June 2022

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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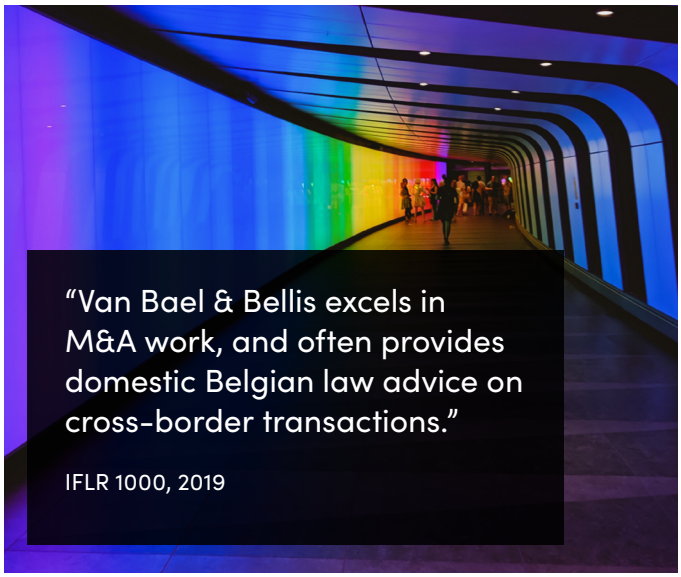

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COMMERCIAL LAW

Government Submits Bill Containing Various Provisions in Economic Matters to Federal Chamber of Representatives

On 17 June 2022, the federal government submitted Bill 55K2742 "containing various provisions in economic matters" to the federal Chamber of Representatives (*Wetsontwerp houdende diverse bepalingen inzake Economie / Projet de loi portant dispositions diverses en matière d'Économie* - the ***Bill***). The Bill covers a wide range of topics and, when adopted, will modify several provisions of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* - the ***CEL***) and other pieces of Belgian legislation that impact the economy. This article focuses on key provisions affecting commercial law.

First, the Bill amends Article III, paragraph 2, CEL to allow companies registered in the Crossroads Bank for Enterprises (*Kruispuntbank van Ondernemingen / Banque-Carrefour des Entreprises*) to mention a SEPA bank account on their company documents and invoices (Article 3, Bill). Companies are currently required to mention a Belgian bank account.

Second, the Bill allows the Government to designate products that are considered risky to consumers and determine the terms according to which additional and specific pre-contractual information regarding those products should be provided to consumers (Article 10, Bill).

Third, the Bill modernises the Belgian standardisation system as laid down in Book VIII, CEL (Articles 20-26, Bill). If Belgian rules cause specific standards to become compulsory, these standards should be accessible and made available in Dutch and French. Accordingly, the Bill requires the Standardisation Office (*Bureau van Normalisatie / Bureau de normalisation*) to grant access to Belgian compulsory standards for free. If compulsory standards are not available in the Belgian official languages because they are of European or international origin, the Bill authorises the Standardisation Office to charge the costs of third-party translations to the authority which made the standard compulsory. Additionally, the publication of compulsory standards by the Standardisation Office will replace the ratification or registration of those standards and their publication in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*).

Fourth, the Bill abolishes a database collecting information on accidents involving products or services, as the system is not functioning well and significant investments would be needed to improve its performance (Article 27 j° 76, 1°, Bill).

Fifth, in the context of investigations carried out to detect and determine breaches of the CEL, the Bill empowers the Economic Inspection services (*Economische Inspectie / Inspection économique*) to request data collected by operators and providers of telecommunications services pursuant to the relevant provisions of the Law of 13 June 2005 on electronic communications (*Wet van 13 juni 2005 betreffende de elektronische communicatie / Loi du 13 juin 2005 relative aux communications électroniques*) (Article 28, Bill). The Economic Inspection services could request identification documentation and data in order to identify natural and legal persons by means of their telephone number or IP address. Such identification documentation and data may only be required by the Economic Inspection services if this is necessary and proportionate. Traffic data, location data and IP-addresses are apparently considered more sensitive and may only be obtained for level 5 or level 6 breaches of the CEL which are considered to be the most serious breaches and are subject to prior authorisation by the investigating judge (*onderzoeksrechter / juge d'instruction*) of the Dutch or French-language Brussels Court of First Instance.

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Sixth, the Bill introduces sanctions for infringements of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services (the ***P2B Regulation***), which regulates the relationship between online platforms and business users (Articles 36 and 37, Bill). The P2B Regulation requires online intermediation services to have clear and transparent terms and conditions, to communicate to business users the main parameters of ranking and the reasons underlying the relative importance of these parameters and to maintain an internal complaint-handling system. The Bill also establishes sanctions for infringements of Article 7 of Regulation (EU) 2018/644 on cross-border parcel delivery services, which provides that traders who conclude sales contracts that involve cross-border delivery services to consumers must provide information on the delivery options, the fees payable by the consumers, as well as their internal complaint-handling policies.

Seventh, the Bill modifies the Law of 4 July 1962 on public statistics (*Wet van 4 juli 1962 betreffende de openbare statistiek / Loi du 4 juillet 1962 relative à la statistique publique*) so as to make its content compliant and its terminology consistent with the EU General Data Protection Regulation (Articles 38-52, Bill).

Eighth, the Bill specifies that the use of electronic reports (e-PVs) by the Economic Inspection services is a possibility rather than an obligation, in light of the technical issues which the e-PV system is facing (Article 75, Bill).

Ninth and lastly, the Bill also contains new competition rules which are discussed in the competition section of this issue.

The Bill is available here.

COMPETITION LAW

Belgian Competition Authority Starts Investigation of Practices in Connection with Roll-out of Fiber Optic Networks in Flanders

On 17 June 2022, the College of Competition Prosecutors (*Auditoraat / Auditorat*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) announced the start of an investigation into possible anti-competitive practices in the roll-out of fiber optic networks in Flanders.

In its press release, the BCA explained that its decision to open an investigation is based on serious indications of possible competition law infringements in the sector and is in line with its 2022 enforcement policy note, in which the telecommunications sector features as a priority (*See*, this Newsletter, Volume 2022, No. 5).

The BCA pointed out that the deployment of fiber optic networks forms a key part of the European digital strategy, because they offer very high capacity and reliability in comparison with traditional networks. While the roll-out of fiber networks is not as advanced in Belgium as in some other EU countries, the BCA noted that guaranteeing a level playing field and undistorted competition in the sector is key to ensuring that the development of these networks benefits the economy and society.

The BCA did not disclose the names of the entities targeted by the investigation, but its press release suggested that specific municipalities could be concerned because of their crucial role in the authorisation and coordination procedures.

The press release of the BCA is available here.

New Bill Seeks to Empower Belgian Competition Authority to Obtain Data from Telecommunications Operators

On 17 June 2022, the government submitted to the federal Chamber of Representatives Bill 55K2742 "containing various provisions in economic matters" (*Wetsontwerp houdende diverse bepalingen inzake Economie / Projet de loi portant dispositions diverses en matière d'Économie* – the ***Bill***).

The Bill amends a variety of provisions in the Code of Economic Law and in other economic laws and also modifies the powers of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) and the competition rules.

First, the Bill creates a set of rules that confers powers on the BCA to obtain data from telecommunications operators and service providers which is kept pursuant to Articles 122, 123, 126 and 127 of the Law of 13 June 2005 on electronic communications (*Wet van 13 juni 2005 betreffende de elektronische communicatie / Loi du 13 juin 2005 relative aux communications électroniques*). The BCA will be designated as an administrative authority in charge of preserving a significant Belgian or EU economic interest under the Law of 13 June 2005 on electronic communications, as safeguarding competition is considered to be in the general economic interest. The BCA will be able to request traffic data, location data, identification documents and data, and IP addresses. All of this will require a reasoned request from the competition prosecutor (*auditeur / auditeur*) and prior authorisation by the investigating judge (*onderzoeksrechter / juge d'instruction*) from the Dutch-language or French-language Court of First Instance in Brussels.

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Additionally, the Bill seeks to replace the obligation for the BCA to publish excerpts of notifications of concentrations (such as mergers) in the Belgian Official Journal by an obligation to publish them on the BCA's website. This is because the publication in the Belgian Official Journal is frequently delayed, which prevents stakeholders from submitting observations in time and causes bottlenecks for the BCA when reviewing concentrations. This is particularly problematic in the context of a simplified procedure, which is characterised by short deadlines.

The Bill is available here.

New Bill Confers Pension Rights on Top Officials of Belgian Competition Authority

Bill 55K2769 of 22 June 2022 seeks to amend Book IV of the Code of Economic Law concerning the pension of the representatives of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) (*Wetsontwerp tot wijziging van boek IV van het Wetboek van Economisch Recht met betrekking tot het pensioen van de mandaathouders bij de Belgische Mededingingsautoriteit / Projet de loi modifiant le livre IV du Code de droit économique en ce qui concerne la pension des mandataires de l'Autorité belge de la Concurrence* – the ***Bill***)

The purpose of this Bill is to allow senior BCA officials to benefit from a pension provided by the Treasury for their services, which the current rules do not allow. The beneficiaries of the proposed regime are the President (*Voorzitter / Président*), the Chief Prosecutor in Competition Matters (*Auditeur-Generaal / Auditeur général*), the Chief Economist (*Directeur economische zaken / Directeur des affaires économiques*) and the General Counsel (*Directeur juridische zaken / Directeur des affaires juridiques*).

The Bill is available here.

Belgian Competition Authority to Review Acquisition by Intermarché of Retail Activities of Mestdagh Group

On 23 June 2022, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) announced the decision of the European Commission (the ***Commission***) to refer to the BCA the merger control review of the proposed acquisition of the retail activities of Mestdagh Group by ITM Alimentaire (*Intermarché*).

The referral decision is based on Article 4(4) of the EU Merger Regulation (Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings), which allows the notifying party to ask the Commission to refer the case to a national competition authority, even though the concentration meets the EU notification thresholds. The Commission accepted the request and considered the BCA to be best placed to carry out the analysis, because the transaction only concerns the Belgian territory and arises in a sector which the BCA knows well.

Intermarché must now formally notify the transaction to the BCA and cannot implement the concentration before receiving an authorisation from the BCA.

Belgium Moves Closer to Introducing Foreign Direct Investment Screening Mechanism

See, corporate law section.

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Belgium Moves Closer to Introducing Foreign Direct Investment Screening Mechanism

On 1 June 2022, the different Belgian governments approved an intergovernmental cooperation agreement regarding the introduction of a foreign direct investment screening mechanism in Belgium (***FDI Screening Mechanism***) (*Samenwerkingsakkoord tot het invoeren van een mechanisme voor de screening van buitenlandse directe investeringen / Accord de coopération visant à instaurer un méchanisme de filtrage des investissements directs étrangers*). The federal and Flemish Governments approved the draft bill in relation to the FDI Screening Mechanism (the ***Draft Bill***) on respectively 10 and 24 June 2022. While the Draft Bill is not yet final and will have to be approved by all regional governments and their parliaments, the objective of the various stakeholders is to have the FDI Screening Mechanism in place by the end of 2022.

The Draft Bill provides for an FDI Screening Mechanism requiring foreign investors (i.e., non-EU investors or EU investors with a non-EU ultimate beneficial owner) to notify their acquisition to a new Interfederal Screening Committee (*Interfederale Screeningscommissie / Comité de Filtrage Interfédéral* - ***ISC***). The notification requirement applies to direct investments that may affect Belgium's national security or public order or the strategic interests of the Belgian regions and communities. The notification of qualifying transactions must take place prior to completion and will have suspensory effect. In addition, the ISC may launch a verification procedure of its own motion within two years following completion (prolonged to five years in case of bad faith).

The following foreign direct investments fall within the scope of the Draft Bill:

1. in case a foreign investor, directly or indirectly, acquires 25% or more of the voting rights in a Belgian entity with activities that concern critical infrastructure (including, energy, transport, water, health, communications, media, finance and defence); technologies and raw materials that are of essential importance for public safety or that are of strategic importance (such as artificial intelligence or nuclear technologies); the supply of critical inputs (such as energy or raw materials, as well as food); access to sensitive information (including personal data or the ability to control such information); the private security sector; the freedom and pluralism of the media; and technologies of strategic interest in the biotechnology sector (provided the turnover of the target exceeded EUR 25 million in the previous financial year).

2. in case a foreign investor, directly or indirectly, acquires 10% or more of the voting rights in a Belgian entity with activities that concern defence (including dual-use products), energy, cyber security, electronic communications, and digital infrastructure; provided the turnover of the target exceeded EUR 100 million in the previous financial year.

The Draft Bill lays down a notification and screening procedure with strict deadlines, which also leaves room for the different governments to have their say.

Additional Extension of Temporary Measures for Companies in Difficulties

The measures for companies in difficulties that were introduced on 29 June 2021 by the Law of 21 March 2021 modifying Book XX of the Code of Economic Law (*Wet tot wijziging van Boek XX van het Wetboek van Economisch Recht en het Wetboek van de Inkomstenbelastingen 1992 / Loi modifiant le livre XX du Code de droit économique et le Code des impôts sur les revenus 1992*) and extended until 16 July 2022, are likely to be extended a second time until 31 December 2022. These measures include (i) a pre-packaged insolvency procedure and (ii) a more accessible judicial reorganisation procedure (*See*, this Newsletter, Volume 2021, No. 3 and Volume 2021, No. 6).

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Separately, 17 July 2022 was the deadline for transposing Directive 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt (the ***Directive***). That deadline was not met and the transposition of the Directive will probably be delayed until the end of the year.

DATA PROTECTION

Belgian Data Protection Authority Fines Media Companies for Unlawful Use of Cookies

In 2019, the Belgian Data Protection Authority (the ***DPA***) launched an investigation into the management of cookies on popular Belgian media websites. The DPA has now handed down its first decisions resulting from this sector investigation.

In a decision of 25 May 2022, the DPA imposed a fine of EUR 50,000 on Roularta Media Group for the management of cookies on the websites levif.be and knack.be. Cookies are mini files used to collect and/or store information about user behaviour on the website or on user devices. The media company is responsible for its websites that place or read cookies and it must obtain the user's prior consent to do so, unless the cookies are strictly necessary.

The fine mainly related to the method of collecting user consent for the placement of cookies on user devices because this did not meet all the conditions set out in Articles 4 (11), 6.1(a) and 7 of the GDPR. The DPA found that some cookies had been placed on the user device before the user had given consent. In addition, the DPA noted that the websites failed to offer adequate information regarding the cookies used. Moreover, there was no possibility for offering unambiguous consent because the boxes requesting user consent for installing cookies of third parties on the user device had already been checked in advance. This approach falls short of the requirement that consent must be the result of a positive action. Lastly, the DPA noted that user consent could not be withdrawn as easily as it had been given.

In a second decision of 16 June 2022, the DPA imposed a fine of EUR 50,000 on Groupe Rossel relating to the use of cookies on the websites www.lesoir.be, www.sudinfo.be and www.sudpressedigital.be because of similar breaches of the GDPR.

More fines are expected to follow for various other media companies.

The Roularta Media Group decision can be found here (in Dutch) and the Groupe Rossel decision can be found here (in French).

European Data Protection Board Adopts Guidelines on Certification as Tool for International Transfers

On 16 June 2022, the European Data Protection Board (the ***EDPB***) announced that it had adopted guidelines on the practical use of certification as a tool for data transfers (the ***Guidelines***). The Guidelines are intended to clarify the operation of the certification system for personal data transfers to third countries and promote the use of this mechanism.

International transfers of personal data outside the EU/EEA are prohibited by the General Data Protection Regulation (***GDPR***, Articles 44-50), unless the transfers fall under the scope of specific exceptions, when "*appropriate safeguards*" are provided for in the third country. In some cases, the European Commission may issue an adequacy decision, if it determines that the level of data protection in a given third country or specific sector is essentially equivalent to the data protection prevailing in the EU. Transfers to such countries or sectors can take place without further authorisation. Alternatively, for countries that do not form the subject of such an "*adequacy finding*", the "*appropriate safeguards*" must be found to exist on a case-by-case basis. These safeguards "*may be provided for*" by a number of different methods, including a certification system.

Article 46(2)(f) of the GDPR stipulates that an "*approved certification mechanism*" permits the systematic transfer of personal data from the EU to third countries. This mechanism must ensure the presence of "*binding and enforceable commitments of the* [data] *controller or processor in the third country to apply the appropriate safeguards*". A certification is a formally recognised confirmation (which means directly

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or indirectly approved by supervisory authorities) that the appropriate safeguards are present and that, as a result, the rights of data subjects will be respected in the third country. If granted, no further authorisation is required to transfer personal data to third countries.

These are not the first Guidelines which the EDPB issued on certification. The EDPB had already adopted a more general set of Guidelines (1/2018) on GDPR certification in January 2019,. The new Guidelines are to be read in tandem with this pre-existing guidance. However, as the EDPB recently confirmed, a certification system pursuant to Article 46(2)(f) must be *specifically* designed to protect data rights in an *international* transfer context.

The Guidelines consist of four sections. First, they provide guidance and clarification on the purpose and scope of Article 46(2)(f) of the GDPR. Second, they outline the accreditation and resource requirements for certification bodies, which are obliged to assess the suitability of applicants for certification. These can be the relevant national data protection authorities (***DPAs***) or an independent body. Third, the Guidelines establish criteria for the assessment of "*appropriate safeguards*" for international transfers. Fourth and finally, they explain the nature and degree of the "*binding and enforceable commitments*" which third country data processors and/or controllers should be subject to.

Ventsislav Karadjov, Deputy Chair of the EDPB, described the Guidelines as a "*ground-breaking*" development. He explained that the Guidelines aspired to "*provide guidance on how* [the certification] *tool can be used in practice and how it can help maintain a high level of data protection when transferring personal data from the European Economic Area to third countries*".

The Guidelines remain subject to public consultation until the end of September 2022.

Data Governance Act Published in Official Journal of European Union

On 3 June 2022, Regulation (EU) 2022/868 of 30 May 2022 on European Data Governance and amending Regulation (EU) 2018/1724 (the ***Data Governance Act*** or ***DGA***), was published in the Official Journal of the European Union. The DGA's emphasis is on the establishment of rigorous processes for the safe and trusted use of data to encourage data exchanges and increase European competitiveness. It can apply in tandem with the General Data Protection Regulation (***GDPR***).

Initially proposed in late 2020, the DGA has several key provisions and effects:

- **Public Sector Data & Private Companies**. The DGA introduces a system for sharing public sector data, such as official documents of Member States, with private companies. The safe re-use of personal data, trade secrets and data subject to intellectual property rights is regarded as potentially beneficial to society. However, the DGA does not create an obligation for such sharing and a high degree of discretion is left to the Member States.

- **Data Intermediation Services**. This enables the provision of a broad array of commercial data brokering services by the establishment and maintenance of trusted spaces for the exchange of data. This could include digital platforms or data wallet apps, where information could be shared without risk of it being abused. The providers of such services will be subject to strict conditions, notification obligations and monitoring.

- **Data Altruism**. This enables persons to 'donate' their data for the common good (e.g., medical research) to registered organisations.

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- **European Data Innovation Board**. This is a new expert group established by the DGA, consisting of Member State representatives, the European Commission, specific sectoral authorities, and others. It will advise and assist the European Commission in operating the DGA's regimes.

- **Data Transfer Rules**. Like the GDPR's provisions governing personal data, the DGA restricts the conditions under which non-personal data can be transferred outside of the European Economic Area.

The DGA entered into force on 23 June 2022 and will become applicable on 24 September 2023.

INTELLECTUAL PROPERTY

Federal Government Submits Bill On Intellectual Property to Parliament

On 3 June 2022, the federal government submitted to the federal Chamber of Representatives bill 55K2727 introducing various provisions on intellectual property in Book XI of the Belgian Code of Economic law (the ***Bill***) (*Wetsontwerp houdende de invoeging in boek XI van het Wetboek van Economisch Recht van diverse bepalingen betreffende intellectuele eigendom/ Projet de loi portant insertion dans le livre XI du Code de droit économique de diverses dispositions en matière de propriété intellectuelle*). The Bill intends to modernise several aspects of intellectual property, making the Belgian intellectual property system more intelligible, easily accessible and user friendly. In addition, the Bill seeks to support innovative SMEs in recovering from the COVID-19 crisis.

First, the Bill aims to create flexibility regarding the use of languages. Applicants for a Belgian patent will be able to submit specific application documents in English, such as the description of the invention, the drawings and the excerpt. Moreover, the Bill clarifies the choice of language when corresponding with the Intellectual Property Office (*Dienst voor de Intellectuele Eigendom / l'Office de la Propriété Intellectuelle*) if there are several applicants for the same patent.

Second, the Bill will implement, for the Intellectual Property Office, the "Digital Access Service" of the World Intellectual Property Office. This service will allow companies that have applied for a Belgian patent to use the documents submitted in the Belgian proceedings for obtaining patent protection in third countries. By facilitating the road to patent protection, this measure should stimulate and support the development of innovative SMEs.

Third, the Bill gives the government the power to increase the amount of the research tax for patent applicants which abuse the subsidy system. The government will also be allowed to grant extensions of the deadlines in patent grant proceedings in a public safety crisis. The current COVID-19 crisis has shown that such a crisis can prevent patent applicants from complying with applicable deadlines. The possibility to extend deadlines follows the example set by many European Member States and the European Patent Office.

Lastly, the Bill modifies Book XI of the Code of Economic law to comply with the General Data Protection Regulation (***GDPR***) by specifying the purpose and detailed rules of the processing of personal data in intellectual property proceedings.

Advocate General of Court of Justice of European Union Issues Opinion in Amazon/Louboutin Case on Primary Liability of Online Marketplaces for Trade Mark Infringement

On 2 June 2022, Advocate General Maciej Szpunar (***AG***) of the Court of Justice of the European Union (***CJEU***) issued his opinion (the ***Opinion***) in the *Louboutin/Amazon* case (Joined Cases C-148/21 and C-184/21).

The questions which the French-language commercial court of Brussels and the Luxembourg court referred to the CJEU are the following:

- On advertising, the CJEU was asked:

    1. whether a website operator is liable for trade mark infringement if, in the perception of a reasonably well informed and reasonably observant internet user, the website operator played an active role in preparing an advertisement for a counterfeit product; and

    2. whether the website operator is liable for advertising counterfeit products if it copies such advertisements in its own commercial communications (or that of a linked entity). This

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question also seeks to know whether specific practices, such as the use of pop-ups, uniform marketing messages or qualifications as "best seller" and "most popular" products, strengthen the possible finding of an infringement.

- In addition, the CJEU was asked whether shipping counterfeit products constitutes use of a trade mark for which the shipper (i.e., Amazon in the case at hand) may be liable if:

1. the shipper does not have actual knowledge that the goods are counterfeit, or

2. if the shipper (or a linked entity) informed the final consumer that it will carry out the shipment, or

3. if the shipper (or a linked entity) actively displayed an advertisement for the counterfeit goods or took the consumer's order on the basis of such an advertisement.

In his Opinion, the AG noted that the questions referred to the CJEU concern the interpretation of the notion of "use" within the meaning of Article 9(2) EUTMR and summarised the questions as follows:

1. Is the operator of an online marketplace which also provides logistics assistance to third-party sellers through a fulfilment programme (such as, for example, Amazon) 'using' – within the meaning of Article 9(2) of the EU Trade Mark Regulation (EUTMR) – third-party trade marks itself when it displays, on its marketplace, advertisements of independent third-party sellers' products that infringe such trade mark rights, which it also delivers to end customers? In other words, the question is whether such online marketplace is itself 'using' the trade marks in advertisements which are published by third-party sellers on the marketplace and can therefore be held directly liable for infringements of trade marks displayed in the advertisements.

2. Is the perception of a reasonably well informed and reasonably observant internet user relevant when undertaking such an assessment?

The AG advised the CJEU to rule that the operator of an online marketplace cannot be considered to 'use' itself the trade marks under the conditions set out above (i.e., when displaying on its marketplace advertisements of independent third-party sellers' products that infringe trade mark rights) for the following reasons:

- The notion of 'use' requires a form of active behaviour and a direct or indirect control over the act constituting use. The rationale for this is that the 'user' must be able to stop such use (because nobody can be legally obliged to do the impossible).

- With respect to intermediaries on the internet, there is a 'use' within the meaning of Article 9(2) EUTMR if the intermediary relies on the sign for its own commercial communications (the AG referred in this context to the Google France, eBay and Coty cases of the CJEU).

- The notion 'commercial communications' encompasses all forms of communications aimed at promoting its own activity, products or services and therefore serves an external purpose as it is targeting third parties. Accordingly, this assessment should be carried out from the perspective of the user of the marketplace. In addition, the AG confirmed that the benchmark should be the "reasonably well informed and reasonably observant internet user".

Finally, the AG also considered whether the fact that Amazon also provides storage and shipping services constitutes a form of 'use' within the meaning of Article 9(2) EUTMR. Referring to the Coty judgment of the CJEU, the AG pointed out that in order for the

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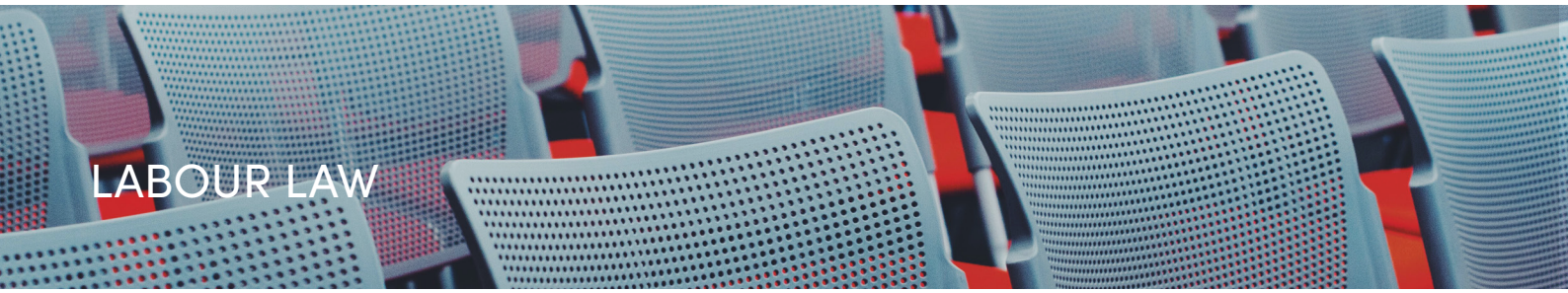
storage of goods bearing signs identical or similar to trade marks to be classified as 'using' those signs, it is also necessary for the economic operator providing the storage to pursue offering the goods or putting them on the market. By contrast, shipping goods on behalf of a third party does not constitute a use of the sign.

According to the AG, it follows that the owner of a trade mark right will have to bring an action for trade mark infringement against the third-party seller, rather than the operator of the marketplace.



LABOUR LAW

Council of Ministers Approves New Measures Governing Employee's Incapacity to Work and Reinstatement

On 10 June 2022, the federal Council of Ministers approved several proposed measures regarding an employee's incapacity for work and his or her reinstatement. The proposals form part of the implementation of the 2022-2024 multi-year budget. The proposals still have to be reviewed by the Council of State and it is unclear when they will be adopted.

First Measure: New procedure to Terminate Employment Agreement Because of Medical Force Majeure and Reliance on Workplace Reinstatement Plan

The workplace reinstatement plan is often used as a tool to end the employment agreement in the event of force majeure on medical grounds, rather than as a means to reinstate the employee in the workforce. The proposed measure therefore splits and simplifies these two processes.

The workplace reinstatement plan will be generalised and it will become possible to start it earlier. Additionally, employees can already invoke the force majeure on medical grounds if the employee is unfit to work after 9 months of incapacity.

Second Measure: Exemption from Duty to Supply Medical Certificate for First Day of Incapacity to Work

To relieve the administrative burden on medical practitioners and to reduce costs, the proposed measure will lift the obligation for employees to present a medical certificate for the first day of incapacity for work. By contrast, a medical certificate may be due as of the second day.

This exemption will have a limited scope. First, it cannot be invoked for more than 3 days per year. Second, it does not apply to firms with less than 50 employees.

Third Measure: Amendment to Rules on Neutralisation of Guaranteed Wages in Case of Resumption of Part-Time Work

This measure aims to promote the return to part-time work with the approval of the medical advisor of the health insurance fund. First, the employee will have the possibility to work during less than 3 hours a day. Second, the guaranteed salary will be neutralised if the employee becomes unfit for work for a second time after a period of partial recovery. An employee who only partially resumes work after a period of total incapacity but is compelled to stop working for a second time will no longer receive a guaranteed salary from the employer and will instead receive an indemnity from the health insurance company. The guaranteed salary is "neutralized" since it is no longer paid by the employer but directly by the health insurance company.

LITIGATION

New Rules on Default Judgments Enter into Force on 10 July 2022

On 9 June 2022, the federal Parliament adopted new rules amending the second paragraph of Article 805 of the Judicial Code on default of appearance in courts (*See*, this Newsletter, Volume 2022, No. 5).

The new rules were published in the Belgian Official Journal on 30 June 2022 and entered into force on 10 July 2022. As a result, parties are now able to retract the default not only at the first hearing, during which the default was established, but also at a subsequent hearing, provided that the default is retracted before the matter is taken under consideration (*voordat de zaak in beraad wordt genomen / avant que la cause ne soit prise en délibéré*) and provided the defaulting party appears at this subsequent hearing (in person or through a lawyer).

Court of Justice of European Union Rules on Possibility to Rely on Judgment Entered in Terms of Arbitral Award as Basis for Refusing to Enforce Later Irreconcilable Judgment

On 20 June 2022, in a judgment delivered in Grand Chamber (Case C-700/20, *London Steam-Ship Owners' Mutual Insurance Association*), the Court of Justice of the European Union (***CJEU***) held that despite the general exclusion of arbitration from the scope of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels I Regulation***, now replaced by Regulation (EU) No 1215/2012, known as the Brussels Ibis Regulation), a judgment entered in the terms of an arbitral award delivered in the court of a Member State can be the basis for a refusal to recognise a later irreconcilable judgment.

The CJEU nevertheless specified that the possibility to rely on a judgment entered in the terms of an arbitral award to challenge the enforcement of a later irreconcilable judgment only applies if the underlying arbitral award which served as the basis for the first judgment was delivered in compliance with the fundamental objectives of the Brussels I Regulation.

Background

The case at hand relates to the sinking, in 2002, of the oil tanker *Prestige* off the coast of Spain.

Following this sinking and the significant environmental damage to Spanish coasts, Spain brought in 2011 a direct liability action before a Spanish court against the London Steam-Ship Owners' Mutual Association Limited (the *Prestige*'s insurer) based in London (the ***Insurer***).

Whilst this case was pending, the Insurer initiated arbitral proceedings in London seeking a declaration that, pursuant to the arbitration clause in the insurance contract concluded between the Insurer and the owner of the *Prestige*, Spain was required to pursue its claim in those arbitration proceedings. In an award dated 13 February 2013 (the ***Award***), the arbitral tribunal followed the Insurer's view and concluded that the claim brought by Spain should be referred to arbitration. The Insurer subsequently sought to enforce the Award and applied to the UK courts for a judgment to be entered in the terms of that Award. The UK courts handed down such a judgment in the terms of the Award in October 2013 (the ***2013 Judgment***).

Between 2016 and 2019, the Spanish courts handed down several judgments regarding the direct liability action brought by Spain against the Insurer. In a final order of 1 March 2019, the Provincial Court of Coruna held that the Insurer had to pay EUR 855 million to the Spanish State (the ***2019 Order***). Spain then sought to enforce the 2019 Order against the Insurer in London.

Faced with the apparent contradiction between the 2013 Judgment and the 2019 Order, a UK court decided, shortly before the UK's withdrawal from the EU, to stay the proceedings and seek guidance from the CJEU on whether it should refuse the enforcement of the 2019 Order on the ground that

the 2019 Order had been issued after the 2013 Judgment (and thus, might violate Article 34(3) of the Brussels I Regulation on the principle of *res judicata*).

CJEU Judgment

In its judgment, the CJEU noted that arbitration proceedings are excluded from the scope of the Brussels I Regulation. Consequently, proceedings for the recognition and enforcement of arbitral awards are, in the European Union, exclusively covered by either national law or international law (such as the 1958 New York Convention on the recognition and enforcement of arbitral awards). The CJEU also pointed out that a judgment entered in the terms of an arbitral award is caught by the arbitration exclusion of the Brussels I Regulation and therefore cannot enjoy mutual recognition between EU Member States.

Nevertheless, the CJEU held that a judgment entered in the terms of an arbitral award was still capable of being regarded as a "judgment" within the meaning of Article 34(3) of the Brussels I Regulation which provides that "*a judgment shall not be recognised:* [...] *(3) if it is irreconcilable with a* ***judgment*** *given in a dispute between the same parties in the Member State in which recognition is sought.*"

However, the CJEU also considered that the possibility to rely on a judgment entered in the terms of an arbitral award to challenge the enforcement of a later irreconcilable judgment only applies if the underlying arbitral award which served as the basis for the first judgment was delivered in compliance with the fundamental objectives of the Brussels I Regulation.

In the case at hand, the CJEU found that the Award violated two fundamental tenets of the Brussels I Regulation.

First, the CJEU noted that the 2013 Judgment imposed arbitration on Spain despite the fact that Spain was not a party to the arbitration agreement in the insurance contract concluded between the Insurer and the owner of the *Prestige*. According to the CJEU, such an extension of the arbitration clause in the insurance contract would jeopardise the protection of injured parties vis-à-vis an insurer.

Second, the CJEU observed that the 2013 Judgment violated the *lis pendens* rule provided for in Article 27(1) of the Brussels I Regulation. The CJEU noted that the civil actions brought before the Spanish courts had been notified to the Insurer in June 2011 whilst the arbitration proceedings that ultimately led to the adoption of the 2013 Judgment were only initiated in January 2012.

In such circumstances, the CJEU held that, within the meaning of the Brussels I Regulation, a judgment entered by a court of a Member State in the terms of an arbitral award cannot prevent, in that Member State, the recognition of a judgment given in another Member State if a judgment resulting in an outcome equivalent to the outcome of that award could not have been adopted by a court of the first Member State without infringing the provisions and the fundamental objectives of that Regulation, in particular as regards the relative effect of an arbitration clause included in the insurance contract in question and the rules governing *lis pendens*.

This CJEU judgment is likely to have a great impact on future arbitration proceedings. In particular, despite the general exclusion of arbitration from the scope of the Brussels I Regulation (and from the Brussels I*bis* Regulation), it may result in arbitrators taking greater consideration of the fundamental objectives of the Brussels I Regulation.

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