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Topics covered in this issue

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Table of contents

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COMMERCIAL LAW

Leuven Enterprise Court Confirms Arbitrability of Exclusive Distribution Agreements Governed by Foreign Law

On 19 May 2020, the Leuven Enterprise Court (the ***Leuven Court***) held that, following the reform of the Belgian arbitration rules in 2013, arbitration clauses in exclusive distribution agreements are valid, even if these agreements are governed by foreign law (judgment of 19 May 2020 in case A/20/00034, *Akron NV v. Amphenol (Maryland) Inc.*).

The judgment was given in a dispute between a US supplier and its former Belgian distributor following the supplier's decision to terminate unilaterally a distribution agreement of 1 April 2018 for serious misconduct. While the distribution agreement contained an arbitration clause pursuant to which any dispute had to be resolved by arbitration proceedings in the US in accordance with the Commercial Arbitration Rules of the American Arbitration Association, the distributor had initiated proceedings before the Leuven Court and claimed damages based on Title 3 of Book X of the Code of Economic Law (***CEL***) which contains the Belgian mandatory rules governing the unilateral termination of exclusive or quasi-exclusive distribution agreements of indefinite duration.

Article X.39 CEL provides that "[t]*he distributor may, upon termination of a distribution agreement effective within the entire Belgian territory or a part thereof, in any event summon the supplier, either before the court of his own domicile, or before the court of the domicile or registered office of the supplier" and that "*[i]*n case the dispute is brought before a Belgian court, this court shall exclusively apply Belgian law*". According to the established case law of the Supreme Court, it follows from this provision that arbitration clauses in distribution agreements of indefinite duration are not valid if they have been agreed upon before the date of termination of the distribution agreement or if the arbitral tribunal will apply foreign law. However, this case law dates from before the entry into force, on 1 September 2013, of the Law of 24 June 2013 "*amending part six of the Judicial Code on arbitration*" (*Wet van 24 juni 2013 tot wijziging van het zesde deel van het Gerechtelijk Wetboek betreffende de arbitrage / Loi du 24 juin 2013 modifiant la sixième partie du Code judiciaire relative à l'arbitrage* – the ***New Arbitration Law***).

The US supplier raised a jurisdiction defence, claiming that the Leuven Court had no jurisdiction to hear the case. Without examining all of the supplier's arguments (in particular the argument that the distribution agreement of 1 April 2018 is not a distribution agreement within the meaning of Title 3 of Book X, CEL – this argument was considered to involve the merits of the case), the Leuven Court confirmed that it lacked jurisdiction. It reached this conclusion based on the following considerations.

First, it noted that, since the entry into force of the New Arbitration Law in 2013, Article 1676, §1 of the Judicial Code provides that any dispute of a pecuniary nature can be submitted to arbitration. Article 1676, §4 of the Judicial Code adds that this rule is "*without prejudice to the exceptions provided by law*". However, as the legislative preparatory works of the New Arbitration Law favour a broad interpretation of the arbitrability criterion, the Leuven Court concluded that Article X.39 CEL does not qualify as such an exception since this provision does not expressly exclude disputes in relation to the termination of distribution agreements from arbitration. Moreover, such disputes are indisputably of a pecuniary nature.

Second, the Leuven Court stressed that the requirements of international trade mandate a broad interpretation of the arbitrability criterion as well. Mindful of the legitimate expectations of foreign suppliers, it held that Belgian distributors should not be allowed to escape from validly agreed arbitration clauses based on internal Belgian legislation and case law.

The judgment should be welcomed. By expanding the arbitrability of disputes regarding the termination of exclusive or quasi-exclusive distribution agreements, it increases legal certainty for foreign suppliers who, in the past, could be faced with claims under Belgian law before Belgian courts despite their distribution agreement providing for arbitration and the application of foreign law. This is not without practical importance considering that the Belgian rules on the unilateral termination of exclusive or quasi-ex-

clusive distribution agreements of indefinite duration are particularly advantageous for and protective of distributors. The new case law only applies to distribution agreements that are entered into on or after 1 September 2013.

Court of Justice of European Union Holds that Commercial Agents Need Not Have Power to Set Prices

On 4 June 2020, the Court of Justice of the European Union (the ***CJEU***) handed down a judgment which clarifies the notion of "commercial agent" as defined in Article 1(2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (the ***Directive***). The case, which pitted Trendsetteuse SARL (***Trendsetteuse***) against DCA SARL (***DCA***) (together the ***Parties***), was referred to the CJEU by the Paris Commercial Court for a preliminary ruling (CJEU, judgment of 4 June 2020 in case C-828/18).

DCA manufactures and markets clothing and jewellery under the brand IZI-MI, notably through two retail stores located in Corsica. Trendsetteuse markets its customers' products – mainly clothing and accessories – in showrooms and its Paris-based offices. Under an oral agreement concluded in 2003, Trendsetteuse was to sell IZI-MI products on behalf of and in the name of DCA in the Northern and Southern Regions of France, except Corsica. In this context, Trendsetteuse would bring customers to DCA, order products and follow up on deliveries.

In 2016, DCA terminated the agreement for the Southern French Region due to insufficient sales. Trendsetteuse challenged this decision which would lead to the loss of half of its revenues, and demanded the payment of an indemnity for the termination of a commercial agency agreement. DCA refused to pay any indemnity, arguing that Trendsetteuse did not have the quality of a commercial agent pursuant to Article L. 134-1 of the French Commercial Code, which reflects the implementation of Article 1(2) of the Directive into French law.

Trendsetteuse then brought an action for damages before the Paris Commercial Court, arguing that the agreement concluded with DCA constituted a commercial agency agreement. In its defence, DCA maintained that Trendsetteuse did not have the power to negotiate the terms of the sales which it was carrying out on DCA's behalf and could therefore not be considered as DCA's commercial agent.

Article L. 134-1 of the French Commercial Code defines a commercial agent as an intermediary which has the continuing authority to negotiate the sale or purchase of goods on behalf of another person. However, the Paris Commercial Court expressed doubt as to the interpretation of the term "negotiate". While the French Supreme Court (*Cour de Cassation*) has interpreted this term in such a way as to exclude an intermediary which does not have the power to modify the terms of sale and to establish the price of the goods which it sells on behalf of the principal, other French courts and other EU Member States have adopted the opposite interpretation.

Therefore, the Paris Commercial Court asked the CJEU whether an intermediary which does not have the power to modify the terms of sale of the products which it sells on behalf of another company, including their prices, may be considered as having the power to "negotiate" contracts within the meaning of Article 1(2) of the Directive.

Pursuant to Article 1(2) of the Directive, three conditions are necessary and sufficient for a person to be qualified as a commercial agent. First, that person must be an independent intermediary. Second, the intermediary must be permanently bound by a contract with the principal. Third, its activities must consist either in the negotiation of sales or purchases for the principal, or in the negotiation and conclusion of such transactions in the name and on behalf of the principal.

As to the term "negotiation", the CJEU indicated that the Directive does not refer to national laws. As a result, this concept should be considered as an autonomous term and should be interpreted uniformly throughout the EU.

The CJEU noted that the main tasks of a commercial agent consist in bringing new customers and maintaining relations with existing customers. Such tasks involve the provision of information and advice, as well as discussions fostering sales on behalf of the principal, without necessarily involving the faculty to modify prices. The CJEU considered that interpreting Article 1(2) of the Directive differently would deprive persons who do not have the power to modify prices from the protection of the Directive which, through mandatory provisions, provides for the compensation of the commercial agent upon termination of the agreement. Such a result, the CJEU found, would be contrary to the Directive's objectives.

As a result, the CJEU held that Article 2(1) of the Directive should be interpreted as meaning that an intermediary is not required to have the faculty to modify the prices of the goods which it sells on behalf of the principal in order to qualify as a commercial agent within the meaning of that provision.

COMPETITION LAW

Belgian Competition Authority Rejects Requests for Interim Measures in Professional Football

On 29 June 2020 and 2 July 2020, the Competition College (*Mededingingscollege / Collège de la Concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*; the ***BCA***) ruled on several requests for interim measures applying to professional football.

Virton

The first decision concerns the interim measures requested by the Belgian football club Royal Excelsior Virton (***Virton***) against the Royal Belgian Football Association (the ***RBFA***). In April 2020, the RBFA refused to issue a new operating licence to Virton. As a result, Virton was relegated to a lower tier in the competition. Virton appealed this decision and filed a complaint with the BCA. In this complaint, Virton argued that the RBFA had abused its dominant position by maintaining anticompetitive provisions in its licences regulation and by applying this regulation in a discriminatory manner.

We will discuss this decision in our July issue. Broadly, the BCA found that the refusal of a licence by the RBFA was based on grounds that were *prima facie* compatible with competition law. The BCA also observed that, despite several invitations to do so, Virton had not taken advantage of existing possibilities which would have allowed the RBFA to grant a licence in its favour. As a result, the BCA rejected Virton's request for interim measures.

Waasland-Beveren

On 2 July 2020, the BCA similarly refused to impose all but one of the interim measures requested by Foodinvest Holding NV, a shareholder of the Belgian football club Waasland-Beveren (***Waasland-Beveren***), against the Pro League.

This case started on 26 May 2020 when Waasland-Beveren complained about its demotion from Belgium's highest football competition, division 1A. The demotion resulted from the Pro League's decision of 15 May 2020 to suspend the season due to the Covid-19 outbreak, at a time when Waasland-Beveren was placed last in the competition. Waasland-Beveren requested the BCA to require the Pro League and/or the RBFA to maintain it in the first division for the following season. In addition, Waasland-Beveren requested that the Pro League and/or the RBFA be prohibited from imposing sanctions on it for having sought legal redress against the decision of 15 May 2020.

The BCA decided that the Pro League's decision to suspend the competition was not unreasonable considering the Covid-19 outbreak. The BCA also observed that requiring that the 2020-2021 season be played with 17 or 18 teams instead of 16 teams (which would have suited Waasland-Beveren in its bid to avoid relegation) would have imposed a disproportionate burden on the clubs and organisers while allowing Waasland-Beveren to remain in D1A without having earned this right by winning football matches.

At the same time, the BCA also ordered the Pro League to suspend its decision to impose sanctions on football clubs that seek legal remedies against the suspension.

Belgian Competition Authority Finds Agreement between Brussels Airlines and Thomas Cook Belgium To Be Anticompetitive

On 1 July 2020, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité Belge de la Concurrence*; the ***BCA***) found the commercial service agreement concluded on 8 June 2017 between Brussels Airlines NV (***Brussels Airlines***) and Thomas Cook Belgium NV (***Thomas Cook Belgium***) (the ***Agreement***) to be anticompetitive.

The Agreement required that Thomas Cook Belgium purchase a specified number of airplane seats from Brussels Airlines for specific destinations. The Agreement also pro-

hibited Brussels Airlines from selling airplane seats to third party tour operators on specific flights. This prohibition was combined with an adjustment mechanism affecting Thomas Cook's purchase obligation should Brussels Airlines sell seats to third party tour operators. Finally, the Agreement required Brussels Airlines to disclose new rotations and new destinations of third-party tour operators to Thomas Cook Belgium.

The BCA started to investigate this Agreement on 21 August 2017. On 12 February 2020, the College of Competition Prosecutors (*Auditoraat / Auditorat*) of the BCA submitted its proposed decision to the President of the BCA. According to the College of Competition Prosecutors, the Agreement provided for the exchange of commercially sensitive information and its duration led to customer foreclosure in the wholesale market of airplane seats, which constitutes a competition law infringement both by object and by effect (*See*, this Newsletter, Volume 2020, No 2, p. 4-5).

For its part, the Competition College confirmed that the Agreement infringed Article 101 of the Treaty on the Functioning of the European Union. The decision will be discussed in more detail when it becomes available. In the meantime, the short press release issued by the BCA is noteworthy for two reasons.

First, the BCA only announced that it found an infringement of Article 101 of the Treaty on the Functioning of the European Union. Its press release does not mention the equivalent provision under Belgian law, Article IV.1 of the Code of Economic Law.

Second, the Competition College found that Brussels Airlines never applied the anticompetitive provisions of the Agreement, and that it terminated the Agreement following the bankruptcy of Thomas Cook Belgium. For this reason, and consistent with the view of the College of Competition Prosecutors, the Competition College decided not to impose a fine on either Brussels Airlines or Thomas Cook Belgium.

Given that no fine was imposed and that the BCA's finding that the Agreement was never applied greatly reduces the possibility of follow-on damage actions, the parties are unlikely to appeal this decision.

Belgian Competition Authority Launches In-Depth Investigation of Car Dealership Acquisition

On 15 June 2020, the Competition College (*Mededingingscollege / Collège de la Concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité Belge de la Concurrence*) took the rather unusual step of opening an in-depth ("phase 2") investigation in a merger case.

This case concerns the acquisition of control by Holding Groep Delorge BV (which forms part of Groep Automotive & Mobility Invest NV) of Coox Gregor Management BV and Coox Jochem Management BV. The transaction concerns official car dealerships for Audi, Seat, Skoda and Volkswagen commercial vehicles.

Belgian Competition Authority Launches Investigation into Alleged Anticompetitive Practices in Private Security Sector

The Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*; the ***BCA***) started a formal investigation of alleged anticompetitive agreements or concerted practices in the private security sector. Although the BCA has not yet provided any communication regarding this case, it appears from three parliamentary questions and the answers provided on 18 June 2020, 1 July 2020 and 8 July 2020 by the Minister for the Digital Agenda, Telecommunications and Post, Philippe De Backer, and the Minister for Employment, Economic Affairs and Consumers, Nathalie Muylle, that the investigation started on 10 March 2020 and concerns private security firms G4S, Securitas and Seris as well as trade association BVBO/APEG. It is unclear whether Jean-Paul Van Avermaet, former Cluster Managing Director for G4S in Belgium, France, Luxembourg and Morocco who became the CEO of Belgian incumbent postal operator bpost in February 2020, is also personally a target of the investigation.

The parliamentary questions and answers suggest that the BCA is looking into a possible cartel involving the exchange of commercially sensitive information and price-fixing which has lasted for twelve years. They also reveal that several administrative services of the Belgian State, such as prisons and asylum centres, and other government entities may have fallen prey to the alleged cartel as customers for security services.

Minister Muylle indicated that the investigation will require up to one or two years to complete.

CONSUMER LAW

Supreme Court Prioritises Remedies Available to Consumers Following Sale of Defective Products

On 18 June 2020, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) delivered a judgment concerning the conditions under which the two-year legal warranty vis-à-vis consumers can be invoked (Supreme Court, judgment of 18 June 2020 in case C.19.0332.N).

Pursuant to Article 1649*quinquies*, §2 of the Civil Code, a consumer who purchased a defective product from a seller who is liable under Article 1649*quater* of the Civil Code may demand the free repair or the free replacement of the product, except where these remedies are impossible or require a disproportionate effort from the seller.

Pursuant to Article 1649*quinquies*, §3 of the Civil Code, if the free repair or replacement of the product is unavailable, the consumer may demand an adequate price reduction or rescission of the sale. However, a rescission of the sale is unavailable to the consumer if the defect is minor. Moreover, any amount to be reimbursed should be reduced to reflect the use made of the product since it fell in the hands of the consumer.

In its judgment, the Supreme Court held that the adequate price reduction or rescission of the sale are subsidiary remedies to the free repair or replacement of the product. It also determined that the priority given by law to the free repair or replacement of the defective product cannot only be relied on by the consumer but also by the seller, who must be given the opportunity to carry out the remedies provided for by Article 1649*quinquies*, §2 of the Civil Code.

Therefore, the Supreme Court held that a judge who orders the seller to pay damages to the consumer due to the defective nature of the product sold must first establish that:

1. the seller offered the possibility of repairing or replacing the product for free but failed to do so within a reasonable time or could not do so without serious inconvenience to the consumer; or
2. the free repair or replacement of the defective product was no longer possible or would be abusive.

As a result, the Supreme Court overturned the judgment under review (namely a judgment of the Antwerp Court of First Instance, which was acting on appeal of a decision of the justice of the peace) and referred the case to the Limburg Court of First Instance for reassessment.

DATA PROTECTION

European Commission Reviews First Two Years of Application of GDPR

On 24 June 2020, the European Commission (the ***Commission***) published an evaluation report assessing the first two years of application of the General Data Protection Regulation (the ***GDPR*** – hereinafter the ***Report***). Overall, the Commission is of the opinion that the GDPR has met its objectives of strengthening an individual's right to personal data protection and guaranteeing the free flow of personal data within the EU. The Commission observes that the GDPR is becoming a global standard for data protection. However, it also notes the need for further cooperation and implementation at Member State level.

According to the Commission, the GDPR has been an empowering tool enabling European citizens to increasingly use and enforce their rights since it became fully applicable on 25 May 2018. The Commission added that during the Covid-19 crisis the GDPR has proven to be an essential and flexible tool to ensure that new technologies, such as contact tracing apps, comply with fundamental rights. The Report identifies the following challenges that signal room for improvement in the coming years.

National Divergences

The GDPR provides a harmonised set of rules but a certain degree of fragmentation still exists. An example is the different approach between Member States in determining the minimum age for a minor to consent to the use of their data in relation to information society services. Article 8 of the GDPR allows Member States to provide for a lower age than 16 and some Member States opted for the age of 13 or 14. These differences create uncertainty for both children and their parents in addition to difficulties for businesses working across borders.

The same is true for Member States' different legislative approaches in implementing derogations from the general prohibition to process special categories of personal data, including for health and research purposes. The Commission plans to map the different national approaches in this regard following which it will support the establishment of codes of conduct to contribute to a more consistent approach. These measures should facilitate cross-border processing of personal data.

Cross-border Enforcement

Although the GDPR strengthened procedural rights, including the right to lodge a complaint with a data protection authority (***DPA***), there is a need to facilitate the exercise and full enforcement of data subjects' rights. Currently, there are many differences in, for instance, the complaint-handling procedures and the duration of proceedings due to different national timeframes. The Commission stresses the important role played by the DPAs in ensuring the GDPR's enforcement at national level, but the development of a truly common European data protection culture between DPAs is an on-going process. The Commission therefore calls upon the Member States to provide the DPAs with adequate resources as required by the GDPR.

New Technologies

Further challenges lie ahead in clarifying how to apply the proven data protection principles to specific technologies, such as artificial intelligence, blockchain, the "Internet of Things" or facial recognition. Moreover, the Commission indicates that a stronger and more effective enforcement of the GDPR vis-à-vis large digital platforms and integrated companies in areas such as online advertising and micro-targeting is essential to protect European citizens.

Higher Burden for SMEs

In the Report, the Commission acknowledges the higher burden for small and medium-sized enterprises (***SMEs***) to implement the GDPR. DPAs have already provided templates for, for instance, processing contracts, but further efforts are needed to offer practical tools to facilitate the implementation of the GDPR by SMEs, preferably on the basis of a common European approach.

Developing Modern International Data Transfer Toolbox on Basis of "Adequacy Decisions"

In order to develop a modernised toolbox to facilitate the transfer of personal data from the EU to a third country or international organisation, the Commission actively engaged with key partners with a view to reaching so-called "adequacy decisions". Such a decision enables the safe and free flow of personal data to the third country concerned without the need for the data exporter to provide further safeguards or obtain an authorisation. According to the Report, the adequacy process with the Republic of Korea is at an advanced stage, and exploratory talks are under way with other partners in Asia and Latin America. Adequacy also plays an important role in the future relationship with the UK as an enabling factor for trade and an essential prerequisite for close cooperation in the area of law enforcement and security.

In addition to its adequacy work, the Commission will update the standard contractual clauses in the light of new requirements introduced by the GDPR. To make full use of the international dimension of EU data protection rules on the basis of the GDPR's extended territorial scope, the Commission will ask DPAs to send a clearer message to foreign operators that the lack of an establishment in the EU does not relieve them of their responsibilities under the GDPR.

Promoting Global Convergence

While the GDPR has already emerged as a key reference point at international level and has acted as a catalyst for many countries around the world to consider introducing modern privacy rules, the Commission intensified its dialogue in a number of bilateral, regional and multilateral frameworks to foster a global privacy culture. This implies, for instance, the continuing exploration of synergies between trade and data protection instruments to ensure free and safe international data flows.

Way Forward

The Report stresses the importance of continuing the work towards a common European culture of data protection. However, the Commission considers it too soon to draw permanent conclusions on the existing level of fragmentation after two years of application of the GDPR given the ongoing assessment of national legislation and the fact that sector-specific legislation is still being revised in many Member States. Relevant case law of national courts and of the Court of Justice of the European Union will help to create a consistent interpretation of the data protection rules.

By way of conclusion, the Commission lists the actions needed to support the GDPR's application which will be monitored for the forthcoming evaluation report of 2024. In addition to certain recommendations already highlighted, Member States should, for instance, consider limiting the use of specification clauses that might create fragmentation and jeopardise the free flow of data within the EU. The Commission will encourage cooperation between regulators, in particular in fields such as competition, electronic communications, security of network and information systems and consumer policy. The European Data Protection Board (***EDPB***) is invited to take action as well, for instance, by issuing guidelines on the application of the GDPR to scientific research, artificial intelligence, blockchain and other technological developments. The EDPB is also called upon to clarify the interplay between the rules on international data transfers and the GDPR's territorial scope of application.

The Commission's full report can be consulted here.

Belgian and EU Advice on Data Protection Compliance for Covid-19 Measures

National and European authorities published various guidance documents on data protection in relation to the fight against Covid-19, including:

- *A statement by the European Data Protection Board (**EDPB**) on 2 June 2020 on restrictions on data subject rights in connection with the state of emergency in EU Member States*. The EDPB published this statement in response to the decree by the Hungarian government that suspended all measures following data subjects' requests exercising their rights under the General Data Protection Regulation (the ***GDPR***) with respect to personal data processing for the purpose of preventing, understanding, detecting the coronavirus disease and impeding its further spread until the state of emergency is revoked in Hungary. The EDPB affirmed that data protection does not impede the fight

against the Covid-19 pandemic. It added that the protection of personal data must be upheld in all emergency measures. Provided that possible restrictions on data subject rights do not exceed the limits of what is necessary and proportionate in order to safeguard the public health objective, the state of emergency adopted in a pandemic context is a scenario that may legitimise specific restrictions of data subject rights.

- *The European Commission's guidelines and technical specifications on interoperability for contact tracing apps* (12 June 2020). These guidelines build on the Commission's first iteration of the toolbox for mobile applications to support contact tracing in the EU's fight against Covid-19 and previous guidance on apps supporting the fight against Covid-19. Our note discussing the Commission's toolbox and previous guidance can be found here. The guidelines of 12 June 2020 present the basic elements for interoperability for "*Covid+ Keys driven solutions*" and are addressed to Member States implementing this type of protocol. The Commission's guidelines can be found here.

- *A statement adopted by the EDPB on 16 June 2020 that focuses on data protection issues related to interoperability of contact tracing apps*. Interoperability adds another layer of complexity to contact tracing apps and creates additional risks for data subjects in terms of transparency, the legal basis on which the tool relies, and the exercise of data subjects' rights. Other key issues identified by the EDPB are that interoperability should not lead to a decrease in data security or affect the level of data quality. The EDPB's recommendations follow earlier EDPB guidelines on the use of location data and contact tracing tools (Guidelines 04/2020). Our note on this EDPB statement can be found here.

Belgian Data Protection Authority Fines Non-Profit Organisation for Unlawful Direct Marketing Practices

On 29 May 2020, 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 1,000 on a non-profit organisation for unlawful direct marketing practices under the General Data Protection Regulation (the ***GDPR***).

The fine was imposed in response to a complaint filed by an individual who had repeatedly received promotional material from the non-profit organisation. The individual had objected to the processing of his contact details for the purpose of direct marketing multiple times and had requested the erasure of his personal data.

Direct Marketing

The Litigation Chamber held that sending promotional material to the individual constituted direct marketing within the meaning of the GDPR since this is a form of unsolicited communication, sent by post, to the data subject with the aim of promoting the organisation's services and fundraising.

Right To Object and Right To Be Forgotten

The Litigation Chamber added that, if personal data are processed for the purpose of direct marketing, the data subject has the right to object to such processing of its personal data (Recital 70 of the GDPR). The data subject can do so at any time and free of charge. In addition, in the context of direct marketing, the processing of personal data should be stopped immediately in case the data subject objects to such processing (Articles 21(2) and 21(3) of the GDPR).

In the present case, the data subject had exercised his right to object under Article 21(2) of the GDPR and his right to be forgotten under Article 17(1)(c) of the GDPR. Nonetheless, the organisation continued to process the individual's personal data for (at least) five months following the data subject's request and for three months after being notified that a complaint had been filed to the DPA. As a result, the organisation was found to be in breach of the GDPR.

Lawfulness of Processing

The processing of personal data must be based on one of the legal bases foreseen in Article 6 of the GDPR. In the case at hand, the organisation relied on the ground of legitimate interests (Article 6(1) (f) of the GDPR) for processing the individual's contact details to send promotional materials. The individual was a former donor of the non-profit organisation.

However, the Litigation Chamber did not accept this ground as justified and held that the legitimate interests of the organisation had been overridden by the rights and freedoms of the concerned individual for two reasons: (i) it is doubtful whether individuals can reasonably expect their data to be processed for a period of more than seven years after making a donation; and (ii) the organisation did not take sufficient measures to mitigate the impact of the data processing on the individuals because it failed to inform the data subjects of their right to object and did not provide a real and effective right to object to the processing of their personal data. The right to object should be explicitly brought to the attention of the data subject and presented clearly and separately from any other information.

For the above reasons, the Litigation Chamber decided to impose an administrative fine of EUR 1,000 on the non-profit organisation. The decision can still be appealed to the Market Court (*Marktenhof/Cour des marchés*) of the Brussels Court of Appeal.

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

EU Council Presidency Publishes Progress Report on ePrivacy Regulation

On 3 June 2020, the Presidency of the EU Council published a progress report (the ***Progress Report***) on the Draft Regulation concerning the respect for private life and the protection of personal data in electronic communications (the ***Draft ePrivacy Regulation***). The Draft ePrivacy Regulation was presented in 2017 by the European Commission to replace Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

The Progress Report takes stock of the current situation before the matter was taken over by the incoming German Presidency of the Council. It indicates that a number of amendments were introduced in order to simplify the text of the Draft ePrivacy Regulation and to align its provisions with the General Data Protection Regulation (the GDPR) (*See*, this Newsletter, Volume 2020, No. 2, at p. 10).

The Progress Report is available here.

European Data Protection Supervisor Opinion on EU Digital Data Strategy

On 16 June 2020, the European Data Protection Supervisor (the ***EDPS***) published its opinion (the ***Opinion***) on the European data strategy that was unveiled by the European Commission in February 2020 (*See*, this Data Protection Newsflash of 12 March 2020). In its data strategy, the Commission sought to create a single European data space, which is a single market for data that will be open to data from across the world. The data strategy forms part of broader policy initiatives that involve a digital strategy and a framework for the development of Artificial Intelligence.

To achieve its European data space, the Commission will first pursue a regulatory approach. This includes the development of new rules with regard to data governance, access and data re-use in various relationships between businesses, between business and government, and within administrations. The Commission plans to support the establishment of what it refers to as nine common European data spaces across a range of industries. One such data space will be called the "common European health data space".

Additionally, the Commission will deploy the competition rules for the European data space. This includes providing more guidance on the compatibility of data sharing and pooling arrangements with EU competition law. Also, in the area of merger control, the Commission will look at the possible effects on competition of large-scale data accumulation through acquisitions and at the utility of data-access or data-sharing remedies to resolve possible concerns.

The EDPS understands the growing importance of data for the economy and society. It supports the wider strategic objectives of the EU but recalls at the same time that "*big data comes with big responsibility*". Appropriate data protection safeguards must therefore be in place. In this regard, the EDPS applauds the Commission's commitment to ensuring that fundamental EU rights and values, including the right to the protection of personal data, will underpin all aspects of the data strategy and its implementation. The General Data Protection Regulation (the ***GDPR***) should at all times be adhered to as it provides a solid basis by virtue of its technologically neutral approach, which is assured in the data strategy set out by the Commission.

The EDPS welcomes the Commission's intention to consider the adoption of sector-specific legislation to accompany the creation of common European data spaces. In particular with regard to the "common European health data space", the EDPS highlights that all processing operations that may result from the establishment of this common data space will require a robust legal basis in line with the EU rules on data protection given the significant impact and sensitivity of cross-border exchange of health data. A European code of conduct on the processing of health data for the purpose of scientific research could be an effective enabler for greater cross-border exchange of health data within the EU.

The EDPS's Opinion also refers to the Covid-19 outbreak and, like the European Data Protection Board, expresses the viewpoint that data protection rules do not hinder measures taken in response to the coronavirus pandemic. Data protection and technology can contribute to the fight against the pandemic and other similar threats but only if they effectively empower the individuals and are accompanied by appropriate safeguards.

Finally, the EDPS calls for a cautious approach towards initiatives aimed at compulsory access to personal data in the competition context (*i.e.*, access to personal data held by the incumbent undertaking by competitors).

To conclude, the EDPS strongly believes that one of the most important objectives of the European data strategy should be to prove the viability and sustainability of an alternative data economy model which is open, fair and democratic. The envisaged common European data spaces should serve as an example of transparency, effective accountability and proper balance between the interests of the data subjects and the shared interest of society as a whole.

The full text of the Opinion can be consulted here.

European Data Protection Board Publishes Register on One-Stop-Shop Decisions

On 25 June 2020, the European Data Protection Board, an independent EU body composed of representatives of the national data protection authorities and the European Data Protection Supervisor (the ***EDPB***) published a register (the ***Register***) with decisions taken by national supervisory authorities under the One-Stop-Shop mechanism of Article 60 of the General Data Protection Regulation 2016/679 (***GDPR***).

Under the One-Stop-Shop mechanism, the Lead Supervisory Authority collaborates with other Concerned Supervisory Authorities in cross-border cases. The decision in such cross-border matters is taken by the Lead Supervisory Authority and submitted to the other Concerned Supervisory Authorities for their comments and objections. If the Lead Supervisory Authority does not agree with any objections made, the matter is submitted to the consistency mechanism set out in Articles 63 et seq. of the GDPR.

In its 2 year review of the GDPR, the European Commission identified efficient enforcement in national and cross-border cases as one of the main challenges for the application of the GDPR (*See*, this Newsletter, at p. 9).

The Register can be consulted here.

ENERGY

Court of Justice of European Union Finds Flemish Regulatory Framework Governing Wind Turbines on Land To Be in Breach of EU Environmental Law

On 25 June 2020, the Court of Justice of the European Union (the ***CJEU***) held that the Flemish regulatory framework regarding wind turbines violates Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (the ***Strategic Environmental Assessment Directive or SEA Directive***), on the ground that a planning permit (*stedenbouwkundige vergunning / permis d'urbanisme*) for the installation and operation of wind turbines had not been subject to a prior environmental assessment.

The Flanders Department of Land Planning granted a planning permit for the installation and operation of five wind turbines on a site located close to the E40 motorway in the municipalities of Aalter and Nevele, subject to conditions laid down by article 5.20.6 of the Order of the Flemish Government on the general and sectoral provisions with regard to environmental health of 1 June 1995, as amended from time to time (***Vlarem II***) and by circular letter EME/2006/01 – RO/2006/02 (as replaced by circular letter RO/2014/02) (together, the ***Flemish Provisions***). The Flemish Council for Permit Disputes (*Raad voor Vergunningsbetwistingen / Conseil pour les Contestations de permis*) submitted a request for a preliminary ruling to the CJEU concerning the interpretation of the Flemish Provisions under the SEA Directive.

The CJEU held that the Flemish Provisions, on the basis of which the permit had been granted, violate the SEA Directive. The SEA Directive provides that for certain instruments a prior strategic environmental assessment is required. The CJEU held that the Flemish Provisions, which contain various rules regarding the installation and operation of wind turbines, including measures on shadow flicker, the safety of wind turbines and noise level standards, are instruments that must be subject to such prior environmental assessment.

For planning permits granted to existing wind turbines in Flanders, including conditions laid down by the Flemish Provisions but which did not form the subject of a prior environmental assessment, the CJEU recalled that Member States are required to eliminate the unlawful consequences of such a breach of EU law. However, the CJEU added that in the specific circumstances of the case, the national court could maintain the effects of the Flemish Provisions if the national law permitted it to do so and if the annulment of the planning permits would likely have significant implications for the electricity supply of Belgium. The CJEU specified that maintaining such effects would only be possible during the period of time strictly necessary to remedy that illegality.

The CJEU referred the case back to the Flemish Council for Permit Disputes which will have to carry out the assessment of whether it can temporarily maintain the specific effects of the Flemish Provisions.

On 15 July 2020, the Flemish Parliament adopted emergency legislation temporarily confirming the validity of the existing framework.

INSOLVENCY

End of Temporary Covid-19 Protection Measures for Enterprises

Since 17 June 2020, the temporary Covid-19 protection measures for enterprises are no longer in place. These protection measures were introduced on 24 April 2020 by Royal Decree concerning the temporary suspension of enforcement measures and other measures during the Covid-19 crisis (the ***Decree***).

The Decree granted an automatic moratorium during which enterprises were protected against (i) bankruptcy, judicial dissolution and transfers under judicial authority; (ii) attachments and enforcement measures; and (iii) the termination of existing contracts because of a failure to observe payment obligations. In addition, new credit lines provided during the moratorium and the security interests or acts that were implemented pursuant to such new credit lines, were protected against subsequent bankruptcy (*See*, this Newsletter, Volume 2020, No. 4, p. 16).

The federal government had already extended the initial temporal scope of the Decree from 17 May 2020 until 17 June 2020 but has now decided not to further extend these measures.

INTELLECTUAL PROPERTY

EU General Court Annuls Invalidity Decision concerning Louis Vuitton's Checkerboard Pattern Trade Mark

On 10 June 2020 the General Court of the EU (the ***GC***) delivered its judgment in the case of Louis Vuitton vs. the EU Intellectual Property Organisation (***EUIPO***). Louis Vuitton initiated proceedings before the GC after the EUIPO Board of Appeals (the ***Board***) had invalidated its figurative trade mark (*see*, picture) for a lack of distinctive character. The GC considered that the Board erred in its assessment of the sign's distinctive character because it had failed to carry out an overall assessment of the mark.

In 2008, Louis Vuitton obtained an EU trade mark via international registration from the World Intellectual Property Organisation for goods under Class 18 (handbags, suitcases, etc.). However, in 2015, Norbert Wisniewski filed an application with EUIPO for a declaration of invalidity, leading to the 2018 decision of the Board invalidating the trade mark for its lack of distinctive character in the EU (the ***contested decision***).

Louis Vuitton put forward two grounds to obtain the annulment of the contested decision.

Inherent Distinctive Character

First, it argued that the Board had incorrectly assessed the *inherent* distinctive character of the mark, because it based its decision on the existence of well-known facts, thereby infringing the rules on burden of proof in invalidity proceedings. According to Louis Vuitton, a mark is presumed to be valid in invalidity proceedings and cannot be annulled on the sole basis of well-known facts.

The GC observed that the Board had, to an extent, relied on well-known facts when it stated that the checkerboard pattern had always existed in the decorative arts sector and that it was a basic and commonplace figurative pattern that did not diverge from the norms of the sector. The GC also agreed that there is a presumption of validity of the mark in invalidity proceedings. However, it went on to state that this presumption does not preclude the Board from relying on not only the arguments put forward by the party who applied for a declaration of invalidity, but also on well-known facts which the examiner might have failed to take into consideration in the registration procedure. The Board examined the arguments of Mr. Wisniewski (who claimed that the checkerboard pattern was commonplace) and found these to be substantiated by well-known facts. The GC considered this not to be contrary to the rules on the burden of proof, and dismissed Louis Vuitton's first ground for annulment.

Acquired Distinctive Character

Second, Louis Vuitton contended that the Board had erred in its assessment of the *acquired* distinctive character through use of the trade mark. Article 59(2) of EU Regulation 2017/1001 (the ***EU Trade Mark Regulation***) provides that a mark devoid of any inherent distinctive character may nevertheless not be invalidated if, in consequence of the use which has been made of it, it has acquired distinctive character. Following the case-law established in Nestlé (cases C-84/17, C-85/17 and C-95/17 – *See*, this Newsletter, Volume 2018, No. 7, p. 13), the Board was required to conduct an overall assessment of all evidence submitted to it in order to determine whether that evidence as a whole could show that the mark had acquired distinctive character through use throughout the EU. According to Louis Vuitton, the Board wrongly limited its analysis to a restricted subset of evidence submitted by Louis Vuitton, excluding other pieces of evidence. The Board had thus

erroneously found a lack of acquired distinctive character based on only part of the evidence.

The GC recalled that an EU trade mark is to have a unitary character with equal effect throughout the EU and that therefore the mark should have a distinctive character throughout the EU. However, it added that it would be unreasonable to require proof of such acquired distinctiveness for each individual Member State. It is possible that certain pieces of evidence are relevant to multiple Member States or even to the whole of the EU. The GC noted that Louis Vuitton had filed extensive evidence before the Board and had argued that the whole of that evidence demonstrated that the trade mark had acquired distinctiveness throughout the EU.

In the contested decision, the Board had divided the EU Member States into three groups. The Board decided to assess the third group of countries first, and analysed only specific pieces of evidence that referred in particular to those Member States, excluding all other evidence as irrelevant for the evaluation of the distinctiveness of the trade mark in that group. The CG considered that, although the Board could limit itself first to the assessment of one group of countries for reasons of procedural efficiency, the Board had disregarded numerous pieces of evidence without explanation. It had therefore erred in law, since some evidence may have related to multiple countries or even to the EU as a whole.

The GC therefore upheld the second ground for annulment of Louis Vuitton and annulled the contested decision. As a result, the validity of Louis Vuitton's is confirmed and unless EUIPO appeals to the European Court of Justice, the matter will be referred back to the Board for further review.

LABOUR LAW

Implementation of European Directive On Posting Of Workers In Belgian Law

On 18 June 2020, the Law containing various provisions on the posting of workers (*Wet houdende diverse bepalingen inzake de detachering van werknemers / Loi portant diverses dispositions concernant le détachement de travailleurs*; the ***Law***) was published in the Belgian Official Journal. The Law implements Directive 2018/957 of 28 June 2018 amending Directive 96/71 concerning the posting of workers in the framework of the provision of services.

The Law will enter into force on 30 July 2020 and amends the Law on the posting of workers, the law on temporary work and the social criminal code.

Law on Posting of Workers

The main amendments to the Law of 5 March 2002 on posting of workers (*Wet betreffende de arbeids-, loon- en tewerkstellingsvoorwaarden in geval van detachering van werknemers in België en de naleving ervan / Loi concernant les conditions de travail, de rémunération et d'emploi en cas de détachement de travailleurs en Belgique et le respect de celles-ci*; the ***Law on Posting of Workers***) are the following:

- Within the first 12 months of posting, the employer must, as before, comply with wage and employment conditions arising (i) from provisions that are sanctioned by criminal law; and (ii) from mandatory collective bargaining agreements, with the exception of occupational pension schemes established at sector level.

- After 12 months of posting (extendable to 18 months subject to a justified notification), posted workers are entitled to all wage and employment conditions applicable under Belgian law (regardless of whether these are criminally sanctioned), with the exception of the rules governing the conclusion and termination of employment contracts (including non-compete provisions) as well as occupational pension schemes established at sector level. This means, for example, that workers are entitled to the guaranteed salary in the event of sick leave.

- When the employer replaces a worker posted in Belgium with another posted worker who performs the same tasks in the same place, both posting durations must be added up in order to calculate the above thresholds of 12 or 18 months.

- Allowances to cover travel, meal and accommodation costs for workers who are away from home for professional reasons arising from mandatory collective bargaining agreements must only be awarded to workers posted in Belgium for (i) travel to and from their usual place of work in Belgium; and for (ii) temporary assignments from that usual place of work to another place of work.

- Allowances to cover costs incurred as a result of the posting are, as before, considered as part of the remuneration to the extent that they are not paid to reimburse costs actually incurred on account of the posting. However, a presumption is now introduced according to which the allowances must be considered as reimbursement of costs when their allocation is uncertain.

These amendments do not yet apply to the road transport sector.

Law on Temporary Work

The Law of 24 July 1987 on temporary work, temporary agency work and the lending of workers (*Wet betreffende de tijdelijke arbeid, de uitzendarbeid en het ter beschikking stellen van werknemers ten behoeve van gebruikers / Loi sur le travail temporaire, le travail intérimaire et la mise de travailleurs à la disposition d'utilisateurs*; the ***Law on Temporary Work***) has also been amended.

The Law introduces two information obligations, the violation of which is subject to criminal sanctions, for the employer established in Belgium (the ***User***) who uses the services of a temporary worker posted in Belgium:

- The User must inform the temporary work agency in writing about the working conditions that apply within the company. If, for instance, a temporary worker is posted to Belgium by a French temporary work agency, the User must inform the worker about matters such as the conditions applicable to working time, night work and holidays.

- A prior notification of the temporary work agency by the User is required if the temporary worker posted to Belgium will be performing work in another EEA Member State or in Switzerland. This obligation does not yet apply to the road transport sector.

Social Criminal Code

Finally, the Law also amended the Social Criminal Code (*Sociaal Strafwetboek / Code pénal social*) as follows:

- Non-compliance with the two above information obligations is subject to a criminal fine of between EUR 400 and EUR 4,000 or an administrative fine of between EUR 200 and EUR 2,000 multiplied by the number of workers concerned (with a maximum of 100).

Mitigating circumstances may apply if the wage and employment conditions are not displayed on the website of the Federal Public Service Employment, Labour and Social Dialogue.

LITIGATION

European Parliament and Council Reach Political Agreement on EU Collective Representative Actions

On 22 June 2020, the European Parliament (the ***EP***) announced that it had reached a political agreement with the Council of the European Union (the ***Council***) on the final text of the Directive on representative actions for the protection of the collective interests of consumers (the ***Representative Action Directive***) (*See*, this Newsletter, Volume 2018, No. 4, p. 19 and Volume 2019, No. 11, p. 18). This agreement is the result of interinstitutional negotiations that started on 9 January 2020 (*See*, this Newsletter, Volume 2020, No.1, p. 14).

The Representative Action Directive will introduce harmonised rules that aim to facilitate redress for consumers in the case of widespread infringements of their rights in more than one EU Member State while at the same time providing safeguards against abusive recourses. Collective representative actions will enable consumers to seek redress in a range of areas such as general consumer law, data protection, financial services, travel and tourism, energy, telecommunications, environment and health or train passenger rights.

Each Member State will have to provide for at least one representative action procedure for injunction and redress measures which will make representative actions possible both at the European and national level. To that end, Member States will have to designate at least one qualified entity (organisation or public entity) that will initiate proceedings on behalf of groups of consumers.

Entities that will handle cross-border cases will have to satisfy three harmonised criteria. First, the entities must demonstrate 12 months of prior activity in protecting consumer interests. Second, the entities must have a non-profit making character. Third, they must not be influenced by third parties who have economic interests opposed to those of consumers. By contrast, Member States will have leeway to determine the designation criteria for entities in charge of domestic cases, provided that these criteria are consistent with the objectives of the Representative Action Directive.

Importantly, in order to protect businesses from abusive lawsuits, the negotiators agreed on the introduction of a "*loser pays principle*" according to which the defeated party will have to pay the costs of proceedings to the winning party. Furthermore, courts and administrative authorities will have the power to dismiss actions that clearly lack merit at the earliest possible stage of the proceedings.

Finally, according to the negotiators, the Commission will have to consider creating a European Ombudsman for collective redress who will hold the role of handling cross-border collective actions at the European level.

The EP and the Council now have to approve the political agreement formally. The Representative Action Directive will enter into force 20 days after its publication in the Official Journal of the European Union. Following its entry into force, Member States will have 24 months to transpose the text of the Directive into their national laws and an additional six months to apply the new rules.

The press release of the EP is available here.

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