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April 2022

VBB on Belgian Business Law

Highlights

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IFLR1000, 2019

Topics covered in this issue

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COMMERCIAL LAW

Federal Chamber of Representatives Adopts Book 1 on "General Provisions" and Book 5 on "Obligations" of New Civil Code

On 21 April 2022, the federal Chamber of Representatives adopted the Private Members' Bill inserting Book 1 on "General provisions" of the Civil Code (*Wetsvoorstel houdende Boek 1 "Algemene bepalingen" van het Burgerlijk Wetboek / Proposition de loi portant le Livre 1er "Dispositions générales" du Code civil* – the ***Book on General Provisions***) and that inserting Book 5 "Obligations" of the Civil Code (*Wetsvoorstel houndende Boek 5 "Verbintenissen" van het Burgerlijk Wetboek / Proposition de loi portant le Livre 5 "Les obligations" du Code civil* – the ***Book on Obligations***) (for a summary of both Bills, *see*, this Newsletter, Volume 2021, No. 2). As a result, the status of the emerging new Civil Code is now as follows:

(i) Book 1 on General Provisions will enter into force on the first day of the sixth month following its publication in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*)

(ii) Book 2 on Persons, Family and Patrimonial Relationships of Couples was partially adopted and its Title 3 on Patrimonial Relationships within couples will enter into force on 1 July 2022.

(iii) Book 3 on Goods and Property Law entered into force on 1 September 2021 (*see*, this Newsletter, Volume 2020, No. 3).

(iv) Book 4 on Successions, Donations and Wills was adopted on 13 January 2022 and will enter into force on 1 July 2022.

(v) Book 5 on Obligations was adopted and will enter into force on the first day of the sixth month following its publication in the Belgian Official Journal.

(vi) Book 6 on Torts has not yet been submitted to the federal Chamber of Representatives but a draft version was published in 2019. Torts were originally supposed to form part of the Book on Obligations.

(vii) Book 7 on Special Contracts has not yet been submitted to the federal Chamber of Representatives and no draft is currently publicly available.

(viii) Book 8 on Evidence entered into force on 1 September 2021 (*see*, this Newsletter, Volume 2019, No. 4).

(ix) Book 9 on Securities has not yet been submitted to the federal Chamber of Representatives and no draft is currently publicly available.

(x) Book 10 on Prescription has not yet been submitted to the federal Chamber of Representatives and no draft is currently publicly available.

Book on General Provisions

The Book on General Provisions contains cross-sectional rules that are not specifically associated with one of the other Books of the New Civil Code. For example, it governs the applicability of law in time and the calculation of time periods (*berekening van termijnen / calcul des délais*) triggered by legal acts, such as contracts or notice letters. Time periods are governed by different rules depending on whether they are expressed in hours, days, or months. It is specified that these rules on the calculation of time periods only apply if the law or the legal act in question does not provide otherwise.

The Book on General Provisions also contains generally applicable principles of civil law such as the presumption of good faith (*subjectieve goede trouw / bonne foi subjective*), the prohibition of abuse of rights (*rechtsmisbruik / abus de droit*) and the inability of an intentional fault (*opzettelijke fout / faute intentionelle*) to procure an advantage for its author.

Book on Obligations

The Book on Obligations is limited in scope in that it only contains the general rules that govern all obligations, as well as the general regime for contracts, legal facts (*rechtsfeiten / faits juridiques*) and quasi-contracts, but not the specific law applicable to torts or special contracts such as the sale or rental agreement. Therefore, the old and new regimes will be used in parallel until Books 6 and 7 will enter into force.

The Book on Obligations is, for the biggest part, a codification of existing case law. Nevertheless, it contains important improvements compared to the current regime. Noteworthy changes are as follows.

Article 5.23: Battle of Forms

A first change regards Terms and Conditions. An often-seen problem in practice is the coexistence of Terms and Conditions advanced by each of the parties that contradict each other. Very often, they contain a specific clause rejecting the application of the other Terms and Conditions in the event that they are not compatible. This situation creates endless discussions on the interpretation of the common will of the parties to decide which text will prevail over the other.

Following the general criticism of the uncertainty resulting from the current system, the Book on Obligations opts for the so-called "knock-out" rule. Its application is limited to situations in which two sets of Terms and Conditions apply to a specific contract without having been negotiated by the parties, in which case the negotiated text would prevail. The Book on Obligations then foresees that both Terms and Conditions are considered part of the contract, apart from the incompatible clauses. These are rejected and the general rules of the Code apply instead.

Article 5.74: Change of Circumstances

What has long been known as hardship (*imprevisieleer / théorie de l'imprévision*), and was previously rejected by the case law, is now introduced in Belgian law and regulated by the new Civil Code.

Hardship refers to the possibility to rediscuss the terms of an agreement following an unforeseeable change of circumstances that makes it more onerous for one of the parties to execute the agreement. The new regime conditions such a discussion of the terms of the agreements on a negotiation phase between the parties. It is only if negotiations are unsuccessful that an action can be brought in court.

Courts then have two options. They can either decide to terminate the agreement, or to change the terms of the contract based on what the parties would have agreed upon if they had foreseen the change of circumstances. The criteria that the court must consider when doing so remain open for interpretation. This will most likely become clearer when the case law develops but at this stage is subject to uncertainty.

Lastly, the parties have the possibility to exclude the application of Article 5.74 in their agreement.

Article 5.90: Unilateral Termination of Contracts and Anticipatory Breach

Following the progressive enlargement of the scope of unilateral termination of contracts in the case law, the Book on Obligations now provides for a statutory right for a party to terminate the contract unilaterally. As opposed to the current regime, this does not require a situation of emergency. On the contrary, any breach of the agreement that is serious enough may trigger the application of Article 5.90. The purpose of this new rule is to allow for more flexibility compared to the current regime. Considering the important risks which it creates in terms of legal certainty, it is strongly advised to make its exercise subject to strong contractual safeguards.

Furthermore, Article 5.90 also allows for the unilateral termination of the agreement in the case of an anticipatory breach. This refers to the situation in which, following a formal notice by the creditor to the debtor that the latter should provide some form of guarantee that it will fulfil its obligations, the debtor's actions make it clear that it will not comply with its contractual obligations. In that case, and if the consequences of the breach are serious enough, the creditor can terminate the contract unilaterally. Once again, the parties have the possibility to exclude or restrict the application of Article 5.90 contractually.

Article 5.97: Price Reduction as General Sanction

As a complement to the unilateral termination, the Book on Obligations includes a possibility to ask for a price reduction for breaches that are not serious. This was previously limited to commercial contracts, to contracts falling under the scope of the Vienna Convention and to Business to Consumer contracts under specific circumstances. It will now be possible to activate that possibility for any contractual breach. The price reduction would then have to be proportionate to the breach and would exclude any possibility to ask for damages on the same ground. When making use of this possibility, the creditor can choose between two options: either it can initiate legal proceedings, or it can exercise its right by written notice. The parties can mitigate the effects of Article 5.97 contractually.

COMPETITION LAW

Belgian Competition Authority Closes Investigation into Brink's Solutions Belgium

On 31 March 2021, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) closed its investigation of Brink's Solutions Belgium (formerly G4S Cash Solutions).

The investigation was launched in November 2013 following a complaint by Cobelguard CIT (now Loomis Belgium) against G4S Cash Solutions for allegedly abusing its dominant position on the market for cash in transit in Belgium. Cash in transit (CIT) or cash/valuables in transit (CVIT) is the physical transfer of banknotes, coins, credit cards and items of value from one location to another.

Cobelguard CIT contended that G4S Cash Solutions had, after the bankruptcy of the second player on the Belgian cash in transit market, obtained a *de facto* monopoly on this market. In that position, G4S Cash Solutions was able to implement specific conditions relating to pricing and duration of the contracts in its agreements with customers, which would allegedly have prevented Cobelguard CIT from entering the market. For example, G4S Cash Solutions had concluded several exclusive long-term contracts with its customers.

Cobelguard CIT also drew the BCA's attention to a project, "Joint Infrastructure National Bank of Belgium/G4S", following which G4S Cash Solutions would be the sole cash transporter established in the buildings of the National Bank of Belgium. According to Cobelguard CIT, this relocation, which would lead to lower transporting costs and a faster processing of cash transits by Cash Solutions Belgium, would make it impossible for Cobelguard CIT to gain ground on the market. Also, in the framework of this project, G4S Cash Solutions would have obliged banks based in West Flanders to have their cash processed at the premises of the National Bank of Belgium. This would reduce the role of Cobelguard CIT to a mere cash deliverer.

In March 2014, the BCA communicated an informal opinion to the National Bank of Belgium regarding this project. The project was cancelled later that year and Cobelguard CIT withdrew its complaint. According to the BCA, the cancellation of the project removed G4S Cash Solutions' leverage to force long-term and exclusive contracts on its customers. Furthermore, the BCA pointed out that the cash in transit sector is not part of its enforcement priorities. Consequently, the BCA closed its investigation.

The full text of the decision is available here (in Dutch).

Belgian Competition Authority Carries Out Inspections in the Bovine Meat Sector

On 1 April 2022, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) indicated in a press release (available here) that it had conducted surprise inspections at the premises of a trade association active in the beef sector in Belgium. The BCA suspects possible anticompetitive collusion in breach of Article IV.1 of the Belgian Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) and of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Belgian Competition Authority Fines Tobacco Manufacturers for Anticompetitive Collusion

On 13 April 2022, the Competition College (*Mededingingscollege / Collège de la Concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) fined four tobacco manufacturers on account of anticompetitive concerted practices. The four companies concerned are British American Tobacco Belgium NV (a subsidiary of British American Tobacco PLC), Établissements L. Lacroix Fils NV (a subsidiary of Imperial Brands PLC), JT International Company Netherlands BV (a subsidiary of Japan Tobacco Inc) and Philip Morris Benelux BVBA (a subsidiary of Philip Morris International Inc).

The investigation started on 8 May 2017 and the BCA carried out surprise inspections in June 2017. The College of Competition Prosecutors (*Auditoraat / Auditorat*) investigated the case and concluded that the parties engaged

in anticompetitive practices that consisted of repeated exchanges of commercially sensitive information through wholesalers. According to the College of Competition Prosecutors, manufacturers sent information on their future prices to their wholesalers and received information on the future prices of their competitors via the wholesalers (*See*, this Newsletter, Volume 2021, No. 9).

While the decision adopted by the Competition College is not yet public, a press release published by the BCA suggests that the Competition College essentially followed the preliminary findings of the College of Competition Prosecutors. According to this press release, the four tobacco manufacturers "[have] *been receiving confidential commercially sensitive information from their customers between 2011 and 2015 without objecting*". This conduct "*allowed them to limit the risks of normal competition*", which the Competition College found to be contrary to Article IV.1 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) and Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Philip Morris Benelux BVBA received the highest fine (EUR 16 million), followed by JT International Company Netherlands BV (EUR 7.2 million), Établissements L. Lacroix Fils NV (EUR 7 million) and British American Tobacco Belgium NV (EUR 5.7 million).

The companies concerned have thirty days to appeal the decision to the Markets Court (*Marktenhof / Cour des marchés*) of the Brussels Court of Appeal.

DATA PROTECTION

Belgian Data Protection Authority Imposes Fines on Airports for Unlawful Use of Thermal Cameras and Temperature Checks for COVID-19 Detection Purposes

On 4 April 2022, the Belgian Data Protection Authority (***DPA***) issued two decisions in relation to the use by Brussels Airport Company NV (***BA***) and Brussels South Charleroi Airport (***CA***) of thermal cameras and temperature checks for COVID-19 detection purposes. The DPA imposed fines of EUR 200,000 and EUR 100,000, respectively, as well as a fine of EUR 20,000 for the Ambuce Rescue Team (***ART***) which carried out a second test for passengers at Brussels Airport with a temperature of 38°C or higher.

Following news coverage about the use by BA of thermal cameras to carry out temperature checks on passengers in the airport, the DPA requested its inspection body to investigate these practices. At the same time, the inspection body carried out an investigation at CA on its own initiative. In both airports, thermal cameras were installed to detect passengers with a body temperature of 38°C or higher. In Brussels Airport Zaventem, such passengers received a questionnaire and a medical check-up carried out by ART as part of a second-line check-up.

In both cases, the DPA decided that the relevant processing activity is not based on a valid legal basis. The DPA pointed out that with respect to special categories of personal data (such as health data), controllers must determine an appropriate legal basis both under Article 6 and Article 9 GDPR.

BA based its processing activity on Article 9.2 g) GDPR *juncto* Article 6.1 e) GDPR (i.e., processing is necessary for reasons of substantial public interest and based on Union or member state law), while CA relied on Article 6.1 c) GDPR *juncto* Article 9.2 i) GDPR as a legal basis (*i.e.*, processing is necessary for reasons of public interest in the area of public health and also based on Union or member state law). In other words, BA and CA used different legal bases for an almost identical processing activity. The DPA found that the airports based the processing activity on a protocol for commercial aviation, which – in the view of the DPA – does not qualify as Union or member state law.

According to the DPA, even though there was a state of urgency due to the COVID-19 pandemic, the requirements of the GDPR, which protect the fundamental rights of data subjects, must still be complied with.

Additionally, the DPA found that both airports infringed the information obligation of Article 12 *juncto* Articles 13.1 c) and 13.2 e) GDPR. According to the DPA, the airports did not clearly mention the legal basis for the processing in their privacy notice. In addition, the privacy notices did not include the consequences for the data subject if he/she would not provide the personal data. The DPA also noted that while the privacy notice of BA did foresee the right to file a complaint with the Belgian DPA, it should specify that the data subject can file a complaint with any European supervisory authority.

As regards CA, the DPA stated that news coverage in the press on the processing activity concerned cannot be invoked to demonstrate compliance with the transparency obligations under the GDPR because it cannot be presumed that every passenger in the airport read a press article informing the reader of the existence and conditions of the processing activity. The DPA therefore found that CA infringed Article 5.1 a) GDPR.

As regards the requirement of a data protection impact assessment, the DPA held that both airports had violated this requirement because they had both started the processing activity prior to the completion of the data protection assessment and, in the case of BA, because the scope of the assessment only covered the first-line check (with the thermal camera) but not the second-line check (by an ART medic).

This is why the DPA imposed the administrative fines, but noted that it had considered the specific circumstances of the COVID-19 crisis and that it had also proactively provided guidance on the rules applicable to the processing activities in the pandemic.

According to the president of the DPA, these decisions demonstrate that it is important to carry out a stringent and complete data protection impact assessment prior to the start of the processing activity if such an activity creates a high risk to the rights and freedoms of natural persons. This again stresses the importance of the accountability principle laid down in Article 5.2 GDPR, notably to take responsibility for activities involving personal data, to comply with the other data protection principles and to maintain appropriate measures and records that demonstrate compliance.

Belgian Data Protection Authority Fines Former Employer for Unlawful Data Restoration

In a decision of 21 January 2022, the Litigation Chamber (*Geschillenkamer / Chambre Contentieuse*) of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) imposed a fine of EUR 7,500 on a Belgian company that had used a third party to restore data pertaining to a former employee's private e-mail on a work laptop without relying on a data processing agreement or a lawful basis. The DPA held that the company could not restore data without consulting the former employee. The company had also refused the former employee the right to exercise his or her data subject rights.

Background

The complainant is a former owner and managing director of Company Y. After he sold the company, the complainant was hired as an employee of the company. The parties have since been involved in court proceedings before the Court of First Instance of Brussels where the complainant sued the new owners of Company Y for the incomplete payment of the acquisition, and the new owners countersued for damages related to the debts of the company.

The complainant was laid off and deleted the data on his work laptop before handing it over to his employer. The complainant alleges that he only deleted his private e-mail data. Company Y stated that the complainant had deleted all data from the work laptop and that it had been required to restore all the data that had previously been on the laptop for professional purposes. After finding out about the restoration of his personal data, the complainant tried to exercise his rights to information, deletion, restriction of processing and objection. However, Company Y failed to comply with these requests.

Legal Framework and Analysis

The DPA found that Company Y could not rely on Article 6.1 GDPR to process the complainant's personal data through restoration and also violated Article 28 GDPR by not having a contract that governed its relationship with the third party that restored the data on the work laptop. Furthermore, the employer violated the GDPR by refusing to act on the data subject's requests for information and access (Article 15 GDPR), deletion (Article 17 GDPR), restriction of processing (Article 18 GDPR) and objection (Article 21 GDPR).

The DPA added that in case of dismissal, the employer should delete the employee's personal e-mail data after termination of the employment contract. Additionally, in case of a dispute, the DPA recommends that a trusted intermediary should filter the relevant information. These procedures should be set out in an internal policy which the DPA ordered Company Y to adopt.

The decision is available in French.

European Data Protection Board Issues Statement Regarding New Trans-Atlantic Data Privacy Framework

On 6 April 2021, the European Data Protection Board (the ***EDPB***) adopted a statement on the "Trans-Atlantic Data Privacy Framework" (***Framework***) regarding which a political agreement between the European Commission and the US authorities had been announced earlier this year. In its statement, the EDPB welcomed as a positive first step the commitments made by the US to take "unprecedented" measures to protect the privacy and personal data of individuals in the European Economic Area when their data are transferred to the US.

The EDPB also pointed out that an announcement of the Framework does not yet constitute a set of rules on the basis of which EEA data exporters can transfer data to the US. This is because data exporters should continue to observe the case law of the Court of Justice of the European Union (***CJEU***), including the *Schrems II* judgment of 16 July 2020 (*See*, this Newsletter, Volume 2020, No. 7). The statement added that the European Commission will have to seek an opinion from the EDPB, as required by the

GDPR, before adopting a possible new adequacy decision recognising the level of data protection guaranteed in the US under the Framework as adequate. The EDPB said that it would pay special attention to how this political agreement is translated into concrete legal proposals and that it looks forward to assessing the improvements which the Framework will bring in light of EU law, CJEU case law and previous recommendations of the EDPB.

The EDPB also indicated that it would assess whether the collection of personal data for national security purposes is limited to what is strictly necessary and proportionate. In addition, the EDPB would examine how the independent redress mechanism respects EEA individuals' right to an effective remedy and to a fair trial. Lastly, the EDPB stated that it would also look at whether any new authority, as a part of this mechanism, has access to relevant information, including personal data, when exercising its mission, and can adopt decisions that are binding on the intelligence services. Additionally, the EDPB would consider whether there is a judicial remedy against this authority's decisions or inaction.

The statement of the EDPB is available here.

INSOLVENCY

Court of Justice of European Union Changes Course: "Pre-Pack" Procedure Can Be Exempted From Employee Protection

On 28 April 2022, the Court of Justice of the European Union (the ***CJEU***) delivered its long-awaited decision in the Heiploeg case. Contrary to the CJEU's judgment in *Smallsteps/Estro* and *Plessers* (*See*, this Newsletter, Volume 2019, No. 5), the CJEU held that the Dutch "pre-pack" procedure as applied in *Heiploeg* satisfied the conditions to be exempt from the application of the employee protection in the event of a transfer of an undertaking.

Legal Framework

Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (the ***Directive***) aims to protect employees, in particular by ensuring that their employment contracts are automatically transferred to the transferee and their employment rights are safeguarded in the event of a transfer of an undertaking. In case of a transfer of an undertaking, employees of the transferor may only be dismissed for economic, technical or organisational reasons entailing changes in the workforce (which are not linked to the transfer of undertaking). The transfer of undertaking itself can thus not constitute grounds for dismissal.

However, Article 5(1) of the Directive provides that this protection of employees will not apply in case of (i) a transfer of an undertaking, business or part of an undertaking or business where the transferor (ii) is the subject of a bankruptcy proceeding or any similar insolvency proceeding with a view to the liquidation of the assets of the transferor and (iii) is under the supervision of a competent public authority.

In such an event, the transferee will thus be able to choose which employees it wishes to keep (the so-called cherry picking of employees).

The Netherlands: Smallsteps/Estro and Heiploeg

In both the *Smallsteps/Estro* and *Heiploeg* cases, the main question in the request for a preliminary ruling was whether the Dutch "pre-pack" procedure meets the exemption conditions set out in Article 5(1) of the Directive.

The "pre-pack" is a practice derived from Dutch case law which allows an entity in financial difficulties to prepare a sale of (part of) its business in advance of that entity filing for bankruptcy (and so before its stakeholders become aware of the financial difficulties and envisaged bankruptcy). This allows the entity to liquidate its business as a going concern, safeguarding as much as possible the value of the business for its creditors and preserving employment as much as possible. In the "pre-pack" procedure, the court appoints an "envisaged bankruptcy trustee" and "envisaged supervisory judge", who supervise the "pre-pack" sale and safeguard the creditor's interests. Once an agreement is reached on the sale of the business, the entity files for bankruptcy and, immediately after being declared bankrupt, the business is sold in accordance with the "pre-pack" agreement.

This ensures that the business can be sold at a higher value as a going concern. By contrast, the value would decrease significantly once the entity would be declared bankrupt and its stakeholders would become aware of the financial situation.

In its judgment of 22 June 2017 in *Smallsteps/Estro*, the CJEU held that the purpose of a "pre-pack" procedure is the transfer of the undertaking or business in going concern, and not liquidation or bankruptcy. As a result, the "pre-pack" procedure would not meet the exemption conditions set out in Article 5(1) of the Directive and the employee protection provided for by the Directive applies.

The Dutch Supreme Court submitted a similar request for a preliminary ruling to the CJEU in the *Heiploeg* case. It argued that the purpose of the "pre-pack" procedure is liquidating the assets of the entity, while securing the greatest possible value for the creditors. Contrary to its position in *Smallsteps/Estro* and *Plessers*, the CJEU held that if the main purpose of a "pre-pack" procedure is indeed to obtain the highest possible value for the creditors within the context of liquidation, the exemption conditions set out in Article 5(1) of the Directive can be satisfied. The CJEU added that this should be assessed on a case-by-case basis. For example, in *Heiploeg* insolvency was considered unavoidable.

Belgium: Plessers

Similarly, the Belgian judicial reorganisation procedure by transfer under judicial supervision was challenged for violation of the protection for employees under the Directive (*See*, this Newsletter, Volume 2019, No. 5 and this Newsletter, Volume 2021, No. 3).

In its judgment of 16 May 2019 in *Plessers*, the CJEU held that the judicial reorganisation procedure by transfer under judicial supervision with a view to maintaining all or part of the transferor or its activity (entitling the transferee to choose the employees which it wishes to keep), breaches the protection of employees provided for in the Directive, as the main purpose of this procedure is a transfer as going concern and not liquidation or bankruptcy.

Although the judgment in *Heiploeg* may not have a direct impact on the current Belgian insolvency law, it can serve as a source of inspiration for the Belgian federal Parliament who is currently transposing Directive 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt into Belgian national law.

INTELLECTUAL PROPERTY

Court of Justice of European Union Declares Article 17 DSM Directive Compatible with Freedom of Expression and Information

On 26 April 2022, the Court of Justice of the European Union (***CJEU***) held that Article 17 of Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market (***DSM Directive***) does not infringe the fundamental right to freedom of expression and information of users of online content-sharing services such as YouTube (Case C-401/19, *Poland v Parliament and Council*).

Background and Action for Annulment

Three years ago, the Republic of Poland launched an action for annulment against Article 17 of the DSM Directive which created a new liability regime for online content-sharing providers in the context of copyright infringements. It was introduced because the EU legislator felt that the functioning of the online content market became more complex and the provision of access to a large amount of copyright-protected content had become a main source of access to content online. The legislator found this liability provision to be necessary to foster a fair licensing market between right holders and online content-sharing service providers (***OCSSP***).

Article 17 of the DSM Directive provides that OCCSP are liable when making available copyright-infringing content. However, OCCSP are exempted from that liability if they demonstrate that: (i) they made their best efforts to obtain an authorisation to make the content available from the right holder; (ii) they made their best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific works and other protected subject matter for which the right holders provided the relevant and necessary information; and (iii) they acted expeditiously when they received a sufficiently substantiated notice from the right holders to disable access to the copyright-infringing content or to remove it from their websites, while making their best efforts to prevent this copyright-infringing content from being uploaded again in the future.

Poland argued that the best effort conditions (as set out under point (ii) and (iii) above) to ensure the unavailability of specific protected content, and to prevent protected content from being uploaded again in the future, was infringing the right to freedom of expression and information of the users of those content-sharing services. Furthermore, Poland contended that to fulfil these best effort obligations, the OCCSP would have to review all the content uploaded by their users before it was made available to the public. To do so, the OCCSP would have to rely on automatic filtering tools which could result in lawful content being blocked by an algorithm.

Ruling

The CJEU observed that the sharing of information on the internet via online content-sharing platforms falls within the scope of Article 10 European Convention on Human Rights and Article 11 of the EU Charter of Fundamental Rights, both protecting the freedom of expression and information. On that basis, the CJEU made various references to case law of the European Court of Human Rights (ECHR).

When investigating the compatibility of Article 17 of the DSM Directive with the right to freedom of speech and information, the CJEU admitted that a prior review and prior filtering by means of automatic recognition and filtering tools, entailed a limitation of the freedom of expression and information. However, it added that this right is not absolute. Possible restrictions should be provided for by law, respect the essence of the right and should be proportionate.

The CJEU went on to uphold Article 17 of the DSM Directive. First, the limitation on the freedom of expression and information is provided for by law – even if that law does not define the actual measures to be adopted by the OCCSP.

The wording of the provision as a best-efforts clause is intended to ensure that any obligations imposed can be adapted to keep pace with changing circumstances. Furthermore, this allows service providers to implement the measures that suit their business activities and resources.

Second, the essence of the right to freedom of expression and information is protected, since Article 17(7) and (9) of the DSM Directive explicitly provides that the Directive cannot result in the prevention of the availability of content that does not infringe copyright. Similarly legitimate uses such as parodies are also protected.

Third, with regard to proportionality, the CJEU found that the measures taken by the OCCSP to protect copyright-protected content must be necessary to meet the need to protect intellectual property. In that sense, the CJEU reiterated that technologies that do not distinguish adequately between lawful and unlawful content and that block user uploads go beyond what is necessary and are thus not proportionate.

Last, the CJEU noted that all safeguards provided in Article 17 of the DSM Directive protect the freedom of expression and information. These safeguards should allow for a fair balancing with the right to freedom of expression and information. Consequently, the CJEU rejected Poland's action for annulment and upheld Article 17 of the DSM Directive.

This judgment does not come as a surprise. The CJEU followed the opinion of Advocate General (***AG***) Saugmandsgaard Øe's who had recommended that the CJEU should not annul Article 17 of the DSM Directive even though the AG acknowledged that this provision entails a significant risk of "over-blocking" content. This is why the CJEU would seem to have tried to find the balance between the freedom of expression and information as a fundamental right and the proprietary rights of the right holders.

LABOUR LAW

Belgium Provides Access to Labour Market for Ukrainian Refugees

Russia's military aggression towards Ukraine has caused a large influx of Ukrainian refugees in Europe, including Belgium. As Ukraine is not a member of the European Union, the Ukrainian refugees do not have automatic access to the European labour market. Hence, on 4 March 2022, the Council of the European Union adopted implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (the ***Decision***).

Legal Principles

Under the Decision, the refugees are given temporary protection and the right to work in the EU Member States.

The specific protection status applies to:

- Ukrainian nationals who resided in Ukraine before 24 February 2022;
- Stateless persons and third-country nationals enjoying international protection or equivalent protection in Ukraine (e.g., individuals with a refugee status); and
- Family members of the individuals referred to above.

The temporary protection lasts for one year and can be extended by six months per extension, up to a maximum of one year. After one year, a further extension can be granted depending on future EU decisions.

Belgium's Implementation

On 21 March 2022, the European Commission strongly recommended EU Member States to extend the temporary protection to individuals who fled Ukraine not long before 24 February 2022 (*e.g.*, for work, studies, vacation, family visit or medical reasons). It seems that Belgium also applies this principle for individuals who were already located in Belgium before 24 February 2022 if specific circumstances can be invoked.

In order to implement the Decision in Belgian law, Belgium adopted a Royal Decree on 28 March 2022 (*Koninklijk Besluit van 29 maart 2022 tot wijziging van het Koninklijk Besluit van 2 september 2018 houdende de uitvoering van de Wet van 9 mei 2018 betreffende de tewerkstelling van buitenlandse onderdanen die zich in een specifieke verblijfssituatie bevinden / Arrêté royal du 29 mars 2022 modifiant l'arrêté royal du 2 septembre 2018 portant exécution de la loi du 9 mai 2018 relative à l'occupation de ressortissants étrangers se trouvant dans une situation particulière de séjour* - the ***Royal Decree***).

Based on the Royal Decree, the right to work in Belgium is also granted to the following family members of Ukrainian refugees:

- the spouse or the unmarried partner in a stable relationship;
- the minor unmarried children; and
- other close relatives who lived together as part of the family unit at the time of the circumstances surrounding the mass influx.

Formalities

As soon as the Ukrainian refugees present an electronic A-card with the specific designation "*labour market: unrestricted*", they can be legally employed in Belgium.

The application for the electronic A-card should be filed with the municipality of residence in Belgium. The card will be valid for one year from the date on which the temporary protection is effective, with the possibility to grant two extensions of maximum six months each. Accordingly, it is recommended that the employer only offer an employment contract of definite duration which is applicable within the validity period of the electronic A-card.

If the Ukrainian individual is not in the possession of such a card, the employer must respect the standard rules for employment of third-country nationals and file a request for a single permit/work permit.

Court of Justice of European Union Changes Course: "Pre-Pack" Procedure Can Be Exempted From Employee Protection

See section Insolvency.

LITIGATION

Federal Parliament Remedies Unconstitutionality and Creates Mandatory Indication Of Existence Of Administrative Appeal In Cassation And Of Formal Requirements And Time Limit

Ruling on Unconstitutionality

On 1 April 2019 the Belgian Council of State asked the Belgian Constitutional Court by means of a preliminary question whether Article 19(2) of the Laws on the Council of State breaches the Constitution.

Article 19(2) of the Laws on the Council of State states that the limitation periods for actions for annulment brought against administrative acts with individual scope only commence provided that the service of these acts indicates (i) the existence of such actions for annulment as well as (ii) the formal requirements and (iii) the time limits to be complied with.

However, there is no legal provision stating that the limitation periods for administrative appeals in cassation brought against decisions of administrative courts given at last instance only commence provided that the service of these decisions indicates (i) the existence of administrative appeals in cassation as well as (ii) the formal requirements and (iii) the time limits to be complied with.

The Constitutional Court held in its judgment N° 107/2020 of 16 July 2020 that "*the indication of the existence of remedies in the service of a judicial decision is an essential element of the general principle of due process and of the right of access to justice, which derives from Article 13 of the Constitution.*"

It added as follows: "*Since the expectations regarding the right to a fair trial and informing the person seeking justice, which is inherent in the right of access to justice, are as real and legitimate for the addressees of a decision of an administrative court as they are for the addressees of an individual administrative act, the absence of the aforementioned obligation [i.e. the obligation to indicate the existence of remedies in the service of a judicial decision] without reasonable justification undermines that principle.*"

The Constitutional Court thus held that Article 19(2) of the Laws on the Council of State breaches the Constitution in so far as this provision does not contain the obligation to indicate, in the service of decisions of administrative courts, (i) the existence of administrative appeals in cassation as well as (ii) the formal requirements and (iii) the time limits to be complied with.

Remedying Unconstitutionality

The federal Parliament has now remedied the unconstitutionality identified by the Constitutional Court by means of the Law of 1 April 2022 amending Article 19 of the Laws on the Council of State, coordinated on 12 January 1973 (***Law of 1 April 2022***).

The Law of 1 April 2022 introduces a new paragraph in Article 19 of the Laws on the Council of State which expressly states that the limitation periods for administrative appeals in cassation only commence provided that the service of a judgment of administrative courts delivered at last instance indicates the existence of these appeals as well as the formal requirements and the time limit to be complied with.

If this obligation is not complied with, the limitation periods only commence four months after the parties concerned were informed of the judgment.

In practice, this implies that an administrative court such as the Council for Permit Disputes (*Raad voor Vergunningsbetwistingen / Conseil pour les Contestations de Permis*) must indicate in the service of its judgments delivered at last instance the existence of an administrative appeal in cassation before the Council of State as well as the formal requirements and the time limit to be complied with.

Entry into Force

The Law of 1 April 2022 entered into force on 8 May 2022.

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