use of algorithms and ensuring the use of suitable datasets. The Declaration furthermore provides that algorithms and artificial intelligence should not be used to pre-determine people's choices.

In addition, the Declaration addresses the responsibilities of large platforms and gatekeepers. For instance, it provides that "very large online platforms" should support the free democratic debate online. These players should mitigate the risks stemming from the functioning and use of their systems, including disinformation campaigns, and should protect freedom of expression. The signatories of the Declaration also commit to measures to "tackle all forms of illegal content", but such measures should respect the right to freedom of expression and should not establish a general monitoring obligation.

The Declaration also discusses a right to "fair, just, healthy and safe working conditions". This implies that workers should be able to disconnect and benefit from safeguards for work-life balance.

In its communication accompanying the Declaration, the Commission indicates that EU policy interventions will take account of these key principles. The Commission believes that the Declaration has the potential to become a global benchmark for many emerging societal and ethical questions. To ensure a successful implementation of these principles, the Commission will monitor the way the digital principles will be put into practice.

To promote the Declaration on a worldwide scale, it will be used as a guiding tool for EU diplomatic action and will serve as a framework for the Commission's partnerships and discussions with international partners.

The Declaration will take the form of a joint solemn declaration, which is to be signed by the European Parliament, the Council and the Commission. The Commission aims to have the Declaration signed by all parties "*as early as possible in 2022*".

LABOUR LAW

New Rules for Self-Employed Non-European Nationals in Flanders

On 24 February 2022, the Decree of 17 December 2021 implementing the Flemish Decree of 15 October 2021 on the performance of self-employed professional activities by third-country nationals (*Besluit van de Vlaamse Regering van 17 december 2021 tot uitvoering van het decreet van 15 oktober 2021 over de uitoefening van zelfstandige beroepsactiviteiten door buitenlandse onderdanen / Arrêté du Gouvernement flamand du 17 décembre 2021 portant exécution du décret du 15 octobre 2021 sur l'exercice d'activités professionnelles indépendantes par des ressortissants étrangers*; the ***Implementing Decree***) was published in the Belgian Official Journal.

The Implementing Decree applies retroactively from 1 January 2022 and imposes a new set of rules for obtaining a professional card allowing non-EU citizens to exercise a self-employed activity in Flanders.

The main features of the Implementing Decree are as follows.

New Electronic Application Procedure

As from 1 January 2022, non-EU nationals who are legally residing in Belgium can apply electronically for a new professional card via the electronic counter of the Department of Work & Social Economy. This means that it is no longer required to apply for a profes-sional card via an enterprise counter. For the time being, applicants who have no legal residency in Belgium should still file their application with the Belgian Embassy of their country of residence.

New Admission Requirements

The Implementing Decree lists the supporting documents for the application for a professional card. One set of supporting documents applies to each application (*e.g.*, criminal record extract, a copy of diploma of higher education and a proof of financial sustainability), while other documents depend on the type of professional activity which the applicant contemplates exercising. The following four types of activities should be distinguished:

- Activities with an innovative added value for Flanders, mostly related to the creation of new products or the improvement of existing technologies;
- Activities with an economic added value, creating jobs or attracting investments, provided the applicant has a starting capital of at least EUR 18,600;
- Activities with a cultural or artistic added value, proven by a type of collaboration with the Flemish cultural sector; and
- Activities with a sportive added value, mostly referring to individuals holding a coaching position in a certified Flemish sports club.

Updated Processing Time

The applicant will receive a final decision within 120 days following the day on which the application was declared admissible. Exceptionally, this period is subject to extension to 240 days. If no decision was taken during the processing time, the professional card is considered granted.

Federal Government Agrees on New Labour Deal

On 15 February 2022, the federal government agreed on a so-called "labour deal" (the ***Labour Deal***) providing for a series of labour market reforms designed to have the employment rate of the entire country reach 80% by 2030. Only general principles have been laid down which will now form the subject of discussions with social stakeholders before being converted in binding rules.

The Labour Deal consists of four pillars: (i) improved work-life balance; (ii) individual training; (iii) better protection for platform workers; and (iv) other measures to increase the employment rate.

A newsflash discussing the Labour Deal's principal features is available here.

LITIGATION

EU General Court Reaffirms Obligation of National Courts to Review Compliance of Arbitral Awards with EU Competition Law

On 2 February 2022, the EU General Court confirmed that EU national domestic courts are obliged to annul arbitral awards that do not comply with European Union competition law (Case T-616/18, *Polskie Górnictwo Naftowe i Gazownictwo v Commission*). This judgment applies and confirms established case-law of the Court of Justice of the European Union (the ***CJEU***) in Eco Swiss (Case C-126/97, *Eco Swiss*).

Facts

The case at hand resulted from competition law proceedings initiated by the European Commission (the ***Commission***) regarding alleged abuses of a dominant position (in particular, the application of unfair prices) by the Russian gas company Gazprom in the European Union.

In a Statement of Objections of 22 April 2015, the Commission had reached the provisional conclusion that Gazprom was dominant on the markets for the upstream wholesale supply of natural gas in eight Central and Eastern European Member States (the CEE countries - Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia) and that Gazprom had engaged in an overall strategy of fragmenting and isolating the CEE gas markets and restricting the free flow of gas across CEE with a view to maintaining higher prices in five of those CEE countries.

In order to address the infringements identified by the Commission and bring the investigation to an end, Gazprom offered a number of commitments that were made binding in a formal Commission of 24 May 2018 (the ***Commission Decision***).

Gazprom had thus agreed to allow customers in the five CEE countries affected by Gazprom's unfair pricing policy to ask for a renegotiation of their gas prices if those prices diverged from specific benchmarks. If within 120 days of the request for price renegotiation, Gazprom had not agreed to revise the prices in accordance with these benchmarks, the customers were entitled to submit the matter to binding arbitration. Importantly, in order to oblige the arbitral tribunals to respect and apply EU competition law as a matter of public policy irrespective of the private interest of the parties to the arbitration, the commitments required that the arbitration proceedings take place within the European Union. In addition, the Commission, as the guardian of EU law, was allowed to intervene as an *amicus curiae* in the arbitration proceedings, especially if the arbitration concerned a matter covered by the Commission Decision.

Proceedings and Judgment of EU General Court

Following the adoption of the Commission Decision, a Polish firm active in the oil and gas sectors (the ***Claimant***), brought an action for annulment before the EU General Court, arguing, among other things, that the Commission Decision infringed EU energy rules and policy and that the commitments offered by Gazprom were insufficient and incomplete.

Apart from the substantive issues of this case which will not be discussed here, the judgment offers an interesting confirmation of the CJEU's seminal judgment in *Eco Swiss*.

The Claimant had argued that the Commission Decision erroneously assumed that arbitral tribunals were bound to apply EU competition law to a dispute pending before them just by virtue of being seated in the EU. According to the Claimant, such an assumption is incorrect since arbitral tribunals themselves do not have a duty to apply and comply with substantive EU law. Only national courts handling a request for annulment of an arbitral award must control the application of EU public policy provisions.

The EU General Court acknowledged that arbitral tribunals were not, as such, bound by EU competition law. However, the EU General Court went on to observe that, as the CJEU held in *Eco Swiss*, Articles 101 and 102 of the Treaty on the Functioning of the EU (the ***TFEU***), which govern EU competition law, are public policy provisions within the meaning

of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Consequently, EU national domestic courts are bound to apply Articles 101 and 102 of the TFEU of their own motion and to uphold an application for annulment if they consider that an award is contrary to these provisions. This, according to the EU General Court, is likely to lead arbitral tribunals to ensure that their awards comply with Articles 101 and 102 of the TFEU.

Following the same reasoning, the EU General Court held that EU national domestic courts were also entitled to annul an arbitration award if they find that the arbitral award violates a decision providing for commitments which was adopted in order to implement Articles 101 and 102 of the TFEU.

As a result, the EU General Court held that, despite its rather poor wording, the Commission Decision did not contain errors of law in stating that, if Gazprom did not comply with the binding commitments, a dispute could be referred to arbitration which should take place within the EU in order to oblige "*arbitral tribunals to respect and apply EU competition law as a matter of public policy*".

The judgment of the EU General Court is available in French, German and Polish here.

Constitutional Court Requires Notification of Judgment to Indicate Available Legal Remedies

On 10 February 2022, the Belgian Constitutional Court (the ***Constitutional Court***) held that, when notifying a court judgment, a bailiff's deed of service must indicate the legal remedies (*rechtsmiddelen / voies de recours*) available against the judgment. This decision originates from a request for a preliminary ruling by the Mons Court of Appeal in a case in which the appellant had missed the deadline for filing its appeal.

In that case, the judgment had been notified to the appellant in accordance with Article 43 of the Belgian Judicial Code. This provision lists all the mandatory requirements that must appear on the bailiff's deed of service of a judgment (such as the date of the notification and the names and addresses of the parties). Importantly, however, this provision does not require the indication of the available legal remedies against a judgment.

In order to justify the late filing of the appeal, the appellant argued that a difference of treatment existed between, on the one hand, Article 43 of the Belgian Judicial Code and, on the other hand, Article 792 of the same Code, which expressly provides that, if a judgment is to be notified by a court's clerk, that notification must indicate the remedies available against the judgment. According to the appellant, such a difference of treatment violated Articles 10 and 11 of the Belgian Constitution, Article 6 of the European Convention on Human Rights (***ECHR***) and the right of access to the courts.

In its judgment, the Constitutional Court held that, in order to guarantee the right to a fair trial, the general principle of sound administration, as well as the effective exercise of the right of access to the courts, the legislator ought to ensure that the existence and availability of legal remedies are clearly indicated in the deed of service and that they are explicitly brought to the attention of the parties. The Constitutional Court emphasised that this is the very purpose of a notification, namely, to inform the litigants.

Accordingly, the Constitutional Court held that, in so far as Article 43 of the Belgian Judicial Code does not require that a bailiff's deed of service of a judgment indicate the available legal remedies against that judgment, the time limit for filing such remedies and the designation and address of the competent appellate court, this provision is not compatible with Articles 10 and 11 of the Belgian Constitution, Article 6 of the ECHR and the right of access to the courts.

The Constitutional Court nevertheless expressly stated that notifications of judgments made (or to be made) in accordance with Article 43 of the Belgian Judicial Code will remain valid until Parliament adopts a statute amending the current version of Article 43 of the Belgian Judicial Code. The Constitutional Court determined that such an amendment must be adopted no later than 31 December 2022.

The judgment is available Dutch and in French.

PUBLIC PROCUREMENT

Only Permanent Exclusion Can Deprive Tenderer of Standing to Challenge Public Contract Award Decision

Holding that only the permanent exclusion from a public procurement procedure can have the effect of depriving a tenderer of standing to challenge the award decision, the Court of Justice of the European Union (the ***CJEU***) ensured by judgment of 21 December 2021 full respect for the right to an effective remedy and to a fair hearing of a tenderer which has not yet been permanently excluded. The CJEU delivered its judgment in Grand Chamber (CJEU, Case C-497/20, *Randstad Italia*).

Randstad Italia SpA (***Randstad***) had participated in a public procurement procedure launched by Azienda USL Valle d'Aosta, the local health agency of the Valle d'Aosta region in Italy, for the temporary supply of staff. However, Randstad was awarded one point less than the minimum threshold of 48 points for technical offers as stipulated in the tender documents and was therefore excluded from the public procurement procedure.

Randstad challenged both its exclusion from the public procurement procedure and the regularity of that procedure before the Italian courts. The case eventually went up to the Italian Supreme Court as it was called into question whether Randstad, an excluded tenderer, was able to challenge not only its exclusion but also the regularity of the public procurement procedure, and thus the regularity of the award decision in this procedure. The Italian Supreme Court decided to stay the proceedings and to request a preliminary ruling from the CJEU on this matter.

In its judgment, the CJEU reaffirmed two main principles of the right to an effective remedy and to a fair hearing, namely that:

1. it must be possible for any person having or having had an interest in obtaining a public contract and who has been or risks being harmed by an alleged infringement, to have the decision taken by the contracting authority reviewed effectively and as rapidly as possible as to its conformity with the public procurement regulatory framework.

   For its action to be admissible, such a person must merely adduce evidence that there is a possibility (not a certainty) that the contracting authority will have to restart the public procurement procedure if the review is successful; and

2. only the permanent exclusion of a tenderer can have the effect of depriving this tenderer of standing to challenge a public contract award decision.

   The exclusion of a tenderer is only permanent if the exclusion (i) has been duly notified to the tenderer; and (ii) has been considered lawful by an independent and impartial tribunal or can no longer be the subject of a review procedure.

The CJEU thus confirmed that the question of whether a decision to exclude a tenderer is permanent determines the standing of this tenderer to challenge in law a public contract award decision. Consequently, if the exclusion of a tenderer is not yet permanent, this tenderer – such as Randstad – has standing to challenge not only its exclusion but also the public contract award decision.

On a final note, it also follows from the above ruling that a contracting authority has the obligation, once it has adopted its award decision, to provide tenderers who have not yet been permanently excluded with this award decision, accompanied by a summary of the relevant reasons and a statement of the standstill period. This implies that the contracting authority must also communicate the award decision to tenderers who were placed in a "waiting room" (*wachtkamer / salle d'attente*) during the public procurement procedure. The concept of a waiting room refers to parties that are no longer involved in the tender proceedings, but have not yet been permanently discarded because they could still be involved again under very specific circumstances (*e.g.* in a negotiated procedure).

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