"Van Bael & Bellis' Belgian competition law practice [...]. is a well-established force in high-stakes, reputationally-sensitive antitrust investigations"

Legal 500 2019

May 2020

VBB on Belgian Business Law

Highlights

"Van Bael & Bellis excels in M&A work, and often provides domestic Belgian law advice on cross-border transactions."

IFLR1000, 2019

Topics covered in this issue

vbb@vbb.com
www.vbb.com

Table of contents

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50 vbb@vbb.com
Fax: +32 (0)2 640 64 99 www.vbb.com

COMPETITION LAW

Belgian Competition Authority Adopts New Leniency Guidelines

On 22 May 2020, new leniency guidelines (the ***2020 Leniency Guidelines***) were published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) and entered into force on the same day. The 2020 Leniency Guidelines replace the 2016 guidelines on the same subject and lay down the conditions under which the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) will grant total or partial immunity from fines for undertakings (or associations of undertakings) as well as immunity from prosecution for natural persons involved in a cartel.

The 2020 Leniency Guidelines mainly update the wording and references to the new Book IV of the Code of Economic Law, which contains the Belgian competition law rules and was recast in 2019 (*See, this Newsletter, Volume 2019, No. 5, p. 4*). The conditions to obtain total or partial immunity from fines, the size of the reduction in fines for which leniency applicants may qualify and the procedural aspects of the leniency regime have not changed. However, the new 2020 Leniency Guidelines offer a few clarifications, some of which are described below.

First, the BCA may prosecute and impose fines of up to EUR 10,000 on natural persons who were involved in a cartel. However, natural persons can only be prosecuted in parallel with an undertaking (or association of undertakings). While the 2016 leniency guidelines already provided that a natural person could only be prosecuted if an undertaking (or association of undertakings) was also prosecuted and found guilty of the same offence, the 2020 Leniency Guidelines now specify that this undertaking (or association of undertakings) must be the company for which the natural person acted. The 2020 Leniency Guidelines also make clear that, if the undertaking (or association of undertakings) ceases to exist and has no legal successor, the proceedings can continue against the natural person only.

Second, the 2020 Leniency Guidelines clarify the relationship between leniency applications filed by undertakings and requests for immunity from prosecution lodged by natural persons. The 2016 guidelines already explained that natural persons could lodge a request for immunity either jointly with the leniency application of an undertaking or separately, of their own initiative. By contrast, contrary to the 2016 guidelines, the 2020 Leniency Guidelines explicitly enable the President of the BCA to grant immunity from prosecution to a natural person following a decision on leniency issued to an undertaking. This means that undertakings and natural persons may not only file leniency applications together but also be granted immunity in the same procedure.

Third, the 2020 Leniency Guidelines formally create the possibility for the leniency applicant to be heard by the President of the BCA after receiving the draft leniency decision. If such a request is made, the President is obliged to hear the applicant, a possibility not foreseen under the 2016 guidelines.

Fourth, the 2020 Leniency Guidelines bring about some procedural changes. For instance, while the 2016 guidelines explicitly indicated that the BCA would never communicate leniency statements to a court entertaining a private damages action and that it would not use any evidence produced in good faith by leniency applicants against them if their leniency application was rejected (unless the applicant consented to its use), the 2020 Leniency Guidelines no longer offer these assurances. The 2020 Leniency Guidelines even suggest that the BCA can use information included in a rejected leniency application if the applicant did not formally withdraw its application. Moreover, even if the applicant withdraws the leniency application, the BCA can still obtain this information by using its investigatory powers.

Fifth and finally, leniency applications can no longer be filed in English.

Belgian Competition Authority Adopts Notice on President's Informal Opinions

The President of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) may issue informal opinions on the application of the competition rules to proposed practices or agreements which do not fall within the scope of the merger control rules. A notice published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) on 25 May 2020 which entered into force on the same day sets forth the conditions and the procedure governing these informal opinions (the ***2020 Notice***).

Although it does not expressly mention this, the Notice replaces a 2015 notice on the same subject (*See, this Newsletter, Volume 2015, No. 1, p. 3*). The 2020 Notice does not substantially amend the existing rules, but adapts the wording and references to the new nomenclature of Book IV of the Code of Economic Law, which was recast in 2019 (*See, this Newsletter, Volume 2019, No. 5, p. 4*).

A request for an informal opinion will only be considered if the proposed practice or agreement has not yet been implemented. In addition, a similar question should not be pending before the European Commission, the BCA or a Belgian or EU court. The issue presented must involve a novel question of law which the President of the BCA must be able to answer based on the information received from the applicant. In addition, the question must reflect a "sufficiently important economic and societal interest".

When these conditions are satisfied, the President will provide his informal opinion in a letter to the applicant. In principle, informal opinions are published on the website of the BCA. However, in order to protect the interests of the undertakings concerned, the President may also decide to publish only parts of the opinion, postpone the publication, or decide not to publish the opinion at all.

Even if the President issued an informal opinion, this will not prevent the BCA from opening proceedings at a later stage if the assumptions for the opinion prove to be unfounded.

Belgian Competition Authority Adopts New Guidelines On Calculation of Fines

New Guidelines on the calculation of fines (the ***2020 Fining Guidelines***) were published on 25 May 2020 in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*). They replace the Guidelines on the calculation of fines adopted in 2014 by the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) (*See, this Newsletter, Volume 2014, No. 8, pp. 2-3*).

The 2020 Fining Guidelines reproduce the 2014 Guidelines with minor drafting improvements and adapt the wording and references to the new nomenclature of Book IV of the Code of Economic Law, as recast in 2019 (*See, this Newsletter, Volume 2019, No. 5, p. 4*). The methodology for calculating the fines remains unchanged. As already stated in the 2014 Guidelines, the BCA will normally rely on the European Commission's Guidelines on the calculation of fines as a reference.

The 2020 Fining Guidelines entered into force on 25 May 2020. They will apply to all pending cases unless a draft reasoned decision had already been submitted on that date to the Competition College of the BCA (*Mededingingscollege / Collège de la concurrence*). Similarly, the 2020 Fining Guidelines apply to all pending settlement procedures unless the Competition Prosecutor (*auditeur / auditeur*) had on 25 May 2020 already communicated the amount of the possible fine to the parties.

Belgian Competition Authority Publishes 2019 Annual Report

On 14 May 2020, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) published its annual report for the year 2019 (the ***Report***).

In the foreword, the President of the BCA notes that the terms of office of three of the four members of the Management Committee of the BCA (*Directiecomité / Comité de direction*) expired in August 2019 and that the caretaker government, which currently has limited powers, has so far

proven unable to ensure their succession. The President considers that "without a new, fully-fledged federal government, the BCA also risks being affected by an atmosphere of uncertainty".

The rest of the Report summarises the BCA's activity of last year. It contains statistics on its resources and the results achieved in 2019 as compared to 2018.

Competition Proceedings

The statistics show that the number of ongoing competition investigations has remained unchanged from 2018 to 2019 and stands at eleven.

Over the last year, the Competition College of the BCA (*Mededingingscollege / Collège de la concurrence*) gave two interim measures decisions, compared to four such decisions in 2018. In these decisions, the Competition College imposed interim measures to safeguard the continued service of a television broadcasting network operator (*See, this Newsletter, Volume 2019, No. 1, p. 5*) and rejected a request for interim measures by The Great Circle against the Royal Meteorological Institute of Belgium (*See, this Newsletter, Volume 2019, No. 4, pp. 5-6*).

Contrary to previous years, the BCA adopted in 2019 several competition decisions on the merits. These resulted in fines for a total amount of EUR 1,323 million, including a fine of EUR 98,000 on an infrared cabins distributor (*See, this Newsletter, Volume 2019, No. 1, p. 6*), a fine of EUR 1 million on the professional organisation of pharmacists (*See, this Newsletter, Volume 2019, No. 6, pp. 3-4*) and a second fine of EUR 225,000 on the professional organisation of pharmacists (*See, this Newsletter, Volume 2019, No. 10, p. 5*). The Report further shows that the average duration of competition procedures has further decreased from three years and five months per procedure in 2018 to two years and five months in 2019. By contrast, investigations closed by the BCA still had an average duration of three years and three months in 2019.

Merger Control

The Report reveals that the number of notifications of concentrations remained stable (35 in 2018 and 33 in 2019), while the volume of simplified notifications decreased slightly (28 in 2018 and 22 in 2019). Noteworthy merger decisions adopted in 2019 include the clearance of the acquisition of RWE Generation Belgium by INEOS Oxide Limited (*See, this Newsletter, Volume 2019, No. 4, p. 6*), the conditional clearance of the acquisition of De Vijver Media by Telenet (*See, this Newsletter, Volume 2019, No. 5, pp. 4-5*) and the lifting of specific merger commitments imposed on Kinepolis (for a discussion of the subsequent judgment on appeal by the Brussels Court of Appeal in October 2019 and the BCA's decision of February 2020, *see, this Newsletter, Volume 2019, No. 10, pp. 7-8* and *Volume 2020, No. 2, pp. 3-4*).

Advocacy and Enforcement Priorities

The Report further mentions that the BCA has had a busy year in pursuing its advocacy policy. This included its contribution to the joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on the role of the competition authorities in a digital world (*See, this Newsletter, Volume 2019, No. 10, p. 4*).

Finally, the Report repeats the BCA's enforcement priorities for 2020 (these have already been published on 26 March 2020 (*See, this Newsletter, Volume 2020, No. 3, p. 6*).

The Report is available in both Dutch and in French.

Chamber of Representatives Rejects Close Price Monitoring and Maximum Prices in Context of Covid-19 Outbreak

On 28 May 2020, the Chamber of Representatives (*Kamer van Volksvertegenwoordigers / Chambre des représentants*) rejected 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 was submitted on 9 April 2020 and sought to entrust the Pricing Observatory with the task of assessing price trends of specific goods and to give to the Minister of Economic Affairs the power to impose maximum prices (for a discussion of the Proposed Law, *see, this Newsletter, Volume 2020, No. 4, p. 4*).

Entry into Force of Provisions on Abuse of Economic Dependency Delayed

On 20 May 2020, the Chamber of Representatives (*Kamer van Volksvertegenwoordigers / Chambre des représentants*) adopted what would become the law of 27 May 2020 delaying the entry into force of the provisions governing the abuse of economic dependency (*Wet van 27 mei 2020 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 / Loi du 27 mai 2020 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 ***Law***) (*See, this Newsletter, Volume 2020, No. 4, p. 4*).

The Law seeks to remove 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 the concept of abuse of economic dependency into Book IV of the Code of Economic Law. 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 Law confers on the King the power to consolidate both laws. It also delays the entry into force of the new provisions on economic dependency, which were due to apply as of 1 June 2020. The Law provides that the King will determine the date of entry into force, which should not take place later than 1 December 2020.

Preliminary Questions Referred to Court of Justice of European Union by Brussels Court of Appeal in bpost Case Published in Official Journal of the European Union

On 11 May 2020, the two preliminary questions which the Brussels Court of Appeal (the ***Court***) referred to the Court of Justice of the European Union (the ***CJEU***) in the bpost case were published in the Official Journal of the European Union. The questions concern the double-jeopardy defence which bpost raised to challenge the fines imposed on it by both the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications* - the ***BIPT***) and the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***)

Background

On 20 July 2011, the BIPT imposed a fine of EUR 2.3 million on bpost for applying a discriminatory rebate system in its 2010 contractual tariffs. In addition, on 10 December 2012, the BCA imposed a fine in the amount of EUR 37.4 million on bpost for the same reason, arguing that bpost had abused its dominant position (*See, this Newsletter, Volume 2012, No. 12, p. 3-4*).

On 23 September 2011, bpost sought the annulment of BIPT's fine. On 12 June 2013, the Court referred a request for a preliminary ruling to the CJEU relating to the interpretation of the principle of non-discrimination laid down in Article 12 of Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (the ***Directive***) (Case C-340/13).

On 11 February 2015, the CJEU held that the application of a system of quantity discounts per sender, as introduced in 2010 by bpost, did not amount to a form of discrimination prohibited by the Directive (*See, this Newsletter, Volume 2015, No. 2, pp. 3-4*). Following the CJEU's judgment, the Court annulled the BIPT's fine on 10 March 2016 as it found that there had been no discrimination.

bpost also appealed the decision of the BCA. On 10 November 2016, the Court also annulled the BCA's fine, this time on double jeopardy grounds (*See, this Newsletter, Volume 2016, No. 12, p. 5*).

The BCA appealed the annulment of its fine to the Belgian Supreme Court (*Hof van Cassatie / Cour de Cassation* - the ***Supreme Court***). On 22 November 2018, the Supreme Court annulled the Court's judgment regarding the BCA's fine. The Supreme Court held that the prohibition of double jeopardy does not prevent the imposition of two fines for the same behaviour if these fines pursue two complementary objectives in the general interest. As a result, the Court could not annul the BCA's decision without first determining whether the prosecution carried out by the BIPT and the prosecution led by the BCA had complementary objectives and concerned different aspects of the same infringing behaviour. The Supreme Court referred the case back to a differently composed Court.

Referral

The Court now has to determine whether bpost could rely on the prohibition of double jeopardy to challenge the BCA's fine.

On 19 February 2020, the Court referred two preliminary questions to the CJEU regarding the application of the double jeopardy principle in relation to competition (*See, this Newsletter, Volume 2020, No. 2, pp. 5-6*) (case C-117/20). The two preliminary questions referred to the CJEU are as follows:

1. "*Must the principle non bis in idem, as guaranteed by Article 50 of the Charter, be interpreted as not precluding the competent administrative authority of a Member State from imposing a fine for infringing EU competition law, in a situation such as that of the present case, where the same legal person has already been finally acquitted of an offence for which an administrative fine had been imposed on it by the national postal regulator for an alleged infringement of postal legislation, on the basis of the same or similar facts, in so far as the criterion that the legal interest protected must be the same is not satisfied because the case at issue relates to two different infringements of different legislation applicable in two separate fields of law?*

2. *Must the principle non bis in idem, as guaranteed by Article 50 of the Charter, be interpreted as not precluding the competent administrative authority of a Member State from imposing a fine for infringing EU competition law, in a situation such as that of the present case, where the same legal person has already been finally acquitted of an offence for which an administrative fine had been imposed on it by the national postal regulator for an alleged infringement of postal legislation, on the basis of the same or similar facts, on the grounds that a limitation of the principle non bis in idem is justified by the fact that competition legislation pursues a complementary general interest objective, that is to say, protecting and maintaining a system of undistorted competition within the internal market, and does not go beyond what is appropriate and necessary in order to achieve the objective that such legislation legitimately pursues, and/or in order to protect the right and freedom to conduct business of those other operators under Article 16 of the Charter?*"

Pursuant to the CJEU's case law in Toshiba Corporation and Others (C-17/10, EU:C:2012:72), the application of the double jeopardy principle requires that the three-pronged condition be satisfied that (i) the facts; (ii) the offender; and (iii) the legal interest protected must be the same. However, the application of the third condition has given rise to questions in past cases, which appear to have led the Court to request a preliminary ruling from the CJEU.

Competition College of Belgian Competition Authority Adopts Internal Rules

On 15 May 2020, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) published its internal rules (the ***Internal Rules***).

The Internal Rules indicate that the Secretariat of the BCA will inform the parties of the composition of the Competition College, typically in the invitation to the hearing. The Internal Rules also describe the organisation and agenda of hearings detailing the sequence in which each party will have its say. The Internal Rules formalise the existing practice of hearing third parties first and then having them leave the room before hearing the parties to the case, the Com-

petition Prosecutor (*auditeur / auditeur*), the Chief Economist, and the Legal Counsel. It is then up for the members of the Competition College to ask questions.

In addition, the Internal Rules describe the Competition College's decision-making process. The President of the BCA (or another member of the Competition College designated by the President) will prepare a first draft of a document entitled "assessment by the Competition College". This document will form the basis of written or oral internal discussions held by e-mail, by telephone or in person. A decision will be reached by consensus, absent which the majority should prevail.

The Competition College can base its decision only on documents of the file, on documents that were registered in the minutes of the hearing and on evidence that was submitted during the hearing with the approval of the President. If the Competition College decides to follow the proposed decision submitted by the College of Competition Prosecutors (*Auditoraat / Auditorat*), it should specify to which passages of the proposed decision it subscribes. The Competition College may give reasons for its decision by reference to the points and reasons of the competition prosecutor's proposed decision to which it subscribes or, if necessary, by offering additional or different reasons. Conversely, if the Competition College decides to deviate from the conclusions of the Competition Prosecutor, it should provide reasons for its approach.

The Internal Rules started to apply immediately to all cases pending before the Competition College.

CONSUMER LAW

Publication of Law Postponing Summer Sales Period due to Covid-19 Crisis

On 29 May 2020, the Belgian Official Journal published a Law of 27 May 2020 modifying certain provisions of the Code of Economic Law concerning registration with the Crossroads Bank for Enterprises and the postponement of the sales period (*Wet van 27 mei 2020 tot wijziging van sommige bepalingen van het Wetboek van Economisch Recht wat de inschrijving in de KBO en het uitstel van de solden betreft / Loi du 27 mai modifiant certaines dispositions du Code de droit économique en ce qui concerne l'inscription à la BCE et le report des soldes* – the ***Law***).

The Law introduces three measures aimed at supporting businesses affected by the lockdown measures imposed as a response to the Covid-19 crisis. First, the next summer sales period will take place between 1 and 31 August 2020. Second, restaurants which can no longer host customers on their premises and have resorted to at-home deliveries, as well as other retailers which have temporarily adapted their activities as a response to the lockdown measures, are exempted from their administrative duty to notify this modification to the Crossroads Bank for Enterprises. Third, the maximum time period for which liquidation sales are allowed – which can vary between five months and one year, depending on the underlying reason – is extended by a time period equal to the duration of the lockdown imposed on retailers.

For a detailed discussion of the Law, *see* *this Newsletter, Volume 2020, No. 4, p. 6*.

DATA PROTECTION

Proximus Fined: Data Protection Officer Cannot Be In Charge of Audit, Risk and Compliance says Belgian Data Protection Authority

On 28 April 2020, the Belgian Data Protection Authority (Gegevensbeschermingsautoriteit/*l'Autorité de protection des données* - the ***DPA***) imposed a fine of EUR 50,000 on Proximus because its data protection officer (the ***DPO***) was considered to be insufficiently independent given its responsibility for audit, risk and compliance. It is the first fine imposed by the DPA for this reason.

Interestingly, the procedure arose from a personal data breach that had been duly reported by Proximus. When the DPA investigated the company's organisational security measures, it noticed a conflict of interests in the role of the DPO.

In particular, the DPA examined whether Proximus had violated Articles 38(1) and 38(6) of the General Data Protection Regulation (the ***GDPR***) which describe the role of the DPO. Article 38(1) of the GDPR requires that the DPO be involved in all issues that relate to the protection of personal data, in a properly and timely manner. In addition, Article 38(6) of the GDPR states that the DPO may fulfil other tasks and duties, provided that such tasks and duties do not result in a conflict of interests.

First, the DPA explained that the DPO's duty to become involved in any issue related to the protection of personal data must happen at the earliest possible stage. This means that the DPO must be informed and consulted during the assessment of the risks associated with the processing of personal data. It is sufficient that the DPO is informed of the final decision made on the basis of the risk assessment process and the DPO does not bear responsibility for this final decision. In this particular case, the DPA held that the DPO had been adequately informed and consulted during the risk assessment process and therefore found no violation of Article 38(1) of the GDPR.

Second, the DPA examined whether the other function of the DPO of Proximus, in this case its function as the director of audit, risk and compliance, might have created a conflict of interests. The DPA considered that, as the director of audit, risk and compliance, the DPO determines the purposes and means of the processing of personal data in relation to these departments. However, according to the DPA, the DPO cannot have significant operational responsibility for data processing activities while also advising on, and supervising, such data processing in its role as DPO. In such a situation, the DPO does not have the requisite independence to fulfil its functions under the GPDR. The DPA added that combining both functions may also undermine the DPO's obligation of secrecy and confidentiality towards the employees, as laid down in Article 38(5) of the GDPR.

On this basis, the DPA concluded that there had been a substantial conflict of interests in violation of Article 38(6) of the GDPR. In addition to the EUR 50,000 fine imposed on Proximus, the DPA also ordered Proximus to take measures to avoid further possible conflicts of interests.

The decision can still be appealed to the Market Court (*Marktenhof/Cour des marchés*) of the Brussels Court of Appeal.

The DPA's decision is available in Dutch and in French.

Social Media Platform Fined for Unlawful Processing of Personal Data of Non-members

On 14 May 2020, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit/Autorité de protection des données* - the ***DPA***) imposed a fine of EUR 50,000 on an unidentified international social media platform for the unlawful processing of personal data under the General Data Protection Regulation (the ***GDPR***). It did so in collaboration with data protection authorities of other European countries.

The fine was imposed in response to the processing and use of personal data as part of a function for inviting contacts without a valid legal basis for such processing. For the purpose of this function, the social media platform had collected and stored data concerning the contacts on the

one hand and sent invitations to the persons added by the user on the other hand. The Litigation Chamber of the DPA (*Geschillenkamer/Chambre contentieuse*) examined this function offered by the social media platform through which its members can invite contacts on the platform and found it to be in violation of the principle of lawfulness of processing.

Lawfulness of Processing

The Litigation Chamber explained that the processing of personal data must be based on one of the legal bases provided for under Article 6 of the GDPR. In the case at hand, the social media platform relied on the consent of the member-user to import personal data of non-members for purposes of storing the data and sending them invitations. According to the Litigation Chamber, the consent in the case at hand could not be considered to be a lawful basis for processing because it was not given by the data subject, namely the non-member. Therefore, by storing the data of non-members and sending them invitations, the platform was processing data unlawfully in violation of Article 5, paragraph 1 of the GDPR.

Moreover, the member-user was confronted with pre-ticked opt-in boxes when adding friends or contacts, in the sense that their contacts were pre-selected. This practice, although modified at a later point by the platform, was found to be contrary to the conditions of consent set out in the GDPR. Consent must be free, specific, informed, and unambiguous (See Article 4, paragraph 11 and Article 7 of the GDPR). Thus, the person must be able to tick the desired boxes him- or herself. In the period during which the contacts were preselected, the consent of the member-user of the platform who wished to invite his contacts was therefore also not valid.

For the above reasons, the DPA decided to impose an administrative fine of EUR 50,000 on the social media platform.

International Dimension of Decision

Given the cross-border nature of the processing on the social media platform, the one-stop-shop principle was applied. The proceedings involved European Supervisory Authorities of 16 different countries in which the Belgian DPA acted as leading supervisory authority within the meaning of Article 56 of the GDPR.

The decision can still be appealed to the Market Court (*Marktenhof/Cour des marchés*) of the Brussels Court of Appeal.

The DPA's decision is available in Dutch and in English.

Belgian DPA Imposes Fine on Insurance Company for Lack of Transparency in Privacy Policy

On 14 May 2020, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit/l'Autorité de protection des données* - the ***DPA***) imposed another fine of 50,000 EUR on an insurance company for multiple infringements of the General Data Protection Regulation (the ***GDPR***). The case was introduced to the DPA through a complaint of a client of the insurance company who had concluded a contract for hospitalisation insurance. The DPA found two infringements: (i) the insurance company processed certain personal data unlawfully; and (ii) the insurance company violated its transparency obligations under the GDPR.

First, the DPA found that not all processing activities of personal data by the insurance company were supported by a legal basis, making the processing unlawful under Article 6 of the GDPR. Article 6 of the GDPR provides for a limited list of legal bases on which a data controller can rely to justify its personal data processing activities. One of those legal bases is the "legitimate interests" pursued by the data controller provided these interests are not overridden by the interests or fundamental rights and freedoms of the data subject.

The insurance company's privacy policy listed a number of data processing activities which it had justified on the basis of its "legitimate interests". The DPA accordingly accepted this basis for some of the listed purposes, such as the prevention of fraud and abuse and the pursuing of direct marketing purposes. By contrast, for other processing activities cited by the company (e.g., "the execution of computer tests", "staff education", "monitoring and reporting" or "drafting of statistics"), the DPA held that the insurance company failed to demonstrate its legitimate interest. The insurance company did not show that its interest should prevail over the impact which such processing may have on the interests of the data subject. Furthermore, the DPA held that the same was true for certain data transfers to third parties, which the company had also tried to justify on the basis of "legitimate interests".

Second, the DPA considered that, for multiple reasons, the insurance company had violated its transparency obligations under Articles 5, 12 and 13 of the GDPR. In particular:

- in its privacy policy, the insurance company had failed to differentiate between "normal" and "sensitive" personal data (such as health data). For the latter, stricter rules apply pursuant to Article 9 of the GDPR. The insurance company had simply stated in general terms that it processed personal data for certain purposes, without indicating whether this processing concerned normal or sensitive personal data;

- where the privacy policy indicated that the processing of certain personal data was based on the company's legitimate interests, the policy did not always describe those legitimate interests;

- the privacy policy did not always mention the legal basis for the transfer of personal data to third party recipients;

- the privacy policy did not mention the data subject's right to object to the processing of his or her personal data for the purposes of direct marketing.

The DPA imposed a fine of EUR 50,000, due to the gravity and duration of the infringement and its desire to create a deterring effect and prevent further violations. The DPA considered that the basic principles of the GDPR as enshrined in Article 5 are essential. A violation of the lawfulness and transparency principles was therefore considered to be a serious infringement.

The decision can still be appealed to the Market Court (*Marktenhof/Cour des marchés*) of the Brussels Court of Appeal.

The decision of the DPA can be consulted here (currently only available in Dutch).

European Data Protection Board Updates Guidelines on Consent

On 4 May 2020, the European Data Protection Board (***EDPB***) published an updated version of its guidelines on consent under the General Data Protection Regulation (the ***Guidelines***).

The Guidelines provide an update of the guidelines on consent of the Article 29 Working Party (*i.e.*, the body preceding the EDPB), a draft of which was adopted on 12 December 2017 and which were last revised and adopted on 10 April 2018 (*See, this Newsletter, Volume 2017, No. 12, at p. 10*). The EDPB had endorsed the Article 29 Working Party's guidelines in its first plenary meeting of 25 May 2018.

Consent is one of the six lawful bases listed in Article 6 of the GDPR that allow for the processing of personal data. Article 4, paragraph 11 of the GDPR stipulates that consent of the data subject must be (i) freely given, (ii) specific, (iii) informed, and (iv) an unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

In the Guidelines, the EDPB clarifies two questions, namely the validity of consent provided by the data subject when interacting with so-called "cookie walls"; and whether scrolling through a webpage constitutes clear and affirmative consent under the GDPR. The rest of the guidelines were left unchanged, except for some editorial changes to the previous version.

Cookie Walls

With respect to cookie walls, which require the user to accept cookies before accessing a website, the EDPB considers this practice to be unlawful since the data subject does not have the possibility to access content without accepting the cookies. The data subject is not presented with a genuine choice and its consent is therefore not freely given.

Scrolling Through Webpage

The Guidelines explain that scrolling or swiping through a webpage does not constitute a clear affirmative action leading to a valid consent. The EDPB also points out that, in such a case, it would be difficult to provide a way for the user to withdraw consent in a manner that is as easy as granting it.

Lastly, the EDPB brought the guidelines on consent in line with the judgment of the Court of Justice of the European Union of 1 October 2019 in *Planet 49* holding that a pre-ticked cookie checkbox may not give rise to valid consent

under the GDPR (*See, this Newsletter, Volume 2019, No. 10, at p. 11*).

The guidelines are available *here*.

EDPB Publishes Annual Report for 2019

On 18 May 2020, the European Data Protection Board (***EDPB***) published its Annual Report for 2019 (the ***Annual Report***) which gives insight into the EDPB's activities in 2019 and also lays down its work plan and objectives for 2020.

In 2019, the EDPB adopted five guidelines aimed at clarifying the General Data Protection Regulation (***GDPR***). The adopted guidelines addressed (i) codes of conduct (*See, this Newsletter, Volume 2019, No. 2, at p. 9*); (ii) processing of personal data in the context of online services (*See, this Newsletter, Volume 2019, No. 10, at p. 12*); (iii) processing of personal data through video devices (*See, this Newsletter, Volume 2020, No. 1, at p. 10*); (iv) data protection by design and by default (See, this Newsletter, Volume 2019, No. 11, at p. 8); and (v) the right to be forgotten (*See, this Newsletter, Volume 2019, No. 12, at p. 5*).

Other activities undertaken by the EDPB in 2019 include its report on the Third Annual Joint Review of the EU-US Privacy Shield. With this report, the EDPB confirmed the validity of the EU-US Privacy Shield which continues to provide an adequate level of protection for transfers of personal data. Despite this positive assessment, the EDPB still raised concerns regarding the lack of oversight on substantive compliance and regarding the collection of and access to data by US public authorities for purposes of national security and law enforcement (*See, this Newsletter, Volume 2019, No. 11, at p. 10*).

Last year, the EDPB also clarified the interplay between the ePrivacy Directive and the GDPR (*See, this Newsletter, Volume 2019, No. 3, at p. 5*). In a statement of 13 March 2019, the EDPB also called upon the EU legislators to intensify efforts towards the adoption of the ePrivacy Regulation, which is necessary to complete the framework of EU rules governing data protection and confidentiality of communications. After it was first proposed three years ago, the new ePrivacy Regulation has still not been adopted.

In 2020, one of the EDPB's priorities is to develop guidance on data subject rights. The EDPB also aims to provide guidance on data controllers and processors and the concept of legitimate interest and intensify its work on advanced technologies, such as connected vehicles, blockchain, artificial intelligence, and digital assistants. In addition, the EDPB promises to provide further guidance on the implications for data protection of the fight against Covid-19.

In its advisory role to the European Commission, the EDPB will tackle issues such as cross-border e-Evidence data access requests; the revision or adoption of adequacy decisions for data transfers to third countries; and a possible revision of the EU-Canada Passenger Name Record (PNR) agreement.

The 2019 Annual Report can be consulted here.

Belgian Data Protection Authority Offers Overview of Activities after Two Years of GDPR

In a statement published on 25 May 2020, the Belgian Data Protection Authority (*Gegevensbeschermingsauthoriteit/ Autorité de protection des données* - the ***DPA***) welcomes the second anniversary of the General Data Protection Regulation (the ***GDPR***).

The DPA outlines the main activities carried out in 2019 following its first full year of work and sets out the ambition to act more proactively in investigating violations of privacy rules in 2020.

Since 25 May 2019, the DPA's inspectorate has carried out more than 100 inspections. Until present, these inspections followed from complaints which the DPA received. However, the DPA now wishes to act more proactively by, for example, conducting on its own initiative sectoral or thematic large-scale investigations.

The DPA dealt with 937 data breach notifications, 4,438 requests for information and 351 complaints or requests for mediation. The DPA also issued 128 opinions on proposed rule-making. The complaints received led to 59 sanctions being imposed by the DPA's disputes chamber. Nine of them involved a fine, for a total amount of EUR 189,000. The largest fines were meted out in April and May 2020 and are discussed in this Newsletter.

The statement is available in Dutch and in French.

INTELLECTUAL PROPERTY

District Court The Hague Orders Internet Service Provider to Disclose User E-mail Address

On 30 April 2020, the District Court of The Hague (the ***Court***) gave judgment in summary proceedings in a case concerning the enforcement of intellectual property (***IP***) rights against an internet service provider. The Court held that an IP rightholder is entitled to demand from an internet service provider to receive the email addresses of users infringing its IP rights.

This judgment addresses a question currently pending before the Court of Justice of the European Union (***CJEU***) in case C-264/19, *Constantin Film Verleih*. In that case, the CJEU was asked whether an IP rightholder can request Google and YouTube for information relating to infringing users, including email addresses. It is also noteworthy because of its combined application of the EU Directive of 29 April 2004 on the enforcement of intellectual property rights (the ***Enforcement Directive***) and the General Data Protection Regulation (***GDPR***).

The case was brought before the Court by Dish Network, a US pay television service that streams copyright-protected content, against Worldstream, a Dutch internet service provider. Four Worldstream users had been providing illegal streaming services, thereby allegedly infringing Dish Network's copyright. Dish Network requested Worldstream to provide it with information to identify those users, including name, address, email address, phone number, date of birth, and more. The case ended up before the Court after Worldstream had refused to share this information unless Dish Network guaranteed that it would indemnify Worldstream for any liability under the GDPR for sharing this information.

Pursuant to Article 8 of the Enforcement Directive, an IP rightholder can request national courts to order that certain information be provided to that rightholder when there is an infringement of its IP rights. This information includes "*the names and addresses*" of the infringers (Article 8(2)(a) of the Enforcement Directive). However, this provision is without prejudice to the rightholder's "*rights to receive fuller information*" pursuant to national law (Article 8(3)(a) of the Enforcement Directive).

The Court sided with Dish Network and ordered Worldstream to provide the infringers' names, addresses, *and* email addresses. However, the Court did not rely on (the national implementation of) Article 8(2)(a) of the Enforcement Directive. Instead, it relied on a general rule of access to evidence, read in conjunction with the national implementation of Article 6 of the Enforcement Directive, which is also a general access-to-evidence provision giving a party the right to obtain evidence from another party if specific conditions are satisfied. The national provisions relied upon by the Court therefore probably qualify as measures giving the rightholder a right "*to receive fuller information*" under Article 8(3)(a) of the Enforcement Directive.

This case is therefore slightly different from *Constantin Film Verleih* which raises the specific question whether the term "*addresses*" in Article 8(2)(a) of the Enforcement Directive also covers email addresses and telephone numbers. According to the opinion of Advocate-General Øe, this is not the case (see his opinion here). It remains to be seen whether the CJEU will follow the Advocate General, but even if it does, it is possible that the referring court can still rely on a different provision under national law to give access to user email addresses.

The Court therefore appears to be more lenient on access to personal data of infringers than the Advocate General of the CJEU. Nevertheless, the Court refused Dish Network's request for further information, such as telephone numbers, *etc.* First, the Court held that this request did not fulfill the conditions of the general access-to-evidence provision. Second, it considered that this information was not necessary to identify the infringers. In other words, the Court applied a proportionality test.

Finally, the Court addressed the issue of whether or not the disclosure of this information by Worldstream to Dish Network is possible under the GDPR. Pursuant to the GDPR, personal data may only be transferred if there is a valid legal basis to rely upon. According to the Court, this legal basis could be found in Article 6(1)(f) GDPR, which allows the processing of personal data if "*necessary for the pur-*

poses of the legitimate interests pursued by […] *a third party*". As Dish Network did not have any other means to obtain information on the infringing users and because the disclosure would be limited to specific information, Article 6(1)(f) GDPR could in the Court's view provide the legal basis for the disclosure of the information by Worldstream. The privacy rights of the infringing users do not prevail. This is because, according to the Court, the fundamental rights of Worldstream users cannot go so far as to grant them the right to infringe Dish Network's IP rights anonymously.

The Court's judgment can be found here (in Dutch).

LABOUR LAW

Royal Decree Introduces Corona Parental Leave

On 14 May 2020, a Royal Decree was published in the Belgian Official Journal to enable parents who have to combine working from home with looking after their children to take a special corona parental leave (*Koninklijk Besluit nr. 23 tot uitvoering van artikel 5, §1, 5°, van de wet van 27 maart 2020 die machtiging verleent aan de Koning om maatregelen te nemen in de strijd tegen de verspreiding van het coronavirus Covid-19 (II) houdende het corona ouderschapsverlof / Arrêté royal n°23 pris en exécution de l'article 5, §1, 5°, de la loi du 27 mars 2020 accordant des pouvoirs au Roi afin de prendre des mesures dans la lutte contre la propagation du coronavirus Covid-19 (II) visant le congé parental corona* - the ***Royal Decree***).

What is Corona Parental Leave?

The Royal Decree allows employees with at least one month's seniority and one child under the age of 12 at the date of their request (or under the age of 21 in case of a disabled child) to apply for a reduction of their working time by one half or one fifth. This reduction of working time can be applied from 1 May 2020 until 30 June 2020 included (with a possibility of extension) during a continuous period of time or during several periods of time, divided into consecutive or non-consecutive months and/or weeks.

Part-time employees are also entitled to corona parental leave. However, this will necessarily take the form of a halving of their working time and will only apply if their working time is at least equivalent to 75% of a full-time employment when the corona parental leave starts.

Employees must obtain the prior approval of their employer. To this end, they must notify their employer in writing at least three working days prior to the beginning of the leave. The employer must respond within three working days or at least prior to the beginning of the corona parental leave.

Rules regarding Ordinary Parental Leave Remain Applicable unless Specific Derogations are Provided for

The rules applicable to ordinary parental leave apply to the corona parental leave unless the Royal Decree provides for specific derogations. As a result, employees on corona parental leave:

- are entitled to an allowance paid by the National Employment Office (*Rijksdienst voor Arbeidsvoorziening / Office National de l'Emploi*) which amounts to 125% of the allowance paid in case of ordinary parental leave (in addition to their reduced salary as the employment agreement is not fully suspended); and

- are protected against dismissal from the moment they request the corona parental leave until three months after the end of the corona parental leave. Employers who dismiss employees on corona parental leave will have to prove that the dismissal is based on serious grounds and legitimate reasons that bear no relationship with the suspension of the employment agreement. Failing such proof, the employer can be held liable to pay an additional indemnity of six months' remuneration (including benefits) to the employee.

Corona Parental Leave and Other Forms of Work Reduction or Interruption

Employees who reduced their working time by half or one fifth within the framework of an ordinary parental leave may request to convert it into a corona parental leave. Similarly, employees who interrupted or reduced their working time within the context of a time-credit or career-break regime may request to suspend that regime with a view to taking corona parental leave. Such conversion or suspension requires the employer's consent.

After 30 June 2020 (and unless an extension will be adopted), the original reduction or interruption of work performance will automatically resume for the remainder of the period without a further request.

In the centre of Europe with a global reach

VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com