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VBB on Belgian Business Law

Issue Highlights

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

Legal 500, 2019

Topics covered in this issue

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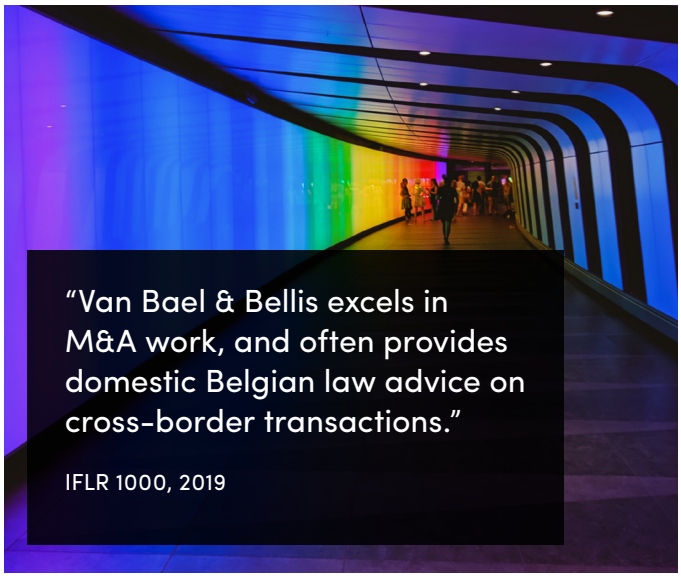

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COMPETITION LAW

Belgian Competition Authority Publishes its Enforcement Priorities for 2022

On 12 May 2022, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - ***BCA***) published (in Dutch and in French) its enforcement priorities for 2022.

The BCA indicates that it will make use of its newly acquired powers following the entry into force of the Law of 28 February 2022 transposing the ECN+ Directive (*See*, this Newsletter, Volume 2022, No. 1).

In addition, the BCA observes that its budget for 2022 will increase by EUR 1.4 million, which amounts to a 20% rise over its budget for 2021. The BCA says it will use these additional funds to create a team of officials specialised in merger control and to invest in new infrastructure, including new IT tools. These additional resources will also enable the BCA to strengthen its policy, advocacy and communication roles at national and international levels, particularly in relation to the application of the competition rules to labour markets and the role of sustainability in the competition analysis.

As part of its specific "strategic priorities" the BCA will monitor closely the sectors affected by the Covid-19 crisis, in particular, the retail, agri-food, financial and health sectors, to maintain a sufficient level of competition in these markets. The BCA will also continue monitoring the application of competition law and policy in the context of the green and circular economy to stimulate innovation and technological developments in this area.

The list of the industries in which the BCA will enforce the competition rules as a matter of priority forms, by and large, a replica of the list of priorities applied in 2021 (*See*, this Newsletter, Volume 2021, No. 3).

- The sector of "*services to business and to consumers*" climbed from the second position in the list of enforcement priorities in 2021 to the top position this year. This sector includes financial services (banking and insurance services), legal services, accounting services, security services and the services of quality control providers.

- The agri-food industry also climbed one position this year (from third to second position). This sector is explicitly mentioned this year while last year, the BCA referred to the retail sector in general. The BCA notes that prices for both unprocessed and processed foodstuffs have increased rapidly and that inflation in this sector was higher in Belgium than in neighbouring countries. The BCA mentions that it will pay specific attention to the functioning of markets along the food chain and will monitor price setting mechanisms, territorial supply constraints and the competitive dynamics in the agricultural sector.

- The energy sector retains the same position in the list of priorities as in 2021. It will continue to be monitored by the BCA, in particular following the increase of energy prices due to the Covid-19 crisis and the war in Ukraine. Together with the Belgian Commission for Electricity and Gas Regulation (*Commissie voor de Regulering van de Elektriciteit en het Gas / Commission de Régulation de l'Électricité et du Gaz* – ***CREG***), the BCA wants to ensure that gas and electricity suppliers do not take advantage of the situation to implement anti-competitive strategies

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- The BCA will continue to have the pharmaceutical industry in the crosshairs (fourth position) and makes it clear that its vigilance and efforts apply to the entire value chain, namely to prices set by pharmaceutical firms, competition between full-line wholesalers, and pharmacies. In this respect, the BCA refers to recent enforcement action against pharmaceutical wholesalers (*See*, Van Bael & Bellis Life Sciences News and Insights of 18 February 2022).

- The digitisation of the economy fell from its top position in 2021 to the fifth position in 2022. The BCA refers to the recent adoption of the Digital Markets Act at EU level and mentions that, like other authorities, it will be on the lookout for possible abuses of dominance or of economic dependence and for infringements of competition law resulting from the digitisation of several sectors.

- Like in 2021, the telecommunications sector features towards the end of the BCA's priority list. The BCA will focus on the implementation of bundles, the roll-out of the 5G network, the consolidation of the telecommunications market and the interactions between the digital and telecommunications sectors.

- The sport sector is a newcomer in the list for 2022. The BCA indicates that it has, in the past, investigated several violations of the competition law rules in the sport sector and that it will use its resulting experience to scrutinise the access to sports leagues, the organisation of sporting events, the implementation of no-poaching agreements and the emergence of electronic sports and (online) sports betting.

The logistics and public procurement sectors, which occupied respectively the sixth and seventh positions in 2021, have now disappeared from the list of enforcement priorities.

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Court of Justice of European Union Clarifies Traders' Obligation to Inform Consumers of Existence and Conditions of Manufacturer's Commercial Guarantee

On 5 May 2022, the Court of Justice of the European Union (***CJEU***) held that traders in goods which rely on the manufacturer's commercial guarantee as a central or decisive element of their offer must inform consumers of the existence of such a guarantee and provide the details that are necessary to allow consumers to decide whether or not to enter into a contractual relationship with the trader (CJEU, Case C-179/21, *absoluts -bikes and more- GmbH & Co. KG v the-trading-company GmbH*).

The dispute in the main proceedings pitted absoluts -bikes and more- GmbH & Co. KG (***absoluts***), a trader in bicycles, sports, and camping goods, against the-trading-company GmbH (***TTC***). Absoluts offered a pocketknife of the Swiss manufacturer Victorinox for sale on the internet platform Amazon. No information on guarantees, whether provided by absoluts or a third party, could be found on the Amazon page offering the knife. However, the Amazon page did include a link to a two-page information sheet, designed and written by Victorinox and a brief reference to the Victorinox guarantee could be found on the second page of the document.

TTC, a competitor of absoluts, initiated court proceedings, claiming that absoluts was infringing the German unfair competition rules by selling products without providing sufficient information on the manufacturer's guarantee. TTC's action was based on German provisions transposing Article 6(1)(m) of Directive 2011/83/EU of 25 October 2011 on consumer rights (***Directive 2011/83/EU***). It provides that, prior to concluding a distance or off-premises contract with a consumer, a trader must inform the consumer of the existence and the conditions of after sale customer assistance, after-sales services, and commercial guarantees. A commercial guarantee is any commitment by the trader or a producer to the consumer, in addition to its legal obligation of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising.

Following an adverse decision in first instance, TTC's action was upheld by the Higher Regional Court of Hamm, which found that a trader must provide information on the guarantee if the offer contains a reference to the existence of such a guarantee. The Regional Court of Hamm went as far as finding that absoluts' offer did not contain any of the information required by the relevant provisions of German law and that the consumer had not received any of that information at a later stage in the ordering process. Absoluts appealed on points of law to the German Federal Court of Justice (*Bundesgerichtshof*), which decided to stay the proceedings and to refer several questions to the CJEU for a preliminary ruling.

First, the Federal Court of Justice sought guidance from the CJEU on whether the mere existence of a manufacturer's guarantee triggers the information requirement under Article 6(1)(m) of Directive 2011/83/EU or, alternatively, whether that obligation exists solely if the trader mentions the existence of such a guarantee in its offer. In response, the CJEU observed that it is not clear from the wording of Article 6(1)(m) whether the trader's obligation to inform consumers of any guarantee extends to a guarantee provided by the manufacturer. However, it noted that an unconditional obligation on the trader to provide consumers with information on manufacturers' guarantees would require considerable work on their part while they do not necessarily have a contractual relationship with those manufacturers. The CJEU continued that the trader's obligation to inform consumers of a manufacturer's commercial guarantee does not

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arise from the mere existence of that guarantee. Instead, the trader is subject to the information requirement if the consumer has a legitimate interest in obtaining information concerning that guarantee, in view of deciding on whether or not to enter into a contractual relationship with the trader. Such a legitimate interest is established, inter alia, if the trader makes the manufacturer's commercial guarantee a central or decisive element of its offer, such as for sales or advertising purposes or in an effort to improve the competitiveness and attractiveness of its offer in comparison with its competitors' offers. In contrast, if a trader only mentions the manufacturer's guarantee incidentally or to such an insignificant or negligible extent that the manufacturer's commercial guarantee cannot be considered as being used for commercial purposes, the trader is not required to provide consumers with pre-contractual information on that guarantee. In the case at hand in the main proceedings, and subject to verification by the Federal Court of Justice, the CJEU had the impression that Victorinox's commercial guarantee had not been used prominently for sales or advertising purposes.

Second, the Federal Court of Justice asked the CJEU to clarify whether a trader must provide information on the manufacturer's commercial guarantee with the same level of detail as required by Article 6(2) of (now repealed) Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, which sets out the information that must be included in a guarantee statement and any associated advertising. The equivalent rule is currently laid down in Article 17(2) of Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods. The CJEU responded that the information to be provided to the consumer on the manufacturer's commercial guarantee must include all details relating to the conditions of application and implementation of the manufacturer's guarantee which allow the consumer to decide whether or not to enter into a contractual relationship with the trader.

Implementation of Omnibus Directive into Belgian Law Leads to New Consumer Protection Rules

A few months following the implementation deadline (on 28 November 2021), the federal Parliament finally adopted on 5 May 2022 the act amending Books I, IV and XV of the Code of Economic Law (the ***Implementation Act***), implementing Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (the ***Omnibus Directive***). This new piece of consumer protection legislation aims to strengthen the protection of consumer rights through increased transparency obligations as well as a more strict and consistent application of enforcement measures.

The Omnibus Directive brings changes to four existing pieces of consumer protection legislation relating to unfair commercial practices (Directive 2005/29/EC), consumer rights (Directive 2011/83/EU), unfair contract terms (Directive 93/13/EEC) and price indications (Directive 98/6/EC). The most significant changes are summarised below.

Modernised Consumer Protection Rules

The scope of existing obligations has been extended to digital content and digital services and now also encompasses transactions pursuant to which the consumer does not pay a price but provides his or her personal data. As a result, consumers involved in transactions relating to digital content and digital services can now benefit from the right to obtain mandatory pre-contractual information and a 14-days' withdrawal period.

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Increased Transparency and Extension of Scope of Misleading Practices

New transparency obligations now apply. This is because the European legislator considers that a higher ranking or any prominent placement of commercial offers within online search results by providers of online search functions has an important impact on consumers. As a result, consumers must receive information in relation to product rankings and customer review processes.

In the same vein, the Implementation Act also introduces additional pre-contractual information obligations for online marketplaces and specifies the main parameters determining the ranking of different offers and the capacity of third-party suppliers.

In addition, the list of unfair practices contained in Article VI.100 Code of Economic Law now includes the practice of submitting false customer reviews in order to promote products or providing search results in response to a consumer's online search query without disclosing paid advertisements or payments made for achieving a higher ranking of products within the search results.

Announcements of Price Reductions

One of the main objectives of the Omnibus Directive is to enhance price transparency towards consumers. The Implementation Act therefore introduces the obligation to indicate the "prior price" (*i.e.*, the reference price) applied by the advertising firm.

The "prior price" is the lowest price applied in the period of thirty days prior to the application of the price reduction.

Stricter and More Consistent Enforcement

To facilitate a more consistent application of penalties, the Omnibus Directive introduces non-exhaustive, indicative criteria, such as the nature, duration, severity and scope of an infringement, prior infringements, or mitigation measures taken.

In addition, the maximum penalties for infringing consumer protection rules have been increased. Fines of up to 6% of the annual turnover realised in Belgium can now be imposed in case of infringements of the consumer protection rules. Alternatively, if there is no information available on the annual turnover of the offending firm, fines can reach EUR 2 million.

The Implementation Act entered into force on 28 May 2022 and does not provide for a transition period.

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Court of Justice of European Union Confirms that Consumer Protection Associations Can Bring Class Actions relating to Data Protection Infringements

On 28 April 2022, the Court of Justice of the European Union (***CJEU***) delivered its judgment in the *Meta Platforms Ireland Limited* case (Case C-319/20), which results from a request for a preliminary ruling by the German Federal Court of Justice. The case, in which the CJEU confirmed that consumer protection associations have legal standing to bring complaints pursuant to alleged violations of the General Data Protection Regulation (GDPR), will likely have significant implications for wider data protection compliance and enforcement across the European Union.

Facts and Request for Preliminary Ruling

The German Federal Union of Consumer Organisations and Associations (***VZBV***) found several issues with the 'App Centre' provided for on Facebook, which is a subsidiary of Meta Platforms Ireland (***Meta***). In short, VZBV was concerned that the third-party apps collected users' personal data by subterfuge and without valid consent. Furthermore, the terms and conditions of their use were alleged to be inconsistent with the standards expected of consumer contracts in EU law (such as those contained in Directive 2019/2161 which provides for better enforcement and modernisation of European consumer protection rules).

VZBV applied for an injunction against Meta, pursuant to national legal standing rules. The Berlin Regional Court allowed the claim, a decision which the Berlin Appellate Court upheld. However, on further appeal, even though the German Federal Court of Justice (the ***Referring Court***) indicated that it agreed with the substantive concerns raised, it was not sure regarding VZBV's legal standing.

As the GDPR contains its own provisions (notably Article 80(2) GDPR) which covers the possibility for representative associations to bring data protection actions, the Referring Court felt there was a risk that the basis for VZBV's standing had been superseded. Whilst German law contained similar provisions to Article 80(2) prior to the GDPR, which would have allowed an action by a representative association, no specific implementation of the possibility provided for by Article 80(2) had been made following the advent of the GDPR itself. The Referring Court therefore decided to stay the proceedings and seek clarification from the CJEU.

Judgment of CJEU

The CJEU confirmed that whilst the GDPR aims to harmonise the data protection rules, it also enables Member States to create specific national rules in relation to specific provisions of the GDPR, known as 'opening clauses'. Such clauses, even when contained in a Regulation such as the GDPR, allow for the national-level implementation of general principles, to complement and/or accentuate those provisions' aims by modifying them for the national context, provided they do not "*undermine the content and objectives of* [the GDPR]". Article 80(2) GDPR is one such 'opening clause' and therefore leaves to Member States a margin of discretion as regards representative actions.

The CJEU concluded that the GDPR cannot be interpreted as "*precluding national legislation which allows a consumer protection association to bring legal proceedings*" in situations without a specific mandate from consumers and independently of the infringement of specific data rights of such consumers.

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Analysis and Practical Impact

In this case, the CJEU rejected a strict interpretation of the wording of Article 80(2) GDPR and re-affirmed its broad commitment to the policy goals of the GDPR. The ruling opens the possibility of representative actions to a wider number of possible claims. Firstly, potential associations do not have to tailor their actions to specific persons, or to specific impugned rights. Secondly, whilst this case was firmly grounded in consumer protection, the CJEU's reasoning paves the way for use of Article 80(2) GDPR by different types of representative associations every time a breach of the interests which they are bound to protect coincides with data protection infringements.

The CJEU's judgment largely reflects the reasoning of Advocate General de la Tour, who had also concluded that representative actions for GDPR violations were compatible with EU law.

European Commission Publishes Q&A on Standard Contractual Clauses

On 25 May 2022, the European Commission (the ***Commission***) published a Q&A on the use of the Standard Contractual Clauses (the ***SCCs***) to assist companies in their compliance efforts when transferring and processing personal data.

On 4 June 2021, the Commission had issued modernised SCCs under the GDPR for data transfers from controllers or processors in the EU/EEA (or otherwise subject to the GDPR) to controllers or processors established outside the EU/EEA (and not subject to the GDPR). The modernised SCCs replaced the three sets of SCCs that had been adopted under the previous Data Protection Directive 95/46. Since 27 September 2021, it is no longer possible to conclude contracts incorporating these earlier sets of SCCs.

The Q&A was drafted as a form of practical guidance based on the feedback which the Commission received from various stakeholders on their experience using these SCCs during the first months following their adoption. It is intended to be a 'dynamic' source of information and its content will be updated as new questions arise. Now, the document contains 44 questions which are divided into three main sections: (i) questions applicable to SCCs in general, (ii) questions relevant to the first set of SCCs, and (iii) questions relating to the second set of SCCs.

The following reflects noteworthy passages taken from the Q&A:

- Questions 7, 8 and 9 set out to what extent the text of the SCC can be modified, when additional clauses may be incorporated and which modules and/or options should be deleted from the SCC;

- Questions 11 *et seq.* clarify the docking clause, *i.e.,* an optional clause by which the parties to the SCCs can choose to agree that additional parties may join the contract in the future;

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- Question 22 addresses the transitional application of the new SCCs when companies have been using the previous model clauses. Agreements to transfer data concluded after 27 September 2021 must be based on the new SCCs while transfer agreements based on the previous SCCs that were entered into before 27 September 2021 will benefit from a transitional period until 27 December 2022;

- Question 24 clarifies that SCCs cannot be used for data transfers to controllers or processors whose processing operations are directly subject to the GDPR and confirms that the Commission is in the process of developing an additional set of SCCs for this scenario;

- Question 27 describes and explains the different modules that are adapted to different transfer scenarios: (i) module 1 applies to data transfers from a controller (the data exporter) to another controller (the data importer); (ii) module 2 applies to data transfers from a controller (the data exporter) to a processor (the data importer); (iii) module 3 applies to data transfers from a processor (the data exporter) to a sub-processor (the data importer); and (iv) module 4 applies to data transfers from a processor (the data exporter) to its controller (the data importer). The Commission specifies that parties can agree on several modules for different data transfers taking place between them as part of their overall contractual relationship;

- Question 40 provides an overview of the specific requirements to be met in order to comply with the *Schrems II* judgment. The Commission adds that the SCCs (Clause 14) should not be read in isolation but should be relied on together with the detailed guidance prepared by the European Data Protection Board.

The full Q&A can be accessed here.

Belgian Data Protection Authority Imposes Fine on National Railway Company for Processing Personal Data without Legal Basis

In a decision of 4 May 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 10,000 on the Belgian national railway company (***NMBS***) for sending a newsletter to a significant part of the population without a legal basis for the processing of personal data.

The fine was imposed following a complaint from a Twitter user, who received a newsletter from NMBS in 2020 in relation to the 'Hello Belgium Railpass' (the ***Railpass***). According to the notifier, the newsletter did not include an option to unsubscribe. The inspectorate of the DPA launched an investigation and concluded that the newsletter was not necessary for the execution of the agreement between NMBS and its customers as the sending of the newsletter by e-mail did not give effect to a contract between NMBS and the customers. Furthermore, the inspectorate found that the right to object was not facilitated by NMBS, while the targeted e-mails should be qualified as 'direct marketing'.

In its defence, NMBS argued that the e-mails had been sent while executing an agreement with a customer who had applied for a free Railpass, as the conditions of use of the ticket together with the general terms and conditions of transport are part of the transport agreement with the passengers. The newsletter also contained information about travelling in a safe way during the second wave of the COVID-19 pandemic. NMBS therefore argued that guaranteeing the sanitary safety of the passengers is necessary for executing the agreement.

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While the DPA acknowledged the fact that guaranteeing safe travel forms part of the execution of the agreement, it decided that the e-mail to the customers in relation to the Railpass contained promotional information, such as links to blogposts about city trip locations in Belgium. Furthermore, the DPA took the view that the information about COVID-19 could also have been provided in other ways, and that the same information was also available from the website of NMBS. As a result, the DPA concluded that such information could have been provided without the processing of personal data.

The DPA decided to impose a fine of EUR 10,000 on the train company because (i) in the DPA's opinion, the e-mail had not been necessary for the performance of the contract between NMBS and its customers; and (ii) the customers had not been provided with the possibility to unsubscribe from such direct marketing e-mails. The DPA considered the mitigating fact that the infringement was a one-time event but, conversely, also noted that nearly one-third of the Belgian population had received the newsletter.

The decision (in Dutch) can be found here.

European Data Protection Board Submits Draft Fining Guidelines for Public Consultation

The European Data Protection Board (***EDPB***) issued for consultation draft guidelines on the calculation of administrative fines (the ***Draft Guidelines***). If adopted, the Draft Guidelines will complement the existing Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679 adopted by the Article 29 data protection Working Party on 3 October 2017. While these guidelines focus on the circumstances in which a supervisory authority should impose fines, the Draft Guidelines seek to harmonise the methodology used to calculate such fines.

Although the objective of the Draft Guidelines is to harmonise data protection fines across the EU, the EDPB makes it clear that, since the final amount of a fine depends on "*all the circumstances of the case*", the Draft Guidelines provide "*harmonisation on the starting points and methodology used to calculate a fine, rather than harmonisation on the outcome*" (para. 5).

In practice, the Draft Guidelines propose a five-step methodology for the calculation of fines under the GDPR.

One or Several Infringements

First, the supervisory authority should determine whether there are one or several infringements that are subject to a fine. The Draft Guidelines explain that several separate sanctionable conducts can constitute multiple infringements and thus give rise to several fines, subject to the legal maximums set out in the GDPR. On the other hand, a single act can either constitute one infringement or several. In the second scenario (*i.e.*, when a single conduct constitutes multiple potential infringements), two situations are possible. Either these multiple infringements cannot co-exist, which means that only one infringement is relevant and that the fine will reflect this single infringement, or the

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infringements co-exist and, as a result, the fine will be calculated to reflect the different infringements. All of this is subject to Article 83(3) GDPR, which provides that, in case the same or linked processing operations infringe several provisions of the GDPR, the total amount of the fine should not exceed the amount specified for the most serious infringement. Moreover, the fine remains subject to maximum amounts provided for by the GDPR.

Starting Point

Second, the Draft Guidelines define a starting point for the calculation of the fine in considering three elements, namely the categorisation of the infringement, its seriousness, and the turnover of the firm at issue (para. 49):

- The *categorisation* of the infringement under Article 83(4) GDPR (which lists infringements that are subject to fines "*up to 10 000 000 EUR, or in case of an undertaking, up to 2 % of the total worldwide turnover of the preceding year, whichever is higher*") or under Article 83(5) and (6) GDPR (which includes infringements which are subject to fines "*up to 20 000 000 EUR, or in case of an undertaking, up to 4 % of the total worldwide turnover of the preceding financial year, whichever is higher*"). The EDPB considers that these categories give "*a first indication of the seriousness of the infringement, in an abstract sense*" (para. 51).

- The *seriousness* of the infringement "*in an individual case*", pursuant to Article 83(2) GDPR. The Draft Guidelines indicate that the seriousness of the infringement depends on the nature, the gravity (which concerns the nature of the processing, its scope, its purpose and the number of the data subjects affected and their level of damage) and the duration of the infringement, its intentional or negligent character, and the categories of data affected (which includes not only the categories of personal data under the GDPR but also the amount of data affected regarding each data subject). Based on the above, the EDPB identifies three levels of seriousness: a "*low level*", for which the starting amount of the fine should be between 0 and 10% of the applicable legal maximum; a "*medium level*", with a starting point between 10% and 20% of the applicable legal maximum; and "high level" of seriousness, which entails a starting point between 20% and 100% of the applicable legal maximum.

- The *turnover* of the firm "*with a view to imposing an effective, dissuasive and proportionate fine, pursuant to Article 83(1) GDPR*" (para. 49). This element is new, as Article 83 GDPR does not use the notion of turnover for calculating the fine (only when determining the maximum amount). The EDPB aims to adjust the starting amount corresponding to the seriousness of the infringement depending on the level of annual turnover of the undertaking concerned. For that purpose, the Draft Guidelines create six categories of turnover. The first three turnover categories apply to smaller companies with a turnover not exceeding EUR 50 million: for these, the supervisory authorities may use a starting point for the fine that is based on a sum from 0.2% to 2%, depending on the range of turnover. The other three turnover categories apply to larger companies with an annual turnover of EUR 50 million or more. For these companies, the supervisory authority may consider adjusting the starting amount corresponding to the seriousness of the infringement based on a sum in a range between 10% and 50% of the identified starting amount.

Aggravating and Mitigating Factors

Third, the Draft Guidelines discuss aggravating or mitigating factors that can increase or decrease the amount of the fine. The EDPB makes clear that the practical impact of these circumstances "*cannot be predetermined through tables or percentages*" as it will "*depend on all the elements collected*

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during the course of the investigation and on further considerations also linked to previous fining experiences of the supervisory authority" (para. 72).

As mitigating circumstances, the Draft Guidelines lists the actions taken by the offender to mitigate damage suffered by data subjects; the degree of cooperation with the supervisory authority to the extent that this cooperation has "*the effect of limiting or avoiding negative consequences for the rights of individuals that may otherwise have occurred*" (para. 97); the circumstance that the controller or processor "*notified the infringement of its own motion, prior to the supervisory authority's knowledge of the case*" (para. 99); compliance with previous measures if there is a "*reinforced commitment on the part of the controller or processor in the fulfilment of previous measures*" (para. 102); and, in some circumstances, adherence to codes of conduct pursuant to Article 40 GDPR (para. 105).

Aggravating circumstances include the degree of responsibility of the offender; the existence of previous infringements committed by the controller or processor (the Draft Guidelines do not set limitation periods beyond which an infringement would be too old to be relevant, nor do they exclude any type of previous infringement, although they do specify that "*infringements of the same subject matter must be given more significance*" (para. 88)); "*non-compliance with a corrective power previously ordered*" (although this may be considered either as an aggravating circumstance or as a separate infringement) (para. 103); and failure to comply with codes of conduct or certification, to the extent that this failure is "*directly relevant to the infringement*" (para. 106). In addition, the Draft Guidelines also cite Article 83(2)(k) GDPR which mentions "*financial benefits gained, or losses avoided, directly or indirectly, from the infringement*".

Maximum Fine

Fourth, the supervisory authority should determine the legal maximum of the fine. These limits are set in Article 83(4), Article 83(5) and Article 83(6) GDPR and consist of both fixed amounts and percentages of the total worldwide turnover of the preceding year (the applicable ceiling being the higher amount in the case at hand). The percentages of turnover are calculated based on the competition law concept of undertaking.

On a separate note, the Draft Guidelines specific that acts of employees authorised to act on behalf of a company will be attributable to that company, even when the employee failed to comply with a code of conduct, except if the employee acted for his or her own purposes or those of a third party (para. 123).

Possible Further Adjustments

Fifth, the supervisory authority must analyse whether the calculated final amount satisfies the requirements of effectiveness, dissuasiveness and proportionality, or whether further adjustments are necessary. This assessment "*covers the entirety of the fine imposed and all circumstances of the case*" (para. 132). The Draft Guidelines include the possibility of reducing the fine based on the principle of inability to pay, similar to the European Commission's fining guidelines in competition law cases. Conversely, the Draft Guidelines also mention the possibility of imposing a discretionary "*deterrence multiplier*" if the amount of the fine is not sufficiently dissuasive (para. 144).

The Draft Guidelines can be found here. Comments can be submitted until 27 June 2022 on the form found on the EDPB's website (here).

DATA PROTECTION

Belgian Data Protection Authority Issues Warning to Controller for Inadequate Security Measures and Orders Controller to Comply with Access Request

On 10 March 2022, the Litigation Chamber (**Geschillenkamer / Chambre Contentieuse**) **of the Belgian Data Protection Authority (Gegevensbeschermingsautoriteit / Autorité de protection des données** – the ***DPA***) adopted a decision against a car dealership which had failed to respond to an access request and to comply with its security obligations under the General Data Protection Regulation (***GDPR***).

Background

A consumer contracted with the car dealership for the purchase of a vehicle and received two consecutive e-mails from an employee of the car dealership in relation to the payment of the order. The second e-mail contained a rectification of the bank account number. The consumer paid the amount and advised the car dealership. However, the employee of the car dealership informed the consumer that it had not received payment. Finally, the car dealership turned out to have been hacked and the consumer had become the victim of fraud. The consumer submitted a request to the car dealership to provide all his personal data in its possession and to specify which data had been hacked. According to the consumer, the car dealership failed to respond which prompted the consumer to file a complaint with the DPA.

Decision

First, the DPA found that the car dealership had failed to respond to the access request of the consumer. In addition, the car dealership had also failed to provide information as to why it did not follow up on the request and to inform the consumer of the possibility to file a complaint with the supervisory authority. As a result, the DPA concluded that the car dealership had infringed Articles 12.3, 12.4 and 15.1 GDPR.

Second, the DPA noted that the security measures taken by the car dealership had proven to be inadequate. As a result, the DPA found that the car dealership had violated the principle of integrity and confidentiality (Article 5.1 f) GDPR) and the principle of security (Article 32 GDPR). The car dealership was also found to be in violation of Article 33 GDPR, as it had not notified the DPA of the data breach.

As a result, the DPA ordered the car dealership to provide an overview of the data requested by the data subject and to specify which data had been hacked. For the remaining violations, the DPA issued a warning and urged the car dealership to update its computer and IT systems in order to comply with its security obligations provided for by the GDPR.

The full decision is available here in Dutch.

INTELLECTUAL PROPERTY

Court of Justice of European Union Highlights Presumption of Validity of Patents in Requests for Preliminary Injunction

On 28 April 2022, the Court of Justice of the European Union (***CJEU***) delivered a preliminary ruling on the presumption of validity of a patent in a request for a preliminary injunction to prevent an imminent patent infringement (Case C-44/21, *Phoenix Contact v. Harting Deutschland et al.*). The CJEU held that it is not necessary for the validity of a patent to have been confirmed in opposition or nullity proceedings before a national court is able to impose a preliminary injunction to counter a patent infringement.

Background

The judgment was prompted by a question referred to the CJEU by the Regional Court of Munich (the ***Referring Court***) that wished to impose interim measures to afford protection to a patent held by Phoenix Contact for a plug connector with a protective conductor bridge. A European Patent had been granted in 2020 and also applied to Germany. In 2021, a competitor, Harting, filed an opposition against the grant of the patent with the European Patent Office.

The Referring Court reached the preliminary conclusion that the patent was valid and had been infringed by Harting. It therefore intended to impose interim measures to prevent any further patent infringement. However, under German binding case-law, imposing interim measures is only possible if the European Patent Office (***EPO***) confirmed the validity of the patent in opposition or appeal proceedings.

The Referring Court therefore asked the CJEU whether this case-law is compatible with Article 9(1)(a) of Directive 2004/48 of 29 April 2004 on the enforcement of intellectual property rights (the ***IPR Enforcement Directive***), which contains an obligation for Member States to ensure that judicial authorities can issue interlocutory injunctions to prevent imminent infringements of intellectual property rights.

CJEU Judgment

The CJEU started by explaining the objective of Article 9(1)(a) of the IPR Enforcement Directive. According to this provision, Member States must provide for the possibility that the national judicial authorities adopt interlocutory injunctions. Furthermore, these measures must allow for the immediate termination of the infringement of intellectual property rights, pending a judgment on the merits. According to the CJEU, these measures are particularly justified when any delay may cause irreparable harm to the holder of the intellectual property right. The CJEU thus stressed the importance of the 'time' factor for purposes of ensuring effective enforcement of intellectual property rights.

In its analysis of the established German case-law, the CJEU found that an interpretation of the law that only allows for the adoption of interim measures offering protection to a patent if an EPO decision confirmed its validity in opposition or appeal proceedings, deprives Article 9(1)(a) of the IPR Enforcement Directive of any practical effect.

The CJEU also noted that filed European patents enjoy a presumption of validity from the date of publication of their grant. Consequently, as from that date, those patents enjoy the full scope of protection guaranteed by the IPR Enforcement Directive.

With regard to the potential harm that would be suffered by the defendant in the proceedings, the Court stated that the IPR Enforcement Directive provides for adequate safeguards and guarantees to mitigate the risk of such harm, including:

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- the fact that provisional measures are revoked or cease to have effect if the applicant does not institute proceedings on the merits within a reasonable period;

- the possibility to require from the patentee adequate security or other assurances to ensure compensation for any harm inflicted on the defendant; and

- the possibility to order the patentee to compensate for the harm incurred by the defendant.

On that basis, the CJEU held that the German case-law was not compatible with EU law and that the Referring Court was under the obligation to ignore that case-law and issue a preliminary injunction to prevent imminent infringements of the patent.

Presumption of Validity under Belgian Law

The CJEU judgment in *Phoenix Contact* highlights the importance of the presumption of validity of European patents. Under Belgian law, granted patents also enjoy a presumption of validity. To obtain a preliminary injunction, the patentee should establish that (i) it owns a *prima facie* valid patent right; (ii) there are 'indications' of an imminent infringement of that patent; and (iii) the balance of interests tips in favour of the patentee. Depending on the type of proceedings initiated, the patentee may also have to show urgency which means that any delay would cause serious harm to the patentee.

The full judgment is available here.

LABOUR LAW

Amended Legal Framework for Detecting Discrimination on Labour Market Through Mystery Calls Enters Into Force

On 8 May 2022, the Law of 1 April 2022 amending the scope of competences of the social inspectors in the framework of detection of discrimination entered into force (*Wet van 1 april 2022 tot wijziging van afdeling 2/1 van het Sociaal Strafwetboek betreffende de bijzondere bevoegdheden van de sociaal inspecteurs op het vlak van de vaststellingen inzake discriminatie / Loi du 1 avril 2022 modifiant la section 2/1 du Code pénal social concernant les pouvoirs spécifiques des inspecteurs sociaux en matière de constatations relatives à la discrimination* – the ***Law***).

The Law expands the powers of the social inspection authorities by creating a simplified framework for detecting discrimination in recruiting activities by means of anonymous practical tests or "mystery calls". Social inspectors now can pretend to apply for a specific position and in the process identify discriminatory behaviour.

Initial Framework

Prior to the adoption of the Law, mystery calls to detect discrimination were rarely used. This is because the use of mystery calls was subject to strict conditions in that (i) an objective indication of discrimination had to be found (ii) which was established based on a complaint or report; and (iii) which resulted from data mining and data matching.

Amendment to Legal Framework

Since 8 May 2022, it has become possible for the social inspection authorities to rely on mystery calls when only one of the above three conditions is fulfilled, implying that either (i) an objective indication of discrimination; or (ii) a substantiated complaint; or (iii) data from data mining or data matching arises. However, for the mystery calls to actually be conducted, a prior written approval of the labour auditor or the public prosecutor is still required.

In addition, the Law gives social inspectors the possibility to rely on third parties for field tests. These third parties can assist the social inspectors in creating fictitious CV's or false online profiles.

LITIGATION

Federal Parliament Amends Rules Governing Default Judgments

On 9 June 2022, the federal Parliament adopted Bill 55K353 amending Article 805 of the Judicial Code on default of appearance in courts (the ***Bill***). The Bill seeks to expand the possibility to retract the default at a subsequent hearing.

Pursuant to Article 802 of the Judicial Code, when a party fails to appear in court at the first hearing, the other party may request the judge to issue a default judgment against that non-appearing party. Furthermore, in accordance with the current version of Article 805 of the Judicial Code, a judge may only deliver a default judgment at the end of the hearing during which the default was established and provided that the default was not retracted by mutual agreement of the parties.

In practice, issues often arise when the party who seeks a default judgment also requests a new hearing (for instance, in order to finalise a file of exhibits or to clarify specific points in the written submissions) and the defaulting party appears at the second hearing. However, pursuant to the current version of Article 805 of the Belgian Judicial Code, a default can no longer be retracted at that subsequent hearing, even if both parties agree on this. This may lead to procedural delays and additional costs.

To address this issue, the Bill seeks to allow the parties to agree and retract the default even at a subsequent hearing, provided that the defaulting party appears at this subsequent hearing (in person or through a lawyer).

PUBLIC PROCUREMENT

New Public Procurement Law Clarifies Self-Cleaning Measures In Line With Judgment Delivered by Court of Justice of European Union

An economic operator which is targeted by one of the optional grounds for exclusion in a public procurement procedure is allowed to provide evidence to show that it took measures that demonstrate its reliability. Pursuant to the self-cleaning principle, if the evidence provided by the economic operator is regarded as sufficient, the operator must not be excluded from the public procurement procedure.

On 14 January 2021 the Court of Justice of the European Union (the CJEU) clarified in Case C-387/19, RTS infra BVBA and Aannemingsbedrijf Norré-Behaegel v Vlaams Gewest, the self-cleaning mechanism as follows:

- a requirement imposed on an economic operator to provide voluntarily evidence of the self-cleaning measures taken to demonstrate its reliability despite the existence of an optional ground for exclusion, is not in conformity with the public procurement regulatory framework if that obligation does not arise from the applicable national rules or from the tender specifications;

- however, such an obligation is in conformity with the public procurement regulatory framework if it is spelled out in a clear, precise, and unequivocal manner in the applicable national rules and is brought to the attention of the economic operator concerned by means of the tender specifications (See, this Newsletter, Volume 2021, No. 1).

Law Of 18 May 2022 – Self-cleaning Mechanism

In view of the lessons learned from *Norré-Behaegel*, the federal Parliament decided to amend Article 70 of the Law of 17 June 2016 on public procurement and Article 53 of the Law of 17 June 2016 on concession contracts. In the Law of 18 May 2022, which amends both the Law of 17 June 2016 on public procurement and the Law of 17 June 2016 on concession contracts, the federal Parliament has now clarified the application of the self-cleaning mechanism.

As a result, Article 70(1) of the Law of 17 June 2016 on public procurement no longer generally requires a candidate or tenderer to provide on its own initiative evidence of corrective measures taken to demonstrate its reliability.

The phrase "on its own initiative" was removed from this provision and the self-cleaning mechanism is further spelled out in two new paragraphs contained in Article 70 of the Law of 17 June 2016 on public procurement.

New Article 70(2) states that, for the mandatory grounds for exclusion, (i) a candidate or tenderer must indicate at the beginning of a public procurement procedure, on its own initiative, whether it has taken corrective measures, and, (ii) the contracting authority must indicate in the tender specifications that this Article 70(2) will apply.

New Article 70(3) affirms that, (i) if a contracting authority considers invoking an optional ground for exclusion, or, (ii) if a candidate or tenderer has not included any reference to corrective measures in its European Single Procurement Document (***ESPD***), the contracting authority will give the candidate or tenderer the opportunity to present corrective measures during the public procurement procedure. Nonetheless, the contracting authority may derogate from the above in the tender specifications and thus require that corrective measures be communicated at the beginning of a public procurement procedure on the candidate's or tenderer's own initiative, on condition that the contracting authority identifies in the tender specifications the optional grounds for exclusion to which this derogation will apply.

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The same amendments were made to Article 53(1), (2) and (3) of the Law of 17 June 2016 on concession contracts.

Entry into Force of New Self-cleaning Mechanisms

The relevant provisions of the Law of 18 May 2022 governing the clarification of the self-cleaning mechanism entered into force on 31 May.

The new provisions immediately apply to public contracts in the process of being awarded and public contracts in execution.

Other Amendments Effected by Law of 18 May 2022

The Law of 18 May 2022 also brings about amendments to the Law of 17 June 2016 on public procurement and the Law of 17 June 2016 on concession contracts with regard to the following matters:

- the promotion of clean and energy-efficient road transport vehicles (replacing the Royal Decree of 20 December 2010 on the promotion of clean and energy-efficient road transport vehicles in public procurement procedures);
- clarification of the method for calculating the three-year period of relevance to the optional grounds for exclusion;
- third party rights in respect of claims (before the (provisional) acceptance contractors' claims may only be the subject of attachment, assignment or pledge in specific foreseen situations); and
- the establishment of a new committee for the governance of public procurement and concession contracts (to assist the point of contact for cooperation with the European Commission).

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