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Highlights

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Topics covered in this issue

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COMMERCIAL LAW

Supreme Court Clarifies How to Determine Damages in Tort Claims

On 28 February 2020, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) delivered an interesting judgment which clarifies how to determine damages in tort claims.

The proceedings were directed against a judgment of the Liège Court of Appeal of 28 June 2018 in a case in which the damage suffered was highly likely to evolve in the future. As a result of an illicit act by the defendant, the claimant suffered from a permanent personal incapacity rate of 15%. Although medical solutions could be envisaged in the future, doctors were not in a position to propose an immediate treatment to the claimant who did not wish to undergo an additional surgical procedure. Accordingly, the Liège Court of Appeal had considered that calculating the damages with certainty was impossible and had therefore awarded a lump sum to the claimant.

The Supreme Court held that, by basing its decision on a hypothetical evolution of the damage, the Liège Court of Appeal had violated its duty to assess the damage *in concreto* at the moment of the ruling based on events that are certain and not hypothetical. As a consequence, it partially quashed the Liège Court of Appeal's judgment and referred the case to the Mons Court of Appeal for reassessment.

The reasoning of the Supreme Court sheds useful light on the determination of damages in tort claims and is based on the underlying principle of full reparation of the claimant's damage.

First, the Supreme Court emphasised that the amount to be awarded can only be determined in equity under the condition that the court indicates the reasons for which it cannot accept the calculation put forward by the claimant and notes that it is impossible to determine the amount of the damage under an alternative method.

Second, the Supreme Court insisted that the damage caused by an illicit act should be evaluated *in concreto* at the moment of the judgment. When assessing the amount of the damage, the judge must take account of events ulterior to the judgment, even if foreign to the illicit act, to the extent these may influence the amount of the damage. However, such ulterior events must be certain and not hypothetical.

COMPETITION LAW

Chamber of Representatives Considers Close Monitoring and Imposing Maximum Prices in Context of Covid-19 Outbreak

On 9 April 2020, Members of the Chamber of Representatives (*Kamer van volksvertegenwoordigers / Chambre des représentants*) submitted a proposed law strengthening price control mechanisms in the context of the Covid-19 health crisis (*Wetsvoorstel houdende bepaalde noodmaatregelen inzake prijzencontrole in het raam van de Covid-19-crisis / Proposition de loi portant certaines mesures d'urgence en matière de contrôle des prix dans le cadre de la crise du Covid-19* - the ***Proposed Law***).

The Proposed Law seeks to entrust the Pricing Observatory with the task of assessing price trends of (i) essential goods; (ii) products necessary for front-line medical and paramedical staff; and (iii) products that are "*offered for sale in shops and stores that benefit from the exception referred to in Article 1, § 1 of the Ministerial Order of 23 March 2020 on emergency measures to limit the spread of the coronavirus Covid-19*", *i.e.*, shops and stores that remained open during the lockdown. If adopted, the Proposed Law will also allow the Belgian office for statistics Statbel and the Commission for Price Regulation to transmit information to the Pricing Observatory regarding these products, regardless of any confidentiality issue. Finally, the Proposed Law aims to give to the Minister of Economic Affairs the power to impose maximum prices for these products.

An amendment has been submitted in order to "*limit the social impact of the crisis by requiring the supermarkets and shops concerned to cap the price of certain essential products*". This cap would be set at the prices applied on 13 March 2020. This amendment would also limit the scope of the Proposed Law to the first two categories of products, *i.e.*, (i) essential goods; and (ii) products necessary for front-line medical and paramedical staff.

The Proposed Law is currently under discussion within the parliamentary committee for economy of the Chamber of Representatives.

Chamber of Representatives to Delay Entry into Force of Provisions on Abuse of Economic Dependency

On 7 April 2020, Members of the Chamber of Representatives (*Kamer van volksvertegenwoordigers / Chambre des représentants*) submitted a proposed law delaying the entry into force of the provisions governing the abuse of economic dependency (*Wetsvoorstel tot wijziging van de wetten van 4 april 2019 houdende wijziging van het Wetboek van Economisch Recht met betrekking tot misbruiken van economische afhankelijkheid, onrechtmatige bedingen en oneerlijke marktpraktijken tussen ondernemingen en van 2 mei 2019 houdende wijzigingen van boek I 'Definities', van boek XV 'Rechtshandhaving' en vervanging van boek IV 'Bescherming van de mededinging' van het Wetboek van economisch recht / Proposition de loi modifiant les lois du 4 avril 2019 modifiant le Code de droit économique en ce qui concerne les abus de dépendance économique, les clauses abusives et les pratiques du marché déloyales entre entreprises et du 2 mai 2019 portant modifications du livre Ier 'Définitions', du livre XV 'Application de la loi' et remplacement du livre IV 'Protection de la concurrence' du Code de droit économique* - the ***Proposed Law***).

The Proposed Law aims to address the legal uncertainty that was created by the fact that Book IV of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*), which contains the Belgian competition rules, was amended twice almost simultaneously in 2019. The first amendment introduced into Book IV of the Code of Economic Law the concept of abuse of economic dependency. However, before this amendment entered into force, a second law revamped Book IV in its entirety, without including the provisions governing the abuse of economic dependency (*See*, this Newsletter, Volume 2019, No. 5, p. 4).

In order to dispel this legal uncertainty, the Proposed Law will confer on the King the power to coordinate both laws. It will also delay the entry into force of the new provisions on economic dependency, which were due to apply as of 1 June 2020. The Proposed Law provides that the King will determine this entry into force which should not take place later than 1 December 2020.

The Proposed Law was adopted by the parliamentary committee for economy of the Chamber of Representatives on 6 May 2020 and is scheduled for final adoption by the plenary Chamber on 20 May 2020.

CONSUMER LAW

Summer Sales Periods to Be Postponed Due to Covid-19

On 9 April 2020, Nathalie Muylle and Denis Ducarme, respectively federal Minister for Employment, the Economy, Consumers, the Fight against Poverty, Equality of Opportunities and Handicapped Persons and federal Minister for the Middle Class, the Self-Employed, Agriculture, Social Integration and Large Cities (the ***Ministers***), issued a joint statement on the summer sales period.

At the request of numerous associations representing retailers, especially those active on the clothes retail market, the 2020 summer sales period, which usually takes place in the month of July, will take place from 1 to 31 August 2020. In addition, the usual one-month blackout pre-sales period, during which retailers must not announce rebates, will apply from 1 to 31 July 2020. This measure aims to allow retailers to better manage their stocks and to generate normal revenues from the sale of their summer collections which have been displayed in stores that were closed for more than a month due to the lockdown imposed by the federal government to limit the spread of Covid-19.

Furthermore, the Ministers stated to be considering two additional measures to support retailers.

First, restaurants which can no longer host customers on their premises and resort to at-home deliveries and other retailers who temporarily modify their activities in response to the Covid-19 crisis would be exempted from their administrative duty to notify the modification of their activities to the Crossroads Bank for Enterprises (*Kruispuntbank van Ondernemingen / Banque-Carrefour des Entreprises*).

Second, the Ministers are contemplating an amendment of the regulatory framework applicable to so-called "liquidation sales" which allow retailers to accelerate the sale of their stock at a loss in the exceptional circumstances listed in Articles VI.22 *et seq.* of the Code of Economic Law. Those situations include the ceasing or significant disruption of retailers' activities and the closing or move of a point of sale. Currently, a liquidation sale can last between five months and one year, depending on the underlying reason. The Ministers are considering an extension of this time period equivalent to the duration of the lockdown applicable to retailers. Accordingly, those retailers which had resorted to liquidation sales should be allowed to continue liquidating their stocks when the lockdown will be lifted.

The above measures were included in a Private Member's Bill modifying provisions of the Code of Economic Law concerning the registration with the Crossroads Bank for Enterprises and the postponement of sales, which was submitted to the Chamber of Representatives on 16 April 2020 (*Wetsvoorstel tot wijziging van sommige bepalingen van het Wetboek van Economisch Recht wat de inschrijving in de KBO en uitstel van de solden betreft / Proposition de loi modifiant certaines dispositions du Code de droit économique en ce qui concerne l'inscription à la BCE et le report des soldes* – the ***Bill***). The Bill was adopted by the Chamber of Representatives' committee of economy, consumer protection and digital agenda on 13 May 2020 and is scheduled for final adoption in plenary session on 20 May 2020.

CORPORATE LAW

Extension of Temporal Scope of Flexible Regime for General Meetings and Board Meetings

On 28 April 2020, the federal Government extended until 30 June 2020 the applicability of the special regime allowing legal entities to organise general meetings and board of directors' meetings in more flexible ways. The flexible regime was initially scheduled to end on 3 May 2020.

On 9 April 2020, the Belgian Federal Government had adopted Royal Decree No. 4 (the ***Royal Decree***) granting more flexibility to:

- all legal entities governed by the Belgian Companies and Associations' Code (*i.e.*, companies and associations);
- all legal entities that acquired legal personality through a specific law; and
- contractual Institutions for Collective Investment,

to organise general meetings and board of directors' meetings in compliance with the confinement measures.

The Royal Decree allows legal entities to organise the general meeting behind closed doors with a remote voting procedure and/or voting procedure by proxy or to postpone the meeting. In addition, the board of directors' meetings may also be held by telephone or video conference or decisions may be adopted by unanimous written resolutions.

The temporal scope of this flexible regime has now been extended and applies to general meetings and board of directors' meetings held between 1 March 2020 and 30 June 2020 or for which the convocation notice was sent or published between those dates.

However, the extension will not affect the already extended deadlines for the adoption of the annual board report and the approval and filing of the annual accounts. Pursuant to the Royal Decree, the annual general meeting may be postponed for up to ten weeks as from the statutory deadline. This means that legal entities whose financial year ended on 31 December 2019 may postpone the approval of the annual accounts until 8 September 2020 and the filing of their approved annual accounts with the National Bank of Belgium until 8 October 2020.

A detailed discussion of the flexible regime to organise general shareholder meetings and board of directors' meetings can be found in our memorandum of 10 April 2020 (*See*, this Newsletter, Volume 2020, No. 3, p. 7).

European Commission Issues Guidelines on Protection of Critical European Assets against Foreign Investment

On 25 March 2020, the European Commission (the ***Commission***) issued guidelines concerning the screening of foreign direct investment (***FDI***) to protect the EU's strategic assets (the ***Guidance***). The Guidance was adopted against the background of the current Covid-19 crisis and the economic vulnerability that may result from this crisis.

Under existing EU rules, EU Member States are allowed to screen FDI and to take measures to prevent such FDI from resulting in control over a company which constitutes a security risk or a threat to public order. The Commission issued the Guidance to ensure a strong EU-wide approach to FDI in the public health sector which explicitly falls under the scope of protection of the existing EU rules.

Given the current circumstances, there could be an increased interest in acquiring control of healthcare infrastructure or related industries, such as research establishments. The Commission now encourages EU Member States to apply their existing national FDI screening mechanisms to prevent FDI from third countries that could put the EU Member States' security or public order at risk.

Furthermore, the Commission urges those EU Member States that do not have national FDI screening mechanisms to set up such a mechanism. In the meantime, these EU Member States are encouraged to consider all availa-

ble options to address cases involving the acquisition of a company, infrastructure or technology in the health, medical research or biotechnology industries by FDI that would put the EU Member States' security or public order at risk.

Given that FDI typically has an impact on the market of more than one EU Member State, the Commission calls for EU Member States to cooperate in screening FDI. In March 2019, the European Parliament and the Council adopted Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the EU. The Commission confirmed that FDI taking place now will already be reviewed under the EU FDI screening cooperation mechanism, even though the mechanism will be fully operational only in October 2020.

The Commission's Guidance can be consulted here.

Law Amending Belgian Companies and Associations' Code

On 16 April 2020, the federal Parliament adopted the law regarding the encouragement of long-term shareholder engagement and containing various provisions on companies and associations (*Wet van 16 april 2020 tot omzetting van Richtlijn (EU) 2017/828 van het Europees Parlement en de Raad van 17 mei 2017 tot wijziging van Richtlijn 2007/36/EG wat het bevorderen van de langetermijnbetrokkenheid van aandeelhouders betreft, en houdende diverse bepalingen inzake vennootschappen en verenigingen / Loi du 16 avril 2020 transposant la directive (UE) 2017/828 du Parlement européen et du Conseil du 17 mai 2017 modifiant la directive 2007/36/CE en vue de promouvoir l'engagement à long terme des actionnaires, et portant des dispositions diverses en matière de sociétés et d'associations* - the ***Law***).

This article discusses the principal amendments to the Belgian Companies and Associations' Code (the ***BCAC***) introduced by the Law while the next article addresses the provisions encouraging long-term shareholder engagement.

- In order to determine whether a person or entity has "control" over a company, it is no longer sufficient to consider the majority of voting rights attached to the shares in the company. Pursuant to the Law, the voting rights attached to other types of securities must also be taken into account. As a result, there will be a presumption of control in case that person or entity holds the majority of the voting rights attached to all securities issued by the company.

- A permanent representative of a legal entity which is the sole director in a limited liability company (*naamloze vennootschap / société anonyme*) is not personally jointly and severally liable for the obligations of the legal entity-director, even if the articles of association of the limited liability company provide for such personal liability.

- It is now confirmed that the time limitations applicable to voluntary exits of shareholders do not apply to the forced exclusion of shareholders in a private limited liability company (*besloten vennootschap / société à responsabilité limitée*). At issue is the prohibition on shareholders from exiting the company voluntarily within the first two years after the incorporation of the company or after the first six months of each financial year.

- It is now confirmed that the cap on directors' liability does not apply to the liability of a director for the debts of the bankrupt company in case of serious misconduct by that director. This exception is in line with the general exception for any serious misconduct.

- The BCAC now provides that if all shares in a (private) limited liability company are held by one shareholder, this situation must be registered in the company's file held by the clerk's office of the competent Enterprise Court. The identity of that shareholder must also be mentioned.

In addition to the above amendments, the Law introduced a number of minor, more technical, amendments. It aligned the different language versions of the BCAC, made linguistic and terminological improvements and rectified a few omissions and substantive mistakes.

The amendments to the BCAC entered into force on 6 May 2020.

Implementation of Shareholder Rights Directive II in Belgian law

On 16 April 2020, the federal Parliament adopted the law regarding the encouragement of long-term shareholder engagement and containing various provisions on companies and associations (*Wet van 16 april 2020 tot omzetting van Richtlijn (EU) 2017/828 van het Europees Parlement en de Raad van 17 mei 2017 tot wijziging van Richtlijn 2007/36/EG wat het bevorderen van de langetermijnbetrokkenheid van aandeelhouders betreft, en houdende diverse bepalingen inzake vennootschappen en verenigingen / Loi du 16 avril 2020 transposant la directive (UE) 2017/828 du Parlement européen et du Conseil du 17 mai 2017 modifiant la directive 2007/36/CE en vue de promouvoir l'engagement à long terme des actionnaires, et portant des dispositions diverses en matière de sociétés et d'associations* - the ***Law***).

The Law implements in Belgian law Directive (EU) 2017/828 which is designed to encourage long-term shareholder engagement, also known as Shareholder Rights Directive II (the ***Directive***). The Directive seeks to (i) encourage effective and sustainable shareholder engagement; (ii) enhance transparency regarding the remuneration of various corporate officers; and (iii) promote discussions and interaction between issuers and investors, in order to improve the financial and non-financial performance of listed companies in the EU.

Remuneration of Directors and Executives

Directors' remuneration is one of the key instruments to align the interests of shareholders and directors in listed companies. The Law therefore strengthens the content of the remuneration report and introduces a remuneration policy which has to be drawn up and publicly disclosed.

(i) Remuneration policy

Shareholders will have the right to determine the company's remuneration policy. This should contribute to the company's business strategy, long-term interests and sustainability.

The Law provides that the remuneration policy must cover directors, daily managers and other executives. The remuneration policy must be submitted to a separate binding vote by the shareholders. The remuneration policy and the result of the vote must be published on the website of the company.

The remuneration policy must be submitted for the first time to the shareholders' meeting approving the annual accounts and the annual report of the first financial year starting after 30 June 2019.

(ii) Remuneration report

The remuneration report must contain a comprehensive overview of the remuneration paid during the most recent financial year to specific individuals. In order to ensure that the remuneration policy is implemented correctly, the Law must now also contain the following information:

- an explanation on how the total remuneration granted in the previous financial year is in line with the remuneration policy;
- a presentation of the annual change in remuneration, the performance of the company, and the average remuneration of full-time employees over the past five years, allowing a comparison with the remuneration of directors and managers; and
- the ratio between the best paid executive and the least remunerated full-time employee within the company.

The European Commission has published non-binding guidelines to specify the standard presentation of the remuneration report.

The remuneration report must be published together with the annual accounts. While the remuneration of directors, members of the supervisory and management board, and daily managers must be disclosed on an individual basis, it is sufficient to disclose the remuneration of other executives on an aggregated basis.

Companies must apply the Law to their remuneration report for the first time in relation to the first financial year starting after 30 June 2019.

Identification of Shareholders, Transmission of Information and Facilitation of Execution of Shareholder Rights

Given that the identification of shareholders is a prerequisite to direct communication between the shareholders and the company, the Law has introduced the following provisions that aim to encourage shareholder engagement:

- granting listed companies the right to obtain specific information from intermediaries regarding the shareholders, such as the name and contact details, the number of shares held and classes of shares held;
- improving the transmission of information along the chain of intermediaries; for example, intermediaries must pass on information made available by the company to the shareholders and *vice versa*; and
- imposing an obligation on intermediaries to ensure that shareholders themselves can exercise their voting rights at the shareholders' meetings or to exercise these voting rights in line with the specific voting instructions of the shareholders.

These provisions will enter into force on 3 September 2020.

Related Party Transactions

Transactions with related parties may cause harm to companies and their shareholders, as they may give the related party the opportunity to appropriate value belonging to the company and, hence, to all its shareholders. The procedure introduced by the Law is largely in line with the already existing Belgian regulatory framework on intra-group conflicts of interest.

However, the scope of application of the procedure has been broadened, and now also applies to transactions entered into by non-listed subsidiaries of a listed company. In addition, the procedure must be applied to transactions with any "related party" within the meaning of IAS 24 (*International Accounting Standards*) rules. The concept of "related party" is broader than "affiliated party". It also covers relationships other than control, such as (i) the exercise of a significant influence over the company; (ii) the qualification as a member of the key management personnel; or (iii) close family ties. Further, the related party transaction must be disclosed publicly at the latest at the time of the conclusion of the transaction.

The provisions regarding related party transactions entered into force on 17 May 2020.

Financial Services and Markets Authority Issues Press Release on Impact of Covid-19 on Listed Companies

On 26 March 2020, the Belgian Financial Services and Markets Authority (*Autoriteit voor Financiële Diensten en Markten / Autorité des services et marchés financiers* - the ***FSMA***) issued a press release regarding the impact of Covid-19 on the information obligations of listed companies. On 14 April 2020, the FSMA also published a more detailed Q&A on the same topic.

Both the press release and the Q&A address the obligations of listed companies concerning the publication of inside information, the company's annual financial report, as well as the organisation of general meetings.

Publication of Inside Information

Listed companies are obliged to publish inside information as soon as possible after becoming aware of such information. Inside information is defined as specific information, which has not been made public, that relates, directly or indirectly, to the company and, if published, may have a significant impact on the market value of the financial instruments issued by the company.

The current circumstances resulting from the Covid-19 crisis are likely to have an impact on listed companies. The FSMA therefore emphasises that companies must ensure that they publish any inside information within the context of Covid-19 crisis as soon as possible, even though the impact of such information is not yet quantifiable. Examples of inside information given by the FSMA include the suspension of dividend distributions, the termination of clinical studies, any delay in important projects or the suspension of production.

The FSMA also urges listed companies to devote in its annual press release a paragraph to the current and expected impact of Covid-19 on the company's activities and its financial situation.

Annual Financial Report

The FSMA announced that it will not issue a warning this year in case a listed company whose financial year runs

from 1 January to 31 December fails to publish its annual financial report regarding financial year 2019 before 30 April 2020.

Pursuant to the Royal Decree (as defined below) listed companies may postpone the publication of their annual financial report for a maximum period of ten weeks. Nevertheless, the FSMA urges companies to publish its annual report as soon as possible. Companies that want to make use of the possibility to postpone the publication will be required to communicate the delay on their website. Further, it is recommended to issue a press release containing information on the expected duration of the delay.

(Annual) Shareholders' Meetings

On 9 April 2020, the federal government adopted Royal Decree No. 4 allowing legal entities to organise general shareholder meetings and board of directors' meetings in more flexible ways or to postpone such meetings (the ***Royal Decree***). A detailed discussion of the flexible regime to organise general shareholder meetings and board of directors' meetings can be found in our memorandum of 10 April 2020 (*See*, this Newsletter, Volume 2020, No. 3, p. 7 and this issue, above).

In its Q&A, the FSMA sets outs guidelines for listed companies on how to apply the Royal Decree to their shareholders' meetings.

The FSMA's press release can be found here. The Q&A is only available in Dutch and French.

DATA PROTECTION

Belgian and EU Advice to Balance Covid-19 Measures with Data Protection

The Covid-19 crisis has caused public authorities, businesses and research organisations to take far-reaching measures to protect public health. The scale of the measures and the nature of the data that are collected (including health-related data and location data) raise questions about the risk posed to fundamental rights, including the right to privacy, family life, protection of personal data and secrecy of correspondence.

European and national authorities were quick to note that measures that are necessary in the fight against the virus are not prohibited under the GDPR. Similarly, recital 46 of the GDPR states that processing of personal data on important grounds of public interest, "including for monitoring epidemics and their spread" are lawful. However, the manner in which such measures are implemented should still comply with applicable data protection rules. On Van Bael & Bellis' Covid-19 webpage, we provide regular updates on the various guidance documents that are published by Belgian and EU authorities. In April 2020, these updates included:

- a statement by the European Data Protection Supervisor (***EDPS***) of 6 April 2020 calling on Member States to adopt a harmonised approach for the protection of personal data when tackling the Covid-19 crisis. The EDPS advocated a pan-European model "Covid-19 mobile application". Our summary of the EDPS statement can be found here.

- two documents published by the European Commission to facilitate and harmonise the use of mobile apps supporting the fight against Covid-19. The first document was adopted on 15 April 2020 by the eHealth Network, a voluntary network of Member State authorities responsible for eHealth created under EU Directive 2011/24/EC. It concerns the first iteration of the toolbox for mobile applications to support contact tracing in the EU's fight against Covid-19 (the ***Toolbox***). The Toolbox is complemented by the European Commission's guidance on apps supporting the fight against the Covid-19 pandemic in relation to data protection. A note discussing these two documents can be found here.

- EDPB guidelines 3/2020, adopted on 21 April 2020, for the processing of personal data concerning health for the purposes of scientific research in the fight against Covid-19. These guidelines provide guidance to public and private organisations on how to reconcile scientific research with data protection requirements. In particular, the guidelines discuss the legal basis for such activity, the implementation of adequate safeguards, and the exercise of data subject rights. Our memorandum on these guidelines can be found here.

- EDPB guidelines 4/2020, also adopted on 21 April 2020, on the use of location data and contact tracing tools in the context of the Covid-19 outbreak. These guidelines clarify the conditions and principles for the proportionate use of location data and contact tracing tools for two specific purposes: (i) using location data to support the response to the pandemic by modelling the spread of the virus so as to assess the effectiveness of confinement measures; and (ii) contact tracing, which aims to notify individuals of the fact that they have been in close proximity of someone who was eventually confirmed to be carrier of the virus in order to break the chains of contamination as quickly as possible. Our memorandum on these guidelines can be found here.

- Finally, on 30 April 2020, the Belgian Data Protection Authority (***DPA***) published its opinion on two draft Royal Decrees preparing the use of contact tracing applications in Belgium. In its opinion, the DPA calls for additional safeguards in the Royal Decrees. A detailed discussion of the DPA's opinion can be found in this section of our Newsletter.

Belgian Data Protection Authority Requires Additional Safeguards for Contact Tracing Apps and Covid-19 Database

On 30 April 2020, the Belgian Data Protection Authority (*Gegevensbeschermingsauthoriteit/l'Autorité de protection des données* - the ***DPA***) decided that the two preliminary draft Royal Decrees governing contact tracing applications (***apps***) and the Covid-19 database have to be

amended. The DPA was consulted to provide its advice on two draft Royal Decrees (i) governing the use of contact tracing apps and (ii) setting up a Covid-19 database by Sciensano, a public research institution that is tasked with scientific assignments in the area of public health and animal health, to prevent further spreading of the Coronavirus.

In its advice, the DPA stipulated that data protection rules do not stand in the way of technological measures in the fight against Covid-19, provided that these measures respect fundamental rights and principles. Therefore, the normative framework governing these measures should be precise and complete in order to be transparent for citizens. In addition, the DPA is of the opinion that the necessity of the contact tracing apps has to be demonstrated. The DPA therefore advocates further amendments to the draft Royal Decrees.

Additional Safeguards for Citizens

The DPA pointed out that it is necessary to demonstrate the necessity and proportionality of contact tracing apps and of the Covid-19 database. Such apps are intrusive and should therefore only be used when necessary and proportionate to the objective of general interest, which is preventing the further spread of the Covid-19 virus. Activating such a tracing system should only be allowed if it is the least intrusive measure to achieve the objective and if there is no imbalance between the conflicting interests.

In addition, the draft Royal Decrees should provide additional safeguards to citizens. In concrete terms, the draft Royal Decrees should contain further details regarding the origin of the gathered (medical) personal data, the third parties who could be granted access to the data and the uses made of the data. The Royal Decrees should also specify that there will be no interoperability between the different databases that are set up in light of the current Covid-19 epidemic, or any other databases, and that the gathered personal data must not be used for other purposes.

Minimum Conditions for Tracing App

The DPA added that contact tracing apps should satisfy the Guidelines published by the European Data Protection Board (the ***EDPB***) on the use of location data and contact tracing tools in the context of the Covid-19 outbreak, and the "EU toolbox" presented recently by the European Commission, which also relates to the use of mobile apps for contact tracing.

The full text of the DPA's advice can be found here.

Markets Court Annuls Decision of Belgian DPA Imposing Fine on Commercial Entity for Disproportionate Use of Electronic Identity Card

On 19 February 2020, the Markets Court, part of the Brussels Court of Appeal (the ***Court of Appeal***) annulled the decision of the Belgian Data Protection Authority (*Gegevensbeschermingsauthoriteit/l'Autorité de protection des données* - the ***DPA***) of 17 September 2019 which had imposed a fine of EUR 10,000 on a commercial entity for non-compliance with the data minimisation principle under Article 5(1)(c) of the EU General Data Protection Regulation (the ***GDPR***) and unlawful processing under Article 6 of the GDPR (*See*, this Newsletter, Volume 2019, No. 10, p. 13).

The Annulled Decision

On 17 September 2019, the DPA imposed a fine on a company that read a customer's electronic identity card when that customer requested a fidelity card. Customers could not obtain a fidelity card if they did not provide their electronic identity card. A customer lodged a complaint with the DPA which fined the company for non-compliance with the principle of data minimisation and unlawful processing.

No Breach of Principle of Data Minimisation

First, the Court of Appeal found that there was no personal data breach within the meaning of the GDPR. In particular, the Court of Appeal held that there had been no processing of personal data since the customer had refused to give her electronic identity card. This implies that there was no evidence of the use of a national identification number or of the date of birth or gender to obtain a loyalty card. The Court of Appeal considered that the DPA had failed to assess whether the company (in this case a liquor store) needed such information to verify the age of the customer.

Second, the principle of data minimisation, as embedded in Article 5(1)(c) of the GDPR, stipulates that the processing of personal data should be adequate, relevant and limited

to what is necessary in relation to the purposes for which the data are processed. According to the DPA, this principle was breached since the customer had not been provided with a substitute for the use of the electronic identity card and therefore could not benefit from a discount.

By contrast, the Court of Appeal held that the store was not obliged to provide the customer with an alternative solution since the requirement was not mandatory at the time of the alleged infringement. At that time (28 August 2018), Article 6, §4 of the Law on the use of identity cards (*Wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten/ Loi du 19 juillet 1991 relative aux registres de la population, aux cartes d'identité, aux cartes des étrangers et aux documents de séjour*) did not contain the obligation to provide a substitute for the use of an electronic identity card when granting a benefit upon the use of such a card. This obligation only entered into force on 23 December 2018. The Court of Appeal underlined that there was no disadvantage when a customer could not obtain a loyalty card and therefore could not benefit from a discount. According to the Court of Appeal, there was therefore no breach of the principle of data minimisation.

Reasons for Administrative Fine

The Court of Appeal noted that Article 83(2) of the GDPR contains general conditions for imposing an administrative fine. The DPA has to take into account the circumstances of the case, such as the nature, gravity and duration of the infringement, the number of affected data subjects and the level of damage suffered by those data subjects as well as the intentional or negligent character of the infringement.

The DPA argued that the infringement involved a fundamental principle of data protection. However, the Court of Appeal held that this is not sufficient to justify the amount of the fine. It held that the DPA had failed to assess the above circumstances and consider "all" of the elements of the case. Therefore, the reasons for the fine did not satisfy the conditions under Article 83 of the GDPR.

Belgian Data Protection Authority Updates Cookie Guidance

The Belgian Data Protection Authority (*Gegevensbeschermingsauthoriteit/l'Autorité de protection des données* - the ***DPA***) updated the information on cookies and other tracking technologies to take account of the recent judgement of the Court of Justice of the EU in Planet 49 (*See*, this Newsletter, Volume 2019, no. 10, p. 11) and the decision of the DPA of 17 December 2019 (*See*, this Newsletter, Volume 2020, no. 1, p. 10).

The guidance sets out the basic principles for the use of cookies. As a general rule, users have to be informed in a clear and understandable manner what cookies are doing and why they are used if installed on a user's device. A cookie policy must be published on the website or mobile application to ensure the transparency of the processing of personal data using these cookies and other trackers. This policy must include information on the cookie lifespan and the retention period of the data collected and must also identify the different types of cookies used by the website or application.

The DPA explains that before placing and reading cookies, the consent of the user must be obtained. However, consent must not be given for so-called "necessary" and "functional" cookies. For instance, cookies that are necessary to transmit a communication over an electronic communications network or to provide an information society service requested by the subscriber or user do not require consent. In order to be valid, consent follows from an affirmative action and the user must have been informed in advance of the consequences of his/her choice. Such information should be given in two stages: (i) a first notice at the time users provide their consent; and (ii) a second, more detailed notice in the form of a cookie policy.

Consent cannot be the result of a "pre-ticked" box or the simple continuation of the user's surfing on a website. Granular consent is possible, meaning that consent can be given per type of cookie in a first phase and, in a second phase, per individual cookie. Importantly, audience-measuring cookies are not free from the consent requirement.

Similarly, consent is also necessary for the use of social media plug-ins on a site or mobile app.

In the Frequently-Asked-Question (***FAQ***) section, the DPA answers questions such as whether a "cookiewall" may be installed. According to the DPA, this practice is not in compliance with the General Data Protection Regulation (***GDPR***). It is a practice which prevents a freely given consent, as the person concerned is required to consent to the installation and/or reading of cookies in order to access the website or mobile application. Furthermore, consent that is collected via the user's browser settings is not sufficiently specific in light of the requirements under the GDPR.

More information and the FAQ are available on the DPA's website in Dutch and French.

Belgian Data Protection Authority Decision on Surveillance Cameras and Records of Processing Activities

On 20 April 2020, the Belgian Data Protection Authority (*Gegevensbeschermingsauthoriteit/l'Autorité de protection des données* - the ***DPA***) issued a reprimand against a store for inadequate use of surveillance cameras and ordered the store to establish a register of its data processing activities. The DPA issued its decision following a complaint lodged on 9 September 2018. The store's cameras filmed the complainant while he was walking on the sidewalk along the store without having obtained his consent.

The DPA found that there was a violation of the Law of 21 March 2007 regulating the installation and use of surveillance cameras (*Wet tot regeling van de plaatsing en het gebruik van bewakingscamera's/Loi réglant l'installation et l'utilisation de cameras de surveillance* – the ***Law on Cameras***) and an infringement of the General Data Protection Regulation (***GDPR***).

First, the DPA held that the store did not comply with Article 30 of the GDPR which requires each controller to maintain a record of processing activities (*e.g.*, the contact details of the controller, the purposes of the processing and a description of the categories of data subjects). According to the DPA, that record of processing activities constitutes an essential tool to avoid breaches of the principle of accountability set out in Article 5(2) of the GDPR. That principle obliges the controller to take steps to ensure compliance with the provisions of the GDPR and to be able to demonstrate such compliance.

Second, the DPA considered that the store did not comply with Article 6, §2 of the Law on Cameras, which obliges the controller to include specific information in the record of processing activities, in addition to the information required by Article 30 of the GDPR. For instance, the record must contain information on the legal basis for the processing, the location and the technical description of the cameras and the place where the data is processed.

Without imposing a fine, the DPA issued a reprimand and required the store to set up a record of all processing activities within a period of three months from the date of the decision.

The DPA's decision is currently only available in French here.

INSOLVENCY

Temporary Protection Measures for Enterprises Affected by Covid-19 Crisis

On 24 April 2020, the federal Government adopted Royal Decree No. 15 concerning the temporary suspension, for the benefit of enterprises, of enforcement measures and other measures during the Covid-19 crisis (*Koninklijk Besluit van 24 april 2020 n° 15 betreffende de tijdelijke opschorting ten voordele van ondernemingen van uitvoeringsmaatregelen en andere maatregelen gedurende de Covid-19 crisis / Arrêté royal du 24 avril 2020 n° 15 relatif au sursis temporaire en faveur des entreprises des mesures d'execution et autres mesures pendant la durée de la crise du Covid–19* - the ***Royal Decree***).

The Royal Decree, as amended on 13 May 2020, grants an automatic moratorium from 24 April 2020 until and including 17 June 2020, during which enterprises are protected against (i) bankruptcy, judicial dissolution and transfers under judicial authority, (ii) attachments and enforcement measures, and (iii) termination of existing contracts due to non-payment. In addition, new credit lines provided during the moratorium and the security interests or acts that are implemented pursuant to such new credit lines will be protected against subsequent bankruptcy.

A detailed overview of the temporary protection measures can be found in our memorandum of 27 April 2020.

Mortgage Holder's Rights Not Affected by Failure to File Claim with Bankrupt Estate

On 12 March 2020, the Supreme Court (*Hof van Cassatie / Cour de cassation* - the ***Court***) held that the preferential rights of a creditor holding a mortgage are not affected in case the creditor failed to file its underlying claim with the bankrupt estate in due time.

Pursuant to Articles 62 and 72 of the previous Bankruptcy Act (now Articles XX.155 and XX.165 of the Code of Economic Law), creditors must file their claim with the bankrupt estate within a period of one year from the date of the bankruptcy judgment in order to be eligible for distribution from the bankruptcy estate or to exercise any preferential rights. In the case at hand, a creditor holding a mortgage failed to file its claim in due time, but still argued that it could enforce its preferential rights over the mortgaged immovable property.

The Court confirmed that the failure to file a claim in the bankrupt estate does not affect any preferential rights of a creditor holding a mortgage. The Court held that pursuant to Article 1326 of the Belgian Judicial Code, the proceeds from the sale of an immovable property in a bankruptcy are automatically allocated to the creditors holding a mortgage over that property. On that basis, the Court concluded that creditors holding a mortgage cannot be excluded from the distribution of the proceeds of the immovable property on the mere basis that the creditor did not file its claim with the bankrupt estate in due time.

INTELLECTUAL PROPERTY

Court of Justice of European Union Holds that Amazon Does not Infringe EU Trade Mark by Storing Third Party Goods

On 2 April 2020, the Court of Justice of the European Union (***CJEU***) delivered its judgment in case C-567/18 involving Coty Germany and Amazon in which it held that Amazon did not infringe Coty's trade mark by stocking trade mark infringing goods on behalf of a third party.

The case concerned the sale of perfume bottles of a Coty-owned brand (DAVIDOFF) by a third party seller on the online marketplace of www.amazon.de. On this marketplace, sales are concluded directly between the purchaser and the third party seller. However, the third party seller can also opt for the "Fulfilment by Amazon" scheme, under which the goods are stored by Amazon which operates a warehouse. Coty discovered that Amazon stored DAVIDOFF perfume bottles that had not been authorised for sale in Europe and considered that Amazon infringed its trade mark rights. Coty therefore sought an order that would require Amazon to desist from further stocking those products. The case ended up before the German *Bundesgerichtshof* which referred the case for a preliminary ruling to the CJEU.

The EU Trade Mark Regulation (both the old Regulation 207/2009 and the new Regulation 2017/1001) prohibit, if there is no consent of the trade mark owner, (i) any use of the sign in the course of trade; and (ii) the offering of goods protected by an EU trade mark, the putting of those goods on the market, and the stocking of those goods "for the purposes" of offering or putting them on the market under the sign. The Bundesgerichtshof asked the CJEU whether that prohibition must be interpreted as meaning that a person such as Amazon which stores goods on behalf of a third party that infringe EU trade mark rights, without being aware of that infringement, must be regarded as stocking those goods in order to offer them or put them on the market for the purposes of those provisions, if that person does not itself pursue those aims.

The CJEU held that, first, the "use" of a sign involves direct behaviour and direct or indirect control of the act constituting the use. In this regard, the CJEU referred to its earlier case-law in which it held that specific third parties do not "use" the sign themselves. For instance, the CJEU considered that the e-commerce platform E-bay did not use trade marks of goods sold by third parties via its platform. Instead the trade mark was used by E-bay's customers who sold goods on the platform (case C-324/09, *L'Oréal and Others*).

Second, the CJEU pointed out that the question from the Bundesgerichtshof clearly stated that Amazon did not stock the goods to offer them or put them on the market. Accordingly, the CJEU decided that Amazon did not stock the goods "for those purposes" and therefore did not infringe Coty's trade mark rights.

The question referred to the CJEU by the Bundesgerichtshof appears to have shaped the response, as the referring court considered in its question that Amazon did not pursue the aims of offering the goods or putting them on the market. However, Coty argued that, in fact, Amazon's role is far greater than simply being a passive third party e-commerce platform and warehouse-keeper. On the contrary, according to Coty, Amazon takes an active part in selling the products on its marketplace and in putting them on the market. Advocate General Campos Sánchez-Bordona had encouraged the CJEU to take this more complex version of the facts into account as well. However, the CJEU did not follow this recommendation and considered that it was bound by the facts as stated in the preliminary reference.

While this judgment was interpreted as a win for Amazon, the case was decided on a specific factual basis and it therefore remains to be seen whether the interpretation of the CJEU would be the same if the court had looked at the broader picture or if it had been expressly requested to do so. The value as a precedent of this judgment with regard to Amazon and other e-commerce platforms operating in a similar manner may therefore be more limited than a first reading might suggest.

The judgment can be found here.

LABOUR LAW

Constitutional Court Annuls Free Tax and Social Security Regime for Complementary Activities

Legal Background

In its judgment dated 23 April 2020, the Constitutional Court annulled the Law of 18 July 2018 regarding the recovery of the economy and the strengthening of the social cohesion, as amended by the Law of 30 October 2018 (*Wet van 18 juli 2018 betreffende de economische relance en de versterking van de sociale cohesie / Loi du 18 juillet 2018 relative à la relance économique et au renforcement de la cohésion sociale* - the ***Recovery Law***).

The Recovery Law allows self-employed individuals, employees, civil servants and retired individuals to earn up to EUR 6,340 per year (indexed amount for income year 2020) for complementary activities in a tax and social security free manner. These complementary activities must be exercised within the framework of associative work, occasional services between citizens and/or the collaborative economy on a recognised platform.

Judgment of the Constitutional Court

The Constitutional Court has now decided that the Recovery Law is discriminatory on the following grounds:

- an unjustified social security and tax difference in treatment was created between individuals who are performing activities within the framework of the Recovery Law and individuals who are performing similar services under an employment agreement or consultancy agreement. Indeed, the full remuneration of the individuals who form part of the second category is subject to normal taxes and social security contributions while the remuneration of individuals of the first category who perform activities within the framework of the Recovery Law is not subject to taxes or social security contributions for an amount of up to EUR 6,340 per year; and

- activities performed within the context of the Recovery Law are not subject to the standard provisions of Belgian employment and social security law. Such activities do not result in the accrual of social security rights, unlike similar activities performed under an employment agreement.

Parliament had put forward a number of justifications in support of the difference of treatment, but the Constitutional Court dismissed them as follows:

- The "societal added value" allegedly associated with the activities exercised within the scope of the Recovery Law does not constitute a reasonable justification for the favourable tax and social security treatment granted to such activities compared to similar activities carried out in another capacity (such as an employee or self-employed status).

- The claim that the limited remuneration awarded to individuals performing activities within the context of the Recovery Law is not essential for them and not intended to satisfy the basic needs of their family was not proven and depends on the personal family situation of each individual. And even if this claim were demonstrated, the remuneration could not be subject to a difference in treatment from a social security, tax and employment law perspective purely depending on its purpose.

- The purported objective to avoid undeclared work and excessive use of volunteer work performed under the Law of 3 July 2005 on voluntary work (*Wet van 3 juli 2005 betreffende de rechten van vrijwilligers / Loi du 3 juillet 2005 sur le travail volontaire*) does not justify that the normal employment and social security laws are ignored.

Practical Consequences

The Constitutional Court decided that the annulment would only enter into force on 1 January 2021. This implies that Parliament still has time to come up with an alternative regime that satisfies the reasoning of the Constitutional Court.

Guidelines for Restarting Economic Activities Following Covid-19 Crisis

On 4 May 2020 Belgian employers who belong to the industrial sector or who are engaged in business to business commerce were allowed to resume their economic activities, regardless of whether they belong to essential sectors as defined in the Ministerial Decree of 23 March 2020, as amended.

Teleworking remains the general rule for all functions. However, for functions for which teleworking is not possible, employers were required to implement strict health and safety standards and social distancing measures.

The Ministry of Employment and the social stakeholders published a guide (Dutch / French) to ensure a safe start-up of the activities and covers issues such as transportation to the workplace, the organisation of the canteen and the breaks, the organisation of the sanitation facilities and the preferred way to greet colleagues. The guide should be applied in combination with any applicable collective bargaining agreements that include additional safety measures.

LITIGATION

Advocate General of Court of Justice of European Union Issues Opinion on State Immunity and Summary Proceedings Involving International Organisations

On 2 April 2020, an Advocate General to the Court of Justice of the European Union (the CJEU), Henrik Saugmandsgaard Øe (***AG Saugmandsgaard Øe***), handed down an Opinion in a case which raised interesting issues relating to the application of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels Ibis Regulation***) in summary proceedings involving international organisations. The case also addressed issues in relation to the interplay between the Brussels I*bis* Regulation and the immunity enjoyed by international organisations.

Facts

The case involves a dispute between, on the one hand, three companies belonging to the Supreme group (***Supreme***) and, on the other hand *Supreme Headquarters Allied Powers Europe* (***SHAPE***) and an entity under SHAPE's command, *Allied Joint Force Command Headquarters Brunssum* (***JFCB***). SHAPE and JFCB are two international organisations belonging to NATO.

The dispute related to the failure to pay by SHAPE and JFCB of fuel supplied by Supreme for use in NATO's military missions in Afghanistan.

In order to obtain the payment for the fuel supplied to SHAPE and JFCB, Supreme brought in 2015 attachment proceedings against SHAPE and JFCB before a Dutch District Court (JFCB being located in the Netherlands), requesting a garnishee order on SHAPE's escrow account located in Belgium. Although this request was initially granted (and SHAPE's escrow account frozen), SHAPE later appealed that decision in summary proceedings and ultimately succeeded in having the interim garnishee order lifted.

Supreme, in turn, appealed from that decision before the Court of Appeal and then before the Dutch Supreme Court. In those proceedings, the Dutch Supreme Court raised of its own initiative the question of whether the jurisdiction to hear this case did not belong to the Belgian courts (instead of the Dutch courts) since the bank account at stake was located in Belgium. The Dutch Supreme Court's reasoning was based on Article 24(5) of the Brussels I*bis* Regulation which provides that "*in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced*" have jurisdiction. In addition, the Dutch Supreme Court also questioned whether the fact that SHAPE and JFCB enjoyed immunity from execution and jurisdiction had any influence on the application of the Brussels I*bis* Regulation. The Dutch Supreme Court stayed the proceedings and referred the matter to the CJEU for a preliminary ruling.

AG Saugmandsgaard Øe handed down his reasoned opinion in which he discussed the following issues.

Brussels Ibis Regulation in Summary Proceedings

Since the Brussels Ibis Regulation only applies to "civil or commercial matters", should summary proceedings (that were brought before the courts of a Member State and aim to obtain the lifting of an interim garnishee order on assets located in another Member State) be considered as a "civil or commercial" matter?

AG Saugmandsgaard Øe expressed the opinion that interim measures such as those in the proceedings at stake should be considered as having a civil and commercial nature and, therefore, fall within the scope of the Brussels I*bis* Regulation. This is because the rights which the interim measures protect have a "civil or commercial" nature (para. 47).

Consequently, according to AG Saugmandsgaard Øe, the answer to the question of whether summary proceedings that were brought before a Member State court and are aimed at obtaining the lifting of an interim garnishee order on assets located in another Member State fall within the

scope of the Brussels Ibis Regulation will depend on the nature of Supreme's underlying claim (para.53).

Brussels Ibis Regulation and International Organisations

Can SHAPE invoke the immunity granted to international organisations to avert the application of the Brussels Ibis Regulation?

In order to answer that question, AG Saugmandsgaard Øe divided the issue into a set of sub-questions:

1. Are disputes involving international organisations automatically excluded from the scope of the Brussels Ibis regulation because of the immunity enjoyed by those organisations?

AG Saugmandsgaard Øe first relied on scholarly works to find that the immunity granted to international organisations is not entirely similar to the immunity granted to States. With respect to the immunity enjoyed by international organisations, AG Saugmandsgaard Øe noted that this immunity has a wide functional character, which implies that the immunity covers all acts pursued by those international organisations (para. 65).

AG Saugmandsgaard Øe then found that the fact that international organisations enjoy a very wide immunity was not an obstacle to the assertion, by a national judge, of international jurisdiction in a specific case. However, the immunity enjoyed by the international organisation may come into play at a later stage (after the international jurisdiction has been asserted) and may force the judge to retract his jurisdiction over the case (paras 67 and 68).

Consequently, according to AG Saugmandsgaard Øe, disputes involving international organisations are not automatically excluded from the scope of the Brussels Ibis Regulation and the Brussels Ibis Regulation can thus, be applied in this case involving SHAPE and JFCB.

2. Irrespective of the fact that disputes involving international organisations are not automatically excluded from the scope of the Brussels I*bis* Regulation, should such disputes nevertheless be considered as "acts and omissions in the exercise of State authority" and therefore be excluded from the scope of the Brussels Ibis Regulation (since the Brussels I*bis* Regulation does not apply to disputes relating to "the liability of the State for acts and omissions in the exercise of State authority"?.

In this respect, AG Saugmandsgaard Øe first agreed that the notion of "*State authority*" in Article 1 of the Brussels I*bis* Regulation also covered the acts or omissions of international organisations (para. 80).

However, referring to the former case-law of the CJEU (in particular to case C-814/79, *Rüffer*), he then found that disputes involving international organisations will only be considered as disputes relating to the exercise of State authority (and therefore fall outside the scope of the Brussels Ibis Regulation) if such disputes relate to a claim whose origin is to be found either (i) in behavior which is intrinsically linked to an act of State authority; or (ii) in a legal relationship which exhibits features of State authority (para. 85).

Conclusion

In the light of these elements and applying these criteria to the case at hand, AG Saugmandsgaard Øe considered that summary proceedings aimed at obtaining the lifting of an interim garnishee order on an international organisation's escrow account could be considered as falling within the scope of the Brussels I*bis* Regulation. This is because Supreme's request for a garnishee order on SHAPE's escrow account sought to preserve a contractual claim and since that contractual relationship did not appear to meet any features of "State authority" (a question which is for the local court to determine (para. 101)).

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