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IFLR1000, 2019

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COMPETITION LAW

EU's "Ne Bis In Idem" Principle Offers Only Limited Protection Against Competition Law Sanctions Following Investigation of Same Conduct Under Sectoral Regulation

On 22 March 2022, the Court of Justice of the European Union (the ***CJEU***) handed down two judgments showing that the European Union's *ne bis in idem* principle – the equivalent of the protection against double jeopardy – provides only limited protection in competition law proceedings if the same conduct has already been investigated in another competition law case or under a national regulatory regime. One of these two judgments (Case C-117/20) concerns the long-standing dispute between the Belgian incumbent postal company, bpost, and the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***). The other involved alleged members of a sugar cartel and the Austrian competition authority (Case C-151/20, *Bundeswettbewerbsbehörde v. Nordzucker and Others*).

The bpost case started in January 2010, when bpost applied, for over a year, a "model per sender" rebate system (the ***Rebate Scheme***). This Rebate Scheme awarded rebates to large clients based on the volume of the mail or the degree of preparation of the mail for further treatment. However, bpost's discount was calculated on the basis of the turnover generated by each sender individually and did not allow consolidators (which collect mail from different senders) to aggregate all the mail processed from different senders. As a result, a sender with a large volume of mailings benefited from a higher rebate than a consolidator which handed over to bpost an equivalent volume of mail on behalf of several senders.

On 20 July 2011, the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications* - the ***BIPT***) found the Rebate Scheme discriminatory and thus incompatible with postal regulations and imposed on bpost a fine of EUR 2.3 million.

On 10 December 2012, the BCA decided that the Rebate Scheme was discriminatory and amounted to an abuse of a dominant position prohibited under EU and national competition law (*See*, this Newsletter, Volume 2012, No. 12). The BCA therefore imposed a second fine of EUR 37.4 million.

bpost sought the annulment of both decisions.

Following a preliminary ruling of the CJEU on the interpretation of the principle of non-discrimination provided for in the postal rules (*See*, this Newsletter, Volume 2015, No. 2), the Brussels Court of Appeal (*Hof van Beroep te Brussel / Cour d'appel de Bruxelles*) found no discrimination and annulled the BIPT's decision on 10 March 2016.

Eight months later, on 10 November 2016, the Brussels Court of Appeal found that the BCA's decision infringed the *ne bis in idem* principle, pursuant to which one cannot be tried or punished for an infringement for which one has already been convicted or acquitted (prohibition of double jeopardy), as the BIPT had already fined bpost for the same acts as those at issue in the proceedings before the BCA. Therefore, the Brussels Court of Appeal also annulled the BCA's decision (*See*, this Newsletter, Volume 2016, No. 12). The BCA appealed this judgment to the Belgian Supreme Court (*Hof van Cassatie / Cour de cassation*), which held on 22 November 2018 that the *ne bis in idem* principle had not been infringed. As a result, the case went back to the Brussels Court of Appeal, acting in a different composition. In February 2020, the Brussels Court of Appeal decided to request a preliminary ruling from the CJEU, asking it to clarify the criteria of application of the *ne bis in idem* principle enshrined in Article 50 of the Charter of Fundamental Rights of the European Union (the ***Charter***) (*See*, this Newsletter, Volume 2020, No. 2).

On 2 September 2021, Advocate General (***AG***) Bobek delivered his opinion on the conditions of application of the *ne bis in idem* principle. The AG proposed that the CJEU reply to the Brussels Court of Appeal that the *ne bis in idem* principle does not preclude an administrative authority from imposing a fine for a violation of the competition rules if the same entity had previously been acquitted in proceedings before another administrative authority for the same or similar facts, provided that the two sets of proceedings differ with respect to the identity of the offender, of the relevant facts, or of the protected legal interests pursued by the applicable laws (*See*, this Newsletter, Volume 2021, No. 8).

In its judgment of 22 March 2022, the Grand Chamber of the CJEU held that the application of the *ne bis in idem* principle in competition law proceedings is subject to a two-fold condition. First, there must be a prior final decision ("*bis* condition"). Second, that prior decision and the subsequent proceedings or decisions must concern the same conduct ("*idem* condition").

The CJEU also noted that any limitation on the fundamental rights recognised by the Charter (including the *ne bis in idem* principle) must be provided for by law, respect the principle of proportionality and the essence of those fundamental rights, and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedom of others. Public authorities can legitimately choose complementary legal responses to harmful conduct through different procedures "*forming a coherent whole*" so as to address different aspects of the social problem involved, "*provided that the accumulated legal responses do not represent an excessive burden for the individual concerned*". Consequently, "*the fact that two sets of proceedings are pursuing distinct objectives of general interest which it is legitimate to protect cumulatively can be taken into account, in an analysis of the proportionality of the duplication of proceedings and penalties, as a factor that would justify that duplication, provided that those proceedings are complementary and that the additional burden which that duplication represents can accordingly be justified by the two objectives pursued*".

The CJEU found that the two sets of legislation at issue pursue distinct legitimate objectives: while the object of the sectoral rules is the liberalisation of the internal market for postal services, the competition rules ensure that competition is not distorted in the market concerned. Therefore, the *ne bis in idem* principle does not prevent an undertaking from being sanctioned for infringing competition law if, on the same facts, it has already been subject to a final decision under sectoral rules.

However, the CJEU also clarified that parallel proceedings would be compatible with the *ne bis in idem* principle only if: (i) clear and precise rules make it possible to predict which acts or omissions may be subject to a duplication of proceedings and penalties while there will be coordination between the two competent authorities; (ii) the two sets of proceedings are conducted in a sufficiently coordinated manner within a proximate timeframe; and (iii) the overall penalties imposed on the undertaking correspond to the seriousness of the offences committed.

In respect of these conditions, the CJEU observed the existence of a legal framework for coordination and exchange of information between the BIPT and the BCA. It also noted that the two authorities' decisions, though adopted 17 months apart from one another, were characterised by a sufficiently close connection in time. Lastly, the CJEU held that the fact that the second fine (imposed by the BCA) is larger than the first one (imposed by the BIPT), does not in itself show that the duplication of proceedings and penalties was disproportionate.

The *bpost* case has been sent back to the Brussels Court of Appeal, which must adopt a judgment that is consistent with the CJEU ruling.

CONSUMER LAW

Federal Chamber of Representatives Adopts Law Implementing EU Directives Extending Legal Warranty of Conformity and Strengthening Protection of Consumers Purchasing Goods with Digital Elements or Digital Contents and Services

On 17 March 2022, the federal Chamber of Representatives adopted a Law modifying the provisions of the old Civil Code relating to sales to consumers, inserting a new title VI*bis* in book III of the old Civil Code and modifying the Code of Economic Law (*Wet tot wijziging van het oud Burgerlijk Wetboek met betrekking tot de verkopen aan consumenten, tot invoeging van een nieuwe titel VIbis in boek III van het oud Burgerlijk Wetboek en tot wijziging van het Wetboek van economisch recht / Loi modifiant les dispositions de l'ancien Code civil relatives aux ventes à des consommateurs, insérant un nouveau titre VIbis dans le livre III de l'ancien Code civil et modifiant le Code de droit économique* – the ***Law***).

The adoption of the Law follows the federal Government's submission on 7 December 2021 of Bill 55K2355 aiming to increase consumer protection for the supply of digital contents and services and sale of goods (*Wetsontwerp tot wijziging van de bepalingen van het oud Burgerlijk Wetboek met betrekking tot de verkopen aan consumenten, tot invoeging van een nieuwe titel VIbis in boek III van het oude Burgerlijk Wetboek en tot wijziging van het Wetboek van economisch recht / Projet de loi modifiant les dispositions de l'ancien Code civil relatives aux ventes à des consommateurs, insérant un nouveau titre VIbis dans le livre 3 de l'ancien Code civil et modifiant le Code de droit économique* – the ***Bill***) (*See*, this Newsletter, Volume 2021, No. 12).

The Law was published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) on 31 March 2022. In line with the two EU directives of 20 May 2019 which it aimed to transpose into Belgian legislation (*i.e.*, Directive (EU) 2019/770 on specific aspects concerning contracts for the supply of digital content and digital services, on the one hand, and Directive (EU) 2019//771 on certain aspects concerning contracts of the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, on the other hand), the Bill provided that it would enter into force on 1 January 2022. However, in light of the delayed adoption of the final text, the Law now provides that it will only enter into force on 1 June 2022.

Court of Justice of European Union Holds that Intermediaries in Consumer Contracts are Traders Subject to EU Consumer Rights Directive, Regardless of Whether They Act for Purposes Relating to their Own Trade, Craft, Business or Profession

On 24 February 2022, in response to preliminary questions referred by the Supreme Court of Lithuania (***Supreme Court***), the Court of Justice of the European Union (***CJEU***) clarified that a person acting as an intermediary in a consumer contract must also be considered a trader within the meaning of EU consumer protection legislation. Additionally, the CJEU held that items of pre-contractual information may validly be communicated to the consumer prior to the conclusion of a distance contract through a trader's general terms and conditions made available online and actively accepted by ticking a box provided for this purpose (CJEU, 24 February 2022, Case C-536/20, *Tiketa*).

Factual Background

The dispute in the main proceedings pitted a private individual (***Mister Š***) against Tiketa UAB, a company active in the online distribution of tickets for events organised by third parties (***Tiketa***) and Baltic Music VšJ, an organiser of cultural events (***Baltic Music***). Mister Š had purchased a ticket for an event organised by Baltic Music on Tiketa's website.

The relevant Tiketa webpage indicated that the event in question was organised by Baltic Music and referred users to another website and a telephone number for further information. The webpage emphasised that the event organiser bore full responsibility for the event, its qual-

ity, content, and any information provided concerning the event. It further noted that Tiketa was acting as a ticket distributor and a disclosed agent. Tiketa's general terms and conditions were also made available on the website and contained detailed information regarding Tiketa and the reimbursement of tickets.

The ticket delivered to Mister Š partly reproduced Tiketa's general terms and conditions. It stated that tickets would neither be exchanged nor refunded and that the event organiser would be liable in full for the reimbursement of the ticket price in the event of cancellation or postponement of the event. It also communicated the name, address and telephone number of Baltic Music and reiterated that the latter bore full responsibility for the event, its quality, content and any information provided regarding the event, while Tiketa merely acted as a ticket distributor and a disclosed agent.

Having travelled to the venue on the day of the event, Mister Š was informed that the event would not take place. Two days later, Baltic Music informed Tiketa that the event had been cancelled and that persons who had purchased a ticket could obtain a refund. Tiketa in turn informed Mister Š that he could obtain a refund either at the ticket office from which his ticket had been purchased, or online if his ticket had been purchased online. Mister Š claimed from Tiketa reimbursement of the ticket price as well as travel costs and non-pecuniary damages suffered as a result of the cancellation. Insisting that it was merely a distributor and as such was not responsible for the cancellation of the event, Tiketa redirected Mister Š towards Baltic Music. Mister Š then addressed his claim to Baltic Music, but the claim remained unanswered for several months.

Mister Š thus brought an action before the District Court of Vilnius, requesting that Tiketa and Baltic Music be jointly and severally ordered to compensate him for his pecuniary and non-pecuniary damage. The District Court of Vilnius upheld this action in part, ordering Tiketa to compensate Mister Š for his pecuniary damage and part of his non-pecuniary damage. After its appeal to the Regional Court of Vilnius was dismissed, Tiketa challenged the District Court's judgment on a point of law before the Supreme Court. The Supreme Court decided to stay the proceedings and asked the CJEU to provide clarifications regarding Articles 2, 6 and 8 of Directive 2011/83/EU of 25 October 2011 on consumer rights (***Consumer Rights Directive***).

Person Acting as Intermediary in Consumer Contract is Trader Subject to Obligations Set out in Consumer Rights Directive

The main question of the Supreme Court was whether the concept of "trader" as defined in Article 2(2) of the Consumer Rights Directive is to be construed as meaning that a person acting as an intermediary, when a consumer purchases a ticket for an event, may be regarded as a trader bound by the obligations set out in that Directive and, accordingly, as a party to the sales or service contract against whom the consumer may bring an action.

The CJEU first noted the existence of disparities between the different language versions of Article 2(2). Irrespective of the language version, the CJEU found that an intermediary such as Tiketa must be considered a trader, as it is acting for purposes relating to its own trade, business, craft or profession in relation to contracts covered by the Consumer Rights Directive. However, the CJEU did not determine whether such an intermediary is not, in any event, a trader simply by virtue of acting in the name of or on behalf of another trader. Noting in particular Articles 6(1)(c) and (d) of the Consumer Rights Directive, which provide that all traders are required, before the consumer is bound by a distance contract, to inform the consumer, if applicable, of the identity and address of the trader on whose behalf they are acting, the CJEU concluded that natural or legal persons acting on behalf of other traders are included in the category of traders. As a result, the term "trader" can both refer to a natural or legal person who is acting for purposes relating to his own trade, business, craft or profession in relation to consumer contracts, and to a natural or legal person who is acting as an intermediary, in the name of or on behalf of a principal trader. Additionally, the CJEU specified that the qualification of an intermediary as a trader does not relieve the principal trader of his quality as a trader.

Trader's General Terms and Conditions Made Available Online and Actively Accepted by Consumer Ticking Box Provided for This Purpose Are Valid Form of Communicating Pre-contractual Information, but Do Not Constitute Durable Medium

Pursuant to Article 6(1) of the Consumer Rights Directive, prior to the conclusion of a distance contract, a trader must provide the consumer with certain items of information

in a clear and comprehensible manner. Such mandatory pre-contractual information includes the price of the goods or services at hand, as well as the trader's identity and contact details and, if applicable, the identity and contact details of the principal trader. This provision aims to ensure that consumers are properly informed of the nature and consequences of the contractual relationship which they are considering entering into. Article 6(5) of the Consumer Rights Directive further provides that all such pre-contractual information forms an integral part of the distance contract unless the parties expressly agree otherwise.

Article 8(7) of the Consumer Rights Directive, in turn, provides that a trader must provide the consumer with the confirmation of the contract concluded on a durable medium within a reasonable time after the conclusion of the contract in question. The term "durable medium" refers to any instrument which enables the consumer or the trader to store information addressed to the consumer personally in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored. The confirmation must include all the information referred to in Article 6(1), unless the trader has already provided that information to the consumer on a durable medium prior to the conclusion of the distance contract.

The Supreme Court asked the CJEU whether the pre-contractual information addressed in Article 6(1) could validly be provided via the intermediary's general terms and conditions available on the intermediary's website, which the consumer actively accepts by ticking a box provided for this purpose. In particular, the Supreme Court queried whether pre-contractual information supplied to the consumer in this manner forms an integral part of the distance contract, even if it has not been communicated to the consumer on a durable medium and/or if the consumer has not received confirmation of the terms on such a medium following the conclusion of the contract.

The CJEU determined that the pre-contractual information listed in Article 6(1) of the Consumer Rights Directive may validly be provided, prior to the conclusion of the contract, only in the general terms and conditions on the intermediary's website, which that consumer actively accepts by ticking a box provided for that purpose, provided that that information is brought to the consumer's attention in a clear and comprehensible manner. In addition, providing pre-contractual information through general terms and conditions accepted by the consumer by ticking a box does not relieve the trader from its obligation to furnish the consumer with confirmation of the contract on a durable medium.

DATA PROTECTION

European Data Protection Board Guidelines on Dark Patterns in Social Media Platform Interfaces

On 14 March 2022, the European Data Protection Board (***EDBP***) published its draft Guidelines 3/2022 on "Dark patterns in social platform interfaces: How to recognise and avoid them" (the ***Guidelines***). The Guidelines describe different types of so-called "dark patterns" and indicate how these can be assessed under General Data Protection Regulation 2016/679 (***GDPR***).

Dark Patterns as Violation of GDPR

The EDPB Guidelines define "dark patterns" as "*interfaces and user experiences implemented on social media platforms that lead users to making unintended, unwilling and potentially harmful decisions in regard to their personal data*". In general, the concept refers to dishonest and duplicitous ways to collect user's data by avoiding the exercise of their rights. Dark patterns have recently come under scrutiny and sparked a discussion on whether additional legislation is required to root them out.

The Guidelines present the GDPR as a useful instrument for combatting dark patterns used by social media platforms. In particular, the EDPB considers the principle of fair processing included in Article 5(1) (a) of the GDPR to be a useful starting point for assessing dark patterns. Indeed, this principle can be relied on to counter insufficient or misleading information.

In addition, the EDPB argues that dark patterns may also impinge upon the principles of accountability and transparency, as they require user interfaces to inform data subjects and demonstrate compliance with the GDPR.

In other situations, dark patterns can be found to run counter to the specific requirements for consent under the GDPR, including the obligation that withdrawing consent should be as easy as providing consent.

Finally, the principle of data protection by design can be relied on to sanction design choices that are not consistent with the objectives of the GDPR. For instance, this is the case if the design does not grant the highest degree of autonomy to data subjects or takes advantage of power imbalances between the controller and the data subject.

Types of Dark Patterns and Best Practices to Counter Them

The Guidelines discuss the different dark patterns that can be found at different stages of the use of such platforms, from the registration on a social media platform over the providing of information on the platform, the management of consent and settings during the time of the use, the exercise of rights, until the termination of the social media account.

The EDPB distinguishes between six types of dark patterns during the life cycle of personal data:

- *Overloading* patterns cover methods by which the data subject is deterred from exercising his or her rights by means of overly communicating information, requests, and options. Overloading patterns include (i) '*continuous prompting*', which consists of providing more information than necessary or repeatedly asking users to provide data, with the objective of leading them to give up and automatically accept any processing – this happens, for example, if users which refuse access to their contact list are prompted each time they log on to share their contacts; (ii) '*privacy maze*' or the process to hide the information sought in a long document obliging the data subject to go through too many pages, and possibly giving up before they find the relevant information; (iii) '*providing too many options*' so users are unable to make a choice, or overlook some settings.

- *Skipping* patterns which lead users to forget or ignore important elements for the protection of their personal data, including (i) '*deceptive snugness*' which sets the most invasive features as the default options on the platform; or (ii) '*look over there*' which uses the presentation of information to distract the user from the privacy related action.

- *Steering* is when the platform makes use of the data subject's emotions or of visual nudges to affect their capacity to decide. The Guidelines mention two types of dark patterns: (i) '*emotional steering*' which uses wordings or visuals to convey a highly positive or negative outlook, making users feel anxious to miss out or guilty to take a selfish choice; and (ii) '*hidden in plain sight*' which displays information in such a way that users easily overlook it, for example if a link to a privacy policy is provided through a small icon in a location on the page where users can hardly notice it.

- *Hindering* is the process by which the access to information or privacy settings is made almost impossible. The EDPB distinguishes three types of situations: (i) '*dead end*', whereby users are directed towards a link that does not work / exist; (ii) '*longer than necessary*' which adds unnecessary steps to a process to discourage the user to make use of their rights or (iii) '*misleading information*' by which a discrepancy between what the users are told they can do and what they can actually do leads them to abandon their pursuit.

- *Fickle* patterns arise if a user interface is not consistent or stable, making it hard for users to obtain reliable information. This includes practices of (i) '*lacking hierarchy*' whereby information appears several times following a different structure each time, making the user's ability to understand or locate the relevant information less effective; and (ii) '*decontextualising*' when information is located in a place that is out of its normal context, making it difficult to find.

- *Left in the dark* patterns consist of a design by which information is hidden or made hard to understand. These cover (i) '*language discontinuity*' meaning that the information on data protection is made available in a different language than that of the website or platform; (ii) '*conflicting information*' which is when pieces of information do not match in terms of content; and (iii) '*ambiguous wording or information*' when the wording used is vague or ambiguous.

Each section of the Guidelines has a recommendation on "best practices" to avoid dark patterns, including the use of a privacy overview with a collapsible table of contents; verifying consistent wordings and terminology; and setting up a data protection onboarding process after the creation of an account. The EDPB also recommends the use of examples to complement the mandatory information and make it more tangible for users.

Even if the Guidelines focus on social media platforms, they also provide a useful framework for assessing whether practices in other processing activities could be viewed as illegal dark patterns. While this guidance helps understanding how certain practices can be assessed under GDPR, it does not draw a clear line between permissible nudging methods and illegal dark patterns. Also, some of the patterns described in the guidance can be caused by oversight or the complexity of ever evolving processing operations instead of intentional practices. Moreover, the examples provided in the Guidelines are not always clear on whether or not a specific practice should be considered to be illegal. Moreover, the structure of the Guidelines, which follows the life cycle of personal data on a social media platform, is lengthy and repetitive, as similar concerns are discussed at various steps in the life cycle. The length of the Guidelines, at 64 pages, is likely to keep them out of the toolbox of many data controllers.

The Guidelines can be found here. Stakeholders can provide their input to the EDPB by 2 May 2022.

European Data Protection Board Publishes Guidelines on Application of One-Stop-Shop Principle

On 14 March 2022, the European Data Protection Board (***EDPB***) adopted Guidelines on the application of Article 60 GDPR (the ***EDPB Guidelines***) to clarify the obligation of cooperation between Supervisory Authorities (***SAs***) under the General Data Protection Regulation (EU) 2016/679 (the ***GDPR***) and to help SAs "*interpret and apply their own national procedures in such a way that it conforms to and fits in the cooperation under the one-stop-shop mechanism.*"

Pursuant to Articles 56 and 60 GDPR, which establish the one-stop-shop for GDPR enforcement, in cases of cross-border processing of personal data, the SA of the Member State in which the controller's or processor's principal place of business is located is referred to as the Lead Supervisory Authority and is responsible for leading the enforcement of the GDPR (***LSA***). In particular, pursuant to

Article 60 GDPR, the LSA is required to cooperate with the other concerned national supervisory authorities (***CSAs***) in an attempt to reach a consensus on a possible infringement of GDPR by cross-border processing activities.

The application of the one-stop-shop mechanism has already been the subject of proceedings before the EU courts. For instance, on 15 June 2021, the Court of Justice of the European Union (***CJEU***) handed down a judgment in which it detailed the circumstances in which a national SA can exercise its power to bring an alleged infringement of the GDPR to court, even though that authority is not the LSA with regard to the specific processing of personal data at issue. The judgment provided important clarifications on the functioning of the one-stop shop mechanism under the GDPR and the possibility for national SAs to bring an action in court outside the scope of this mechanism (*See*, this Newsletter, Volume 2021, No. 6).

The EDPB Guidelines provide clarifications on the interactions between the LSA, the CSAs, the EDPB and third parties under the one-stop-shop mechanism.

First, the EDPB Guidelines articulate several basic principles of the cooperation procedure provided for under Article 60 GDPR and specify that (i) the cooperation procedure of Article 60 GDPR applies to all cases involving processing activities across borders, irrespective of whether the case is based on a complaint or whether it was started "*ex officio*"; (ii) while the LSA has the responsibility to manage the case, the application of the GDPR is a shared responsibility which means that the final decision should, when possible, be based on consensus; and (iii) SAs' national obligation to remain independent from external influence when applying the GDPR and other national procedural rules cannot undermine the effectiveness of the cooperation procedure under Article 60 GDPR.

The EDPB Guidelines then explain that under Article 60(1) GDPR, the SAs, including the LSAs, have a mutual obligation to try and reach a consensus. The achievement of such a consensus entails the SAs' obligation to exchange all relevant information regarding a specific case with the other CSAs as soon as possible, to enable the CSAs to provide their views on the information exchanged. The EDPB considers all factual and legal elements related to the case to be relevant.

In addition, the EDPB Guidelines clarify the interpretation of Article 60(2) GDPR, through which the LSA can request mutual assistance from the CSAs to conduct joint operations such as joint investigations. The EDPB Guidelines explain that the possibility for the LSA to request mutual assistance from the CSAs can take place during the investigatory phase (*e.g.*, to seek or verify specific information) or during the implementation phase after the final decision was adopted (*e.g.*, to verify the implementation of the final decision).

Furthermore, the EDPB Guidelines point to the LSA's obligation under Article 60(3) GDPR to involve the other CSAs in the preparation of the draft decision and to submit the draft decision to the other CSAs as soon as possible in all cross-border cases. In that regard, the LSA is bound to take the other CSAs' views into account when preparing the draft decision and after submitting the draft decision to the CSAs. The EDPB Guidelines also explain that, in the absence of relevant objections by the CSAs within four weeks following the submission of the draft decision, the LSA and other CSAs are deemed to agree, which causes the LSA's draft decision to become binding.

By contrast, if the CSAs raise relevant and reasoned objections against the draft decision, the LSA should take appropriate measures in an attempt to reach a consensus with the other CSAs, including revising its draft decision if necessary. If no consensus can be found, the LSA is required to submit the case to the EDPB to obtain a binding decision settling the dispute pursuant to the dispute resolution procedure laid down in Article 65 GDPR.

Pursuant to Article 60(7) and 60(9) GDPR, when the draft decision, possibly revised following consultation with the CSAs or following the intervention of the EDPB, becomes binding, the LSA adopts a final decision at national level on the basis of this draft decision and notifies the addressees of that decision. The LSA must also inform the other CSAs and the EDPB of such a notification and provide a summary of the relevant facts and grounds of the decision. If a complaint submitted to a CSA which is not the LSA was (partly) rejected or dismissed in the final binding decision of the LSA, a separate decision rejecting that complaint should be adopted.

Finally, the EDPB Guidelines describe the obligations of the addressees of the decision (*e.g.*, the data controller or processor) to ensure compliance with the final decision and describe the possibility to use the urgency procedure in the context of the cooperation between the SAs.

The EDPB Guidelines are available here.

LABOUR LAW

Belgium Adopts National Action Plan to Improve Employees' Well-being

On 24 March 2022, the federal Minister of Labour announced a national action plan 2022-2027 to improve employees' well-being at work (*Nationaal Actieplan ter verbetering van het welzijn van de werknemers bij de uitvoering van hun werk / Plan d'action national pour l'amélioration du bien-être des travailleurs lors de l'exécution de leur travail* - the ***Plan***).

The Plan transposes the EU Strategic Framework on Health and Safety at Work 2021-2027 (the ***EU Framework***) which defines the key priorities and actions for improving employees' health and safety by addressing changes in the economy, demography and work patterns and converting them into concrete action points for Belgium. The Plan also takes into consideration the contributions made by the social stakeholders by implementing their priority note established under the aegis of the High Council for Prevention and Protection at Work (*Hoge Raad voor Preventie en Bescherming op het Werk / Conseil supérieur pour la prévention et la protection au travail* - the ***HCPPW***).

The Plan will be discussed annually with the social stakeholders of the HCPPW so that new challenges can be considered.

The Plan sets several objectives for the six coming years, which can be summarised as follows:

- *Preventing work-related risks*: prevent psychosocial risks at work, skeletal and muscle disorders as well as the exposure of employees to hazardous chemical agents; promote a "vision zero" approach in order to reduce work accidents and reinforce the protection of vulnerable employees, such as domestic workers.

- *Strengthening well-being at work*: support the return to work of employees on long-term sick leave; review the organisation of work, in particular as regards teleworking.

- *Support the several stakeholders*: give support to the employer and employees, whenever necessary (*e.g.*, by providing specific health tools); optimise the cooperation between the several prevention services and social dialogue in general.

- *Pursuing policy-supporting objectives*: in order to meet the above objectives, the Government has to gain access to the necessary data which will allow it to determine the most appropriate measures.

The Plan is available in Dutch here and in French here; the EU Framework is available here.

PUBLIC PROCUREMENT

No New Award Procedure Is Required When New Contractor Takes Over Rights And Obligations Of Initial Contractor Arising From Public Contract Or Framework Agreement Following Insolvency and Liquidation Of Initial Contractor

Substantial modifications of public contracts or framework agreements during their term must give rise to a new award procedure relating to the amended public contract or framework agreement.

A modification will generally be considered to be substantial when a new contractor replaces the one to which the contracting authority had initially awarded the public contract or framework agreement. As a rule, such a substantial modification thus requires a new award procedure.

However, one of the exceptions to this rule is the case in which a new contractor replaces the contractor to which the contracting authority had initially awarded the public contract or framework agreement as a consequence of a universal or partial succession into the position of the initial contractor. This may occur following a form of corporate restructuring, such as a takeover, merger, acquisition or case of insolvency.

In its judgment of 3 February 2022, Advania Sverige and Kammarkollegiet, Case C-461/20, the Court of Justice of the European Union (the ***CJEU***) shed further light on this exception, in particular in the case of a succession by a new contractor into the position of the initial contractor following the insolvency and liquidation of the latter.

In the case at hand, one of the questions raised was whether the exception relating to succession of the initial contractor following insolvency could also be applied if the new contractor does not take over all or part of the business of the initial contractor falling within the scope of a framework agreement concluded with a contracting authority, but takes over only the rights and obligations arising from that framework agreement.

In response, the CJEU held the following:

1. A succession may involve the taking over, by a new contractor, of all or only part of the assets of the initial contractor and may therefore involve an acquisition limited to a public contract or a framework agreement making up the assets of the initial contractor;

2. The insolvency does not presuppose that a new contractor takes over all or part of the business of the initial contractor falling within the scope of a framework agreement. The concept of insolvency must not be understood as being limited to situations in which the business of the initial contractor which enables the performance of a framework agreement or a public contract is pursued in whole or in part.

Consequently, the CJEU clarified that the exception at hand also encompasses the case in which a new contractor, following the insolvency and liquidation of the initial contractor, took over only the rights and obligations of the initial contractor arising from a public contract or framework agreement concluded with a contracting authority. In that case no new award procedure is required.

Notwithstanding the above, such a transfer of a public contract or a framework agreement will still be subject to the conditions that (i) the new contractor satisfies the criteria for qualitative selection initially established; (ii) this does not entail other substantial modifications to the public contract or framework agreement; and (iii) the succession does not seek to circumvent the application of the public procurement regulatory framework.

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