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VBB on Belgian Business Law

Highlights

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Topics covered in this issue

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CAPITAL MARKETS AND FINANCIAL LAW

Financial Services and Markets Authority Implements Guidelines of European Securities and Markets Authority regarding Disclosure Requirements under Prospectus Regulation

On 1 April 2021, the Financial Services and Markets Authority (*Autoriteit voor Financiële Diensten en Markten / Autorité des services et marchés financiers;* ***FSMA***) announced that it would implement the guidelines of the European Securities and Markets Authority (***ESMA***) regarding the disclosure requirements under Regulation 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (the ***Prospectus Regulation***) (the ***ESMA Guidelines***).

The ESMA Guidelines seek to establish consistent and efficient supervisory practices among the various EU Member States' market authorities when assessing the completeness, intelligibility and consistency of the information contained in prospectuses. The ESMA Guidelines also hope to ensure a common set of disclosure requirements across the EU.

The ESMA Guidelines mirror, to a large extent, the guidelines of the Committee of European Securities Regulators, ESMA's predecessor, which were adopted in 2005 on the basis of Directive 2003/71 of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2003/34/EC (the ***Prospectus Directive***). Still, the ESMA Guidelines contain several updates, mainly to simplify the guidelines and align them with the International Financial Reporting Standards. Naturally, they also reflect the changes in disclosure requirements that result from the Prospectus Regulation, as compared to the Prospectus Directive.

The ESMA Guidelines are applicable since 4 May 2021.

European Union Creates Temporary Short-Form Prospectus for Secondary Issues of Shares to Facilitate Recovery from Covid-19 Crisis

On 18 March 2021, Regulation 2021/337 of 16 February 2021 "amending Regulation 2017/1129 as regards the EU Recovery prospectus and targeted adjustments for financial intermediaries and Directive 2004/109/EC as regards the use of the single electronic reporting format for annual financial reports, to support the recovery from the Covid-19 crisis" (the ***EU Recovery Prospectus Regulation***) entered into force. The EU Recovery Prospectus Regulation is supposed to make it easier for listed companies to raise equity in order to recover from the economic impact of the Covid-19 crisis.

Short-form EU Recovery Prospectus

The EU Recovery Prospectus Regulation introduces a temporary, simplified, short-form prospectus that is "*easy to produce for issuers, easy to understand for investors and easy to scrutinise and approve for competent authorities*" (the ***EU Recovery Prospectus***).

The EU Recovery Prospectus should be maximum 30 pages, which is significantly shorter than the standard prospectus format of hundreds of pages, and should focus on the information that is essential to allow investors to make informed investment decisions. The information that must be included in the EU Recovery Prospectus is listed in Annex Va to the EU Recovery Prospectus. This includes an introduction, key information on the issuer and the shares to be issued as well as information on the business and financial impact of the Covid-19 crisis on the issuer.

Approval Process

The time limits for scrutiny and approval of the EU Recovery Prospectus by the competent authority are limited to seven working days, provided that the issuer informed the competent authority at least five working days before the date of filing.

Scope of Temporary Measures

The use of the simplified disclosure regime is limited to secondary issuances of shares. Companies may opt for this regime on the condition that they have had shares admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months. The issued shares must also be fungible with existing issued shares.

In addition, the EU Recovery Prospectus can only be used for offers comprising no more than 150 % of the number of shares already admitted to trading on a regulated market or an SME growth market on the date of approval of the EU Recovery Prospectus. The ceiling is calculated over a period of twelve months.

Financial Intermediaries

The EU Recovery Prospectus Regulation increases the exemption threshold for credit institutions regarding the obligation to publish a prospectus for an offer or admission to trading on a regulated market of specific non-equity securities. The threshold is raised from EUR 75 million to EUR 150 million for securities issued over a period of twelve months. This should foster fundraising for credit institutions and give them breathing space to support their clients in the real economy.

Use of European Single Electronic Format for Annual Financial Reports

The EU Recovery Prospectus Regulation allows EU Member States to delay, for one year, the application of the requirement for issuers whose securities are admitted to trading on a regulated market situated or operating within an EU Member State to prepare and disclose an annual financial report in the European Single Electronic Format (the ***ESEF***) for the financial year that started on or after 1 January 2020. Prior to the formal adoption of the EU Recovery Prospectus Regulation, the FSMA had already announced that it would not take any measures against companies which had failed to implement the ESEF format for the financial year that started on or after 1 January 2020 (*See, communication of FSMA of 11 January 2021* here).

The EU Recovery Prospectus Regulation was adopted as part of the Capital Markets Recovery Package of the European Commission to facilitate the recovery from the economic shock caused by the Covid-19 pandemic. This Recovery Package brings about specific changes to existing capital market rules to encourage greater investments in the economy, allow for rapid re-capitalisation of companies and increase the banks' capacity to finance the recovery.

As the EU Recovery Prospectus regime and the above adjustments are limited to the period that is required to recover from the impact of the Covid-19 pandemic (except for the use of the ESEF format), these measures will, subject to extension, expire on 31 December 2022.

COMPETITION LAW

President and Chief Competition Prosecutor of Belgian Competition Authority To Be Appointed Shortly; New Competition Bill to Implement ECN+ Directive

On 5 May 2021, the Committee for Economic Affairs, Consumer Protection and Digital Affairs of the Chamber of Representatives held a question-and-answer session during which the future of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence;* ***BCA***) was discussed. The Minister for Economic Affairs addressed three issues.

First, asked about the status of the call for candidates for the positions of President of the BCA and Chief Competition Prosecutor, which has been launched again for the third time on 12 January 2021, the Minister indicated that there were "*some setbacks in the recruitment process*". All candidates emerging from the first call for candidates were judged to be "*less suitable*". The second call for candidates launched by the previous government was brought to an end by a successful action for annulment before the Council of State by one of the candidates. The Minister announced that the third call for candidates would be "*concluded shortly*" and expected that interviews would be carried out in June 2021. In the meantime, the outgoing officials temporarily keep their posts.

Second, the Minister noted that "*it is desirable to strengthen the Belgian Competition Authority*". This is also overdue, since *Directive 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market* (***ECN+ Directive***), which confers more powers on national competition authorities, had to be implemented by 4 February 2021. As a result, a new draft competition bill is being finalised and will be submitted to the Council of Ministers "*in the coming weeks*". In addition to transposing the ECN+ Directive, the draft competition bill also includes additional amendments to address specific procedural difficulties supposedly encountered by the BCA in applying the current rules.

Third, the Minister announced that he was looking for additional funding for the BCA. He made it clear that "*any new competence granted to the BMA will require additional resources to enable the authority to carry out its tasks effectively*".

DATA PROTECTION

Constitutional Court Annuls Data Retention Framework for Electronic Communications Data

On 22 April 2021, the Belgian Constitutional Court (the ***Court***) annulled the data retention framework provided for by the Law of 29 May 2016 (the ***Law***) requiring telecommunications providers to retain electronic communications data in bulk.

This judgment follows the judgment of the Court of Justice of the European Union (the ***CJEU***) of 6 October 2020 in case C-623/17, *Privacy International*; joined cases C-511/18, *La Quadrature du Net and Others* and C-512/18, *French Data Network and Others*; and case C-520/18, *Ordre des barreaux francophones et germanophone and Others* (*See*, this Newsletter, Volume 2020, No. 10, p. 11). In these cases, the CJEU confirmed once again that EU law prevents national legislators from imposing broad obligations on providers of electronic communications services to retain or transmit traffic and location data. The CJEU also provided guidance on which retention and transmission requirements are compatible with EU law and how national criminal courts should handle evidence that is collected on the basis of illegal retention and transmission requirements.

In *La Quadrature du Net and Others*, the CJEU considered that neither Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the ***ePrivacy Directive***) nor the Charter of Fundamental Rights of the European Union (the ***Charter***) precludes recourse to an order requiring providers of electronic communications services to retain, generally and indiscriminately, traffic data and location data. This is, however, only the case when the Member State at issue is facing a sufficiently serious threat to national security (*i.e.*, a threat that is genuine and actual or foreseeable). Data retention must then be proportionate, and the retention can only be for a period limited to what is strictly necessary.

On this basis, the Court held that, although retention of communications data is allowed under specific circumstances, the Law did not satisfy any of the exceptions contemplated by the CJEU. The Court therefore annulled the provisions of the Law that impose a general and indiscriminate data retention obligation on electronic communications providers.

The judgment of the Court can be found here (in Dutch) and here (in French).

European Union and South Korea Conclude Adequacy Talks

On 30 March 2021, the European Commission (the ***Commission***) and the Republic of Korea successfully concluded their negotiations on adequacy. An "adequacy finding" will enable free and safe data flows from the European Union to South Korea. The conclusion of the negotiations allows the Commission to adopt an "adequacy finding" under Article 45.3 of General Data Protection Regulation, confirming that South Korea's Personal Information Act (PIPA) provides a comparable level of protection of personal data to European data protection laws. Such an "adequacy finding" will cover both private and public sector data controllers established in South Korea.

The negotiations on adequacy were initiated under the Free Trade Agreement concluded between the European Union and Korea. Within the framework of these negotiations, South Korea enacted a series of reforms to its data protection laws. For instance, South Korea committed to implement additional safeguards to protect European citizens' personal data (*e.g.*, introducing the concept of "pseudonymised information", as well as the "purpose limitation" principle) and streamlined South Korea's data protection regulatory authorities to create a single authority, while previously data protection breaches and issues were handled by multiple agencies. The new rules will be binding on companies importing data from the European Union and enforceable by South Korea's Personal Information Protection Commission (***PIPC***).

The Commission will now launch the procedure for the adoption of a formal adequacy decision. This involves obtaining an opinion from the European Data Protection Board and approval by a committee composed of rep-

resentatives of the EU Member States. Once the formal decision is adopted, personal data will be allowed to flow freely from the EU Member States to South Korea without any further safeguards or authorisations such as binding corporate rules and contractual clauses.

European Data Protection Board Adopts Opinion on UK Draft Adequacy Decision

On 13 April 2021, the European Data Protection Board (***EDPB***) adopted an opinion on the European Commission's draft UK adequacy decision for personal data transfers from the EU into the UK under the General Data Protection Regulation EU 2016/679 (***GDPR***). This follows the publication of the draft UK adequacy decision on 19 February 2021 (*See*, this Newsletter, Volume 2021, No. 2, p. 14).

The EDPB recognises that the UK adequacy assessment is unique because of the UK's previous status as an EU Member State. In particular, the EDPB recognises a strong alignment in critical areas between the EU and the UK data protection legislative frameworks. The UK's processing of data is governed by the so-called 'UK GDPR' and the Data Protection Act 2018. Those legislative acts are based on the EU's GDPR and on the EU Law Enforcement Directive 2016/680.

An analysis of the UK's data privacy laws brings forward similar safeguards, individual rights, obligations for controllers and processors, rules on international transfers and supervision mechanisms to those available under EU law. Therefore, the EDPB acknowledges that, for the most part, the UK reflects the European data protection framework in its legislation and considers many aspects to be essentially equivalent to the level of protection of personal data within the EU.

However, there are also several challenges. In this regard, the EDPB invites the Commission to monitor closely all relevant developments in the UK that might impact the essential equivalence of protecting personal data. The UK indicated its intention to develop separate and independent policies in data protection with the possibility to diverge from EU data protection law. Although such political declarations have not yet materialised, a possible future divergence may create risks for the maintenance of the level of protection provided to personal data transferred from the EU. In particular, the EDPB lays out recommendations for the Commission to consider and monitor issues arising from the UK's broad immigration exemption's impact on data subjects' rights, onward transfers of EU data imports from the UK to third countries and aspects relating to interception and disclosure for national security purposes of personal data transferred to the UK. When necessary, the Commission is recommended to take swiftly appropriate action to address any such developments in the UK.

Regarding access by public authorities to data transferred to the UK, the EDPB welcomes the establishment of an Investigatory Powers Tribunal and the introduction of a Judicial Commissioner. Further explanation and/or monitoring remains necessary with regard to the judicial commissioners' independence and the independence of the Commissioner for the Retention and Use of Biometric Material and of the Surveillance Camera Commissioner.

The EDPB's opinion on the UK draft adequacy decision can be found here.

European Data Protection Board Adopts Guidelines on Targeting of Social Media Users

On 13 April 2021, the European Data Protection Board (***EDPB***) adopted final guidelines on the targeting of social media users (the ***Final Guidelines***). A draft of the guidelines was adopted on 2 September 2020 for public consultation (*See*, this Newsletter, Volume 2020, No. 9, p. 7).

While mostly aligning with the draft guidelines, the Final Guidelines contain some new elements:

- With regard to their scope, the Final Guidelines clarify that they cover the relationship between the registered users of a social network, its providers, as well as the targeters. The term "targeters" designates natural or legal persons that use social media services to direct specific messages at a set of social media users on the basis of specific parameters or criteria. By contrast, a thorough analysis of scenarios of individuals that are not registered with social media providers does not fall under the scope of the Final Guidelines;

- In the examples discussing the different targeting mechanisms (*i.e.*, targeting based on user-provided data, observed data and inferred data), the EDPB further clarifies when joint controller relationships are

formed between social media companies and entities targeting the social media users. In the context of targeting based on user-provided data, there is a joint controllership between the company and the social media provider if (i) the company determines the purposes and means of the processing by actively collecting, processing and disclosing the data; and (ii) the social media provider decides to use personal data of the user to enable targeted advertising. The joint control begins with the transmission of the personal data and the simultaneous collection of it by the social media provider. This joint controllership continues throughout the display of targeted advertising until the subsequent reporting phase is completed. In some cases, the joint controllership can be extended further, even until the deletion of the data phase, insofar as the targeter continues to participate in the determination of purposes and means;

- When establishing a legal ground for the processing of data in the context of targeting on the basis of user-provided data, the EDPB indicates that Article 6(1)(b) of General Data Protection Regulation EU 2016/679 (***GDPR***) ("processing necessary for the performance of a contract") cannot provide a lawful basis for online advertising for the social media providers simply because such advertising indirectly funds the provision of their service. The same applies to the targeter as targeting of social media users cannot be considered as an intrinsic aspect of any service and is not necessary to perform a contract with the user. Personalisation of content may, in certain circumstances, constitute an intrinsic and expected element of certain online services, but Article 6(1)(b) of the GDPR in the context of targeting social media users rarely applies, as is illustrated in the examples offered by the Final Guidelines.

The EDPB's Final Guidelines can be consulted here.

INTELLECTUAL PROPERTY

General Court Rules in Favour of Lego With Regard To EU Designs for Modular Systems

On 24 March 2021, the General Court (***GC***) annulled a decision of the European Intellectual Property Office (***EUIPO***) in case T-515/19 *Lego A/S v. EUIPO*. The GC held that the Board of Appeal (***BoA***) of the EUIPO did not consider Lego's defence under Article 8(3) of Regulation 6/2002/EC (***Design Regulation***). Article 8(3) of the Design Regulation provides an exception to the principle which excludes products dictated by a technical function from design protection. The exception under Article 8(3) of the Design Regulation affords protection to designs that serve the purpose of allowing the multiple assembly or connection of mutually interchangeable products within a modular system.

Factual Background and Procedure

On 2 February 2010, Lego A/S (***Lego***) filed an application with the EUIPO for the registration of an EU design for a new type of Lego bricks. Delta Sport Handelskontor (***Delta Sport***) sought to invalidate the registration before the EUIPO's Cancellation Division. The Cancellation Division rejected Delta Sport's application for invalidity because the building set corresponded to the definition of a modular system which qualifies for design protection. Upon further appeal, the EUIPO's BoA reversed that decision. This decision was again overturned by the GC.

GC's Reasoning

The GC explained that the BoA failed to consider the exception to the exclusionary rule contained in Article 8(3) of the Design Regulation regarding modular systems. This is an exception to both Article 8(1) called "the technical function exclusion", and 8(2) called the "must fit exclusion". The must-fit exclusion under Article 8(2) of the Design Regulation denies protection for features which must necessarily be reproduced in their exact form and dimensions to allow the products to connect with one another and perform a function.

Furthermore, the GC held, in line with its judgment in case C-395/16 *DOCERAM*, that the exclusion under Article 8(1) of the Design Directive only applies when all the features of the design's appearance are solely dictated by its technical function. In the case at hand, there are six features that must be dictated by the technical function of the product to fall under the exclusion of Article 8(1) of the Design Directive. When applying this exclusion to the case at hand, the BoA failed to consider the creative aspect of the design such as the smooth surface on either side of the row of four studs on the upper side. Consequently, the GC upheld Lego's appeal and annulled the BoA's decision. The Lego bricks will now be entitled to the protection afforded by the Design Directive. However, the decision is still open for further appeal to the Court of Justice of the EU (***CJEU***).

The GC's judgment can be found here.

General Court Finds Bad Faith in re-Filing "MONOPOLY" Trade Mark

On 21 April 2021, the General Court of the European Union (***GC***) confirmed in case T-663/19 *Hasbro v. European Intellectual Property Office* (***EUIPO***) that it constitutes bad faith to file a new trade mark application to avoid having to prove actual use of the trade mark. The GC thus confirmed the decision of the Second Board of Appeal (***BoA***) of the EUIPO.

Factual Background and Procedure

In 2011 Hasbro, the toy company, filed a registration for the word "MONOPOLY" as an EU trade mark with the EUIPO in accordance with Regulation 2017/1001 on the European Union Trade Mark (***Regulation 2017/1001***). The 2011 registration was for the following classes of goods: 9 (including electronic amusement apparatus), 16 (including paper and cardboard goods), 28 (including toys and games) and 41 (including entertainment services). Prior to this registration, Hasbro had registered three EU trade marks for classes 9, 25 (including clothing) and 28 in 1998, then again in 2009 and 2010.

In 2015, the Croatian board game company Kreativni Dogadaji d.o.o. (***Kreativini***) contested Hasbro's 2011 registration based on Article 59(1)(b) of Regulation 2017/1001 arguing

that it was made in bad faith as its sole purpose was to circumvent the obligation to prove genuine use of its existing trade marks. First, the EUIPO's Cancellation Division rejected the application for declaration of invalidity. It considered that protecting the same mark over 14 years did not indicate as such an intention to circumvent the obligation to prove genuine use of the earlier marks. Kreativini appealed this decision to the EUIPO's BoA, which found that Hasbro had acted in bad faith by filing a registration for goods and services identical to those covered by the earlier registrations.

GC's Reasoning

The GC noted that to establish that a trade mark registration was made in bad faith within the meaning of Article 59(1)(b), all the relevant factors at the time of filing must be considered, including the awareness that a third party is using an identical or similar trade mark in a Member State capable of causing confusion, the intention of preventing such use by the third party, and that third party's trade mark degree of protection. Bad faith therefore implies a dishonest state of mind or intention. Until proven otherwise, good faith is presumed.

The GC emphasised that it is not the re-filing as such which amounted to bad faith. Instead, bad faith follows from the circumstances of the case. Indeed, Hasbro admitted to the BoA that one of the advantages of the re-filing was to avoid proving the genuine use of the contested trade mark. The GC considered that pursuing such a strategy constitutes an abuse of law.

The GC furthermore held that it is not relevant for establishing bad faith that Hasbro obtained an advantage or caused harm through the re-filing. Moreover, it is not a valid defence that such a practice is common in the industry or that Hasbro was acting on counsel's advice.

The GC's judgment can be found here.

LABOUR LAW

Employees Are Entitled to Paid Leave for Securing COVID-19 Vaccination

Pursuant to the Law of 28 March 2021 (*Wet houdende toekenning van een recht op klein verlet voor werknemers met het oog op het toegediend krijgen van een vaccin ter bescherming tegen het coronavirus COVID-19 / Loi accordant un petit chômage aux travailleurs afin de recevoir un vaccin contre le coronavirus COVID-19*), employees were entitled to paid leave to secure a vaccination against COVID-19 from 9 April 2021 onwards. The regime will apply until 31 December 2021.

In order to be entitled to this paid leave, the employees should inform their employer as soon as their vaccination appointment with a vaccination centre is confirmed.

Upon request of the employer, employees should submit proof of the confirmation of their vaccination appointment. The employer can only use this information, which is considered as sensitive personal data regarding the employees' health, for the purpose of organising the work and ensuring a correct payroll administration. Therefore, the employer cannot keep a copy of the employees' appointment confirmation or manually duplicate this information. The employer can only register the time of the appointment together with the employee's paid absence, without specifying that it concerns paid leave for vaccination purposes.

Employees may be absent from work for the time necessary for the vaccination, as well as for the travel time to and from a vaccination centre, while retaining their normal salary.

The entitlement to paid leave applies for each shot required to be fully vaccinated.

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