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Topics covered in this issue

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Table of contents

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COMMERCIAL LAW

Default Commercial Interest Rate Remains Unchanged

On 18 July 2019, the default interest rate for commercial transactions applicable during the second semester of 2019 was published in the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*). It remains unchanged from that applied in the first semester of 2019 (*See, this Newsletter, Volume 2019, No. 1, p. 3*) and will amount to 8%. Pursuant to the Law of 2 August 2002 on combating late payment in commercial transactions (*Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties/Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales*), the default commercial interest rate applies to compensatory payments in commercial transactions (*handelstransacties/transactions commerciales*), *i.e.*, transactions between companies or between companies and public authorities.

By contrast, relations between private parties and companies or between private parties only are subject to the statutory interest rate. The statutory interest rate for 2019, as published in the Belgian Official Journal on 14 January 2019, amounts to 2% (*See, this Newsletter, Volume 2019, No. 1, p. 3*).

Publication of Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services

On 11 July 2019, the Official Journal of the European Union published Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (the "Regulation"). The Regulation, which was adopted by the European Parliament and EU Council of Ministers in April and June 2019 respectively, aims to address business practices that are likely to be harmful to business users relying on online platforms to sell goods and services to consumers.

For a discussion of the Regulation, we refer to the May 2018 edition of this Newsletter discussing the initial proposal of the European Commission (*See, this Newsletter, Volume 2018, No. 5, p. 3*).

The Regulation will apply from 12 July 2020.

COMPETITION LAW

Belgian Competition Authority Closes Investigation into Alleged Abuse of Dominant Position by Proximus Against Alpha 11 Group

On 15 February 2019, the Service of Competition Prosecutors (*Auditoraat/Auditorat*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence* - "BCA") opened an investigation into Proximus over an alleged abuse of a dominant position.

The BCA had received information from Alpha 11 Belgium BVBA, Schedom NV and Billi BVBA (together, the "Alpha 11 Group") which suggested that Proximus abused a dominant position by intentionally foreclosing relevant markets to the Alpha 11 Group and preventing the launch of that party's television platform 'Choice'.

The investigation covered the following alleged practices of Proximus:

- mandatory and forceful migration of the Alpha 11 Group from the regulated services of Proximus to its more expensive commercial services pursuant to a 'Letter of Agreement';
- preventing and/or hampering of the migration of the Alpha 11 Group to the regulated services of Proximus following the 'Letter of Agreement';
- preventing the use by the Alpha 11 Group of its own certified technician to reduce the cost of the migration between the services of Proximus;
- artificially maintaining a high volume of services used by the Alpha 11 Group, resulting in high invoices;
- issuing exceedingly high invoices by unilaterally increasing tariffs for the use of services;
- failing to provide services resulting in the loss of clientele by the Alpha 11 Group; and
- initiating a bankruptcy procedure and terminating its agreements with and services to the Alpha 11 Group.

On 11 July 2019, the BCA announced that the investigation had not produced sufficient evidence to establish that the conduct under review by Proximus was intended to foreclose the relevant markets to the Alpha 11 group. On the contrary, the BCA reached the conclusion that the allegations of the Alpha 11 Group resulted from either (a) prior agreements between the Alpha 11 Group and Proximus; (b) technical problems for which Proximus had no fault; or (c) own negligence on behalf of the Alpha 11 Group. The BCA also found that there was no evidence of a strategy of Proximus to foreclose the relevant markets to the Alpha 11 Group. As a result, the BCA terminated its investigation.

Belgian Consumer Protection Organisation Files Excessive Pricing Complaint Against Biogen Over Price of Spinraza®

On 24 July 2019, the Belgian consumer protection organisation (*Test Aankoop/Test Achats* – "TA") announced that it submitted a complaint to the Belgian Competition Authority ("BCA") against Biogen, the marketing authorisation holder of Spinraza®. Spinraza® is a medicine indicated to treat 5q spinal muscular atrophy ("SMA"), a genetic disease that causes weakness and wasting of the muscles, including the lung muscles. The disease is linked to a defect on chromosome 5q and symptoms usually start shortly after birth. SMA is a rare disease and Spinraza® was designated as an orphan medicine by the European Medicines Agency back in 2012.

Spinraza® has so far also been the only medicine to obtain reimbursement following joint negotiations with the Belgian and Dutch authorities under the umbrella of the Beneluxa arrangement, a form of cooperation of reimbursement authorities of Austria, Belgium, Ireland, Luxembourg and The Netherlands. TA's competition complaint seems to form part of a larger effort directed by European consumer organisation BEUC which has also given rise to a complaint before the Italian competition authority.

In its complaint, TA alleges that Biogen is charging excessive prices for Spinraza®. It maintains that research has shown an unjustifiable imbalance between the investments made by Biogen and the price charged by the firm. TA therefore urges the BCA to qualify Biogen's conduct as abusive, order Biogen's pricing practice to be stopped and impose a fine on Biogen.

This case, if pursued, would be a first in Belgium and probably around Europe. While a number of excessive pricing cases have been initiated in the pharmaceutical sector by both national competition authorities and the European Commission, no such procedure would seem to have been started against a patented product that benefits from orphan medicine status. This is probably no coincidence, because monopoly prices resulting from intellectual property rights and regulatory schemes such as those encouraging the development of orphan medicines are a reward for risky investment.

In addition and paradoxically, TA acknowledges that it does not actually know which price Biogen is charging since this forms the subject of a Managed Entry Agreement whose financial terms are confidential.

Lastly, it may prove to be difficult for the BCA to find that Biogen engaged in abusive conduct when that company had to face the powerful buyers that are the Belgian and Dutch reimbursement authorities.

CORPORATE LAW

New Directive on Use of Digital Tools and Processes in Company Law

On 11 July 2019, Directive (EU) 2019/1151 of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law was published in the Official Journal of the European Union (the "Directive").

The main objective of the Directive is to harmonise the availability of online tools enabling certain limited liability companies to be incorporated, register or set up new branches and file documents and information throughout the life of the company fully online. The physical presence of the incorporators or the company's representatives filing documents or information will, as a result, no longer be required. EU Member States may provide for exceptions in circumstances justified by reason of public interest in order to prevent identity misuse or to allow for verification of the legal capacity.

In addition, the Directive expands the obligation to make company information freely available online. EU Member States must also provide for the automatic electronic exchange of specific information, such as the closure of a branch office or changes to the company information of the main office, between the central commercial register of the place where the company is registered and that of the register where the branch is registered. This will allow companies to submit changes to their company information to the register where the company is registered only, without having to submit identical information to the register of the branch as well.

Additionally, EU Member States must provide for the possibility to refuse the appointment of a person as director of a company in case that person is disqualified from acting as a director in another EU Member State. EU Member States must also ensure that they are able to exchange without delay information regarding any potential disqualification of a person with the commercial registers of other EU Member States.

The Directive will enter into force on 31 July 2019. EU Member States have until 1 August 2021 (31 August 2023 for specific provisions) to implement the Directive into national law.

DATA PROTECTION

EDPB Guidelines on Processing of Personal Data through Video Devices

On 10 July 2019, the European Data Protection Board ("EDPB") published draft guidelines on the processing of personal data through video devices ("Guidelines"). The Guidelines are subject to public consultation and comments can be submitted until 9 September 2019.

According to the EDPB, the Guidelines clarify how General Data Protection Regulation 2016/679 ("GDPR") applies to the processing of personal data when using video devices and aim to ensure the consistent application of the GDPR. While individuals might be comfortable with video surveillance set up for a specific purpose such as security, guarantees must exist to avoid any misuse for totally different and unexpected purposes (*e.g.*, marketing purposes or employee performance monitoring). It should be kept in mind that video surveillance is not by default a necessity when there are other means to achieve the underlying purpose.

The Guidelines cover both traditional video devices and smart video devices. For the latter, the Guidelines focus on the rules regarding the processing of biometric data. The main elements to take from these Guidelines are as follows:

Scope of Application of GDPR

The Guidelines explain that the GDPR does not apply if the camera does not collect any information regarding a natural person (such as licence plates or information that could identify passers-by). Also, video devices operated inside a private person's premises can fall under the household exemption of Article 2(2)(c) GDPR and, depending on the circumstances, may therefore fall outside the scope of the GDPR.

Disclosing Video Images

The EDPB explains that a transfer of video images to a third party constitutes a form of processing of personal data. If the purpose is different to the purpose for which the data were initially collected, a new legal basis (*e.g.*, consent) may be required. By way of example, the Guidelines indicate that finding an appropriate legal basis for publishing recordings made by security cameras online for amusement purposes may be problematic. Such a purpose would be incompatible with the initial purpose (*i.e.*, video surveillance).

Lawfulness of Processing

The protection of property against burglary, theft or vandalism can constitute a legitimate interest for video surveillance if there is a real and hazardous situation. Relying on the legitimate interest provided for by Article 6.1(f) GDPR presupposes the balancing of interests on a case-by-case basis where data subjects' reasonable expectations have to be taken into account. For instance, an employee in his/her workplace is in most cases not expecting to be monitored by his or her employer. By contrast, the customer of a bank might expect that he/she is monitored inside the bank or in the vicinity of an automated teller machine. The EDPB recommends documenting this balancing exercise in order to rely on legitimate interests as a legal basis.

For processing personal data through video surveillance, the controller can also rely on the legal basis of performing a task carried out in the public interest or in the exercise of official authority vested in the controller. By contrast, the EDPB states that only in "rather exceptional cases" will consent be able to provide the legal basis permitting the processing of personal data in this context.

Processing of Special Categories of Data

First, the Guidelines explain that video surveillance does not always entail the processing of special categories of personal data. This is only the case if the video footage is processed specifically to deduce specific attributes such as ethnic origin or the health of data subjects. The EDPB warns that controllers cannot rely on Article 9.2(e) GDPR, which permits the processing of data that has been made manifestly public by the data subject, to use surveillance recordings to identify employees that take part in a strike.

The Guidelines note that Article 9 GDPR will also apply if the controller stores biometric data in order to identify a person uniquely. For instance, a controller who manages access to his building using a facial recognition method will, in most cases, have to obtain explicit and informed consent from the data subjects. The EDPB recommends that facial recognition methods for access purposes should be triggered by the data subject himself (*e.g.*, by pushing a button) in order to ensure that no one who has not previously given his/her consent is captured. In such cases, the controller should also always offer an alternative way to access the building, without biometric processing, such as the use of badges or keys.

Rights of Data Subject

The right of access and the possibility to receive a copy of the material may be limited on the basis of Article 15(4) GDPR if this adversely affects the right of others. This refers to, for instance, the fact that any number of data subjects may be recorded in the same sequence of video surveillance and a screening would cause additional processing of personal data of other data subjects. However, the controller can implement technical measures to fulfil a request for access by image-editing techniques such as masking or scrambling.

As regards the right to erasure, it is worth noticing that by blurring the picture with no retroactive ability to recover the personal data which the picture previously contained, the personal data processed through video surveillance are considered erased in accordance with the GDPR.

Transparency and Information Obligations

The most important information should be displayed on the warning sign itself (*i.e.,* first layer information) while further mandatory details may be provided by others means (*i.e.*, second layer information). By positioning the warning sign, the data subject should be able to estimate which area is captured by a camera so that he/she is able to avoid surveillance or adapt his/her behaviour if necessary. Furthermore, the EDPB promotes the use of technological means to provide second layer information. This may include, for instance, geolocating cameras and using mapping apps so that individuals can easily identify and specify the video sources related to the exercise of their rights and obtain more detailed information on the processing operation.

Storage Periods and Obligation of Erasure

According to the Guidelines, the personal data should in most cases (*e.g.*, for the purpose of detecting vandalism) be erased, ideally automatically, after a few days. The longer the storage period is set (especially when beyond 72 hours), the more argumentation for the legitimacy of the purpose and the necessity of storage needs to be provided.

Technical and Organisational Measures

To abide by the principles of data protection by design and by default, controllers should build data protection and privacy safeguards not only into the design specifications of the technology but also into organisational practices.

Data Protection Impact Assessment (DPIA)

Finally, the Guidelines point out that many video surveillance systems will require a prior DPIA.

Practical Aspects

It should be borne in mind that many countries, including Belgium, impose additional specific rules for the use of surveillance cameras that will apply in addition to the Guidelines.

The full version of the Guidelines can be consulted here.

EDPB Opinion on Competence of Supervisory Authority if Main or Single Establishment Changes

On 9 July 2019, the European Data Protection Board ("EDPB") adopted Opinion 8/2019 on the competence of a supervisory authority in case of a change in circumstances relating to the main or single establishment. The Opinion seeks to maintain a consistent interpretation among national data protection authorities ("DPA") of the boundaries of their competences and the functioning of the one-stop-shop principle under the GDPR. Pursuant to this principle, the local DPA of the place where the main or single establishment of the data controller within the EU is located will be the "lead authority". That DPA will cooperate with other DPAs in accordance with Article 60 of the GDPR.

The Opinion seeks to identify an objective criterion to establish the moment from which any change in circumstances will have effect on the competence acquired by a DPA over infringements of a continuing nature. Such a criterion should meet three objectives: (i) give both data controller and data subjects a sufficient degree of legal certainty and foreseeability; (ii) take into account considerations relating to good administration, by ensuring the efficiency and effectiveness of action taken by authorities and by avoiding any misuse of the one-stop shop mechanism as a result of forum shopping or forum hopping; and (iii) limit the risk of concurrent competences between DPAs.

The Opinion offers guidance on three specific situations:

1. Relocation of Main or Single Establishment within EEA

The relocation of the main establishment to the territory of another EEA Member State mid-procedure is considered to deprive the first DPA of its original competence at the moment the change becomes effective. The relocation does not retrospectively deprive the operations already carried out by the initial DPA of a legal basis.

2. Creation of Main or Single Establishment or Relocation from Third Country to EEA

The creation of a main or single establishment or its relocation from a third country to the EEA mid-procedure allows for the competence of the DPA to be changed if no final decision has yet been taken by the initial DPA. The competent DPA will then act as lead authority and apply the cooperation mechanism set out in Article 60 of the GDPR from that date.

3. Disappearance of Main or Single Establishment

If the main or single establishment of a controller or processor ceases to exist mid-procedure (either because the main establishment has been moved out of the EEA territory or because it has been disbanded) will deprive the controller of the benefit of the one-stop-shop. The processing will not be considered cross-border anymore, and each DPA will regain full jurisdiction over the matter.

A copy of the Opinion can be found here.

LABOUR LAW

Belgium Referred to Court of Justice of European Union for Failure to Implement EU Directive Facilitating Intra-Corporate Transfers of Highly-Skilled Employees from Third Countries

Background

On 15 May 2014 an EU Directive was adopted on the conditions of entry and residence of third country nationals within the framework of intra-corporate transfers (*Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer*).

This Directive seeks to facilitate the temporary secondment of highly-skilled third country employees, such as managers, specialists and trainee employees, of multinational companies to affiliated entities in the EU. Its deadline for implementation was 29 November 2016, which Belgium failed to meet. The European Commission started infringement proceedings against Belgium in January 2017.

Decision of European Commission

Given Belgium's failure to transpose the Directive into national law, the European Commission sent a final reasoned opinion to Belgium in October 2017 with the request to notify the European Commission within two months of all measures taken by Belgium to ensure full implementation of the Directive. Belgium failed to do so and, consequently, on 25 July 2019, the European Commission decided to refer Belgium to the Court of Justice of the European Union for failing to implement the Directive.

LITIGATION

Adoption of The Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

On 2 July 2019, The Hague Conference on Private International Law which includes the European Union, adopted the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "Convention").

The Convention's objective is to facilitate the recognition and enforcement of court judgments across jurisdictions by creating a single global framework. This should, in turn, enhance legal certainty and predictability, help to reduce transactional and litigation costs in cross-border civil and commercial matters and, ultimately, make multilateral trade and investment easier.

The complexity associated with the recognition and enforcement of foreign judgments has always been a significant obstacle to cross-border litigation. It is a factor prompting businesses to opt for arbitration. In order to tackle this issue, the Convention is expected to simplify the foreign judgment enforcement process and to allow for a more effective access to justice.

The scope of the Convention includes judgments in civil and commercial matters (Article 1).

Article 2 provides for a series of exceptions to the scope of the Convention. For instance, the Convention does not apply (i) the status and legal capacity of natural persons; (ii) family law matters; (iii) the carriage of passengers and goods; (iv) the validity, nullity or dissolution of legal persons or associations of natural or legal persons and the validity of decisions of their organs; (v) privacy; (vi) intellectual property; and (vii) antitrust and competition law matters (with the notable exceptions of judgments based on anti-competitive agreements between companies). However, these exclusions do not apply if such issues arise merely as a preliminary question in the proceedings and not as the principal subject-matter of the dispute at hand.

As a general rule, Article 4 provides that "[a] *judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State)* […]. *There shall be no review of the merits of the judgment in the requested State*".

Article 7 then contains a list of specific grounds on which recognition or enforcement may be refused. This list includes cases (i) where the judgment has been obtained by fraud; (ii) where improper notice was given to the defendant(s); (iii) where the enforcement or recognition of the judgment would be manifestly incompatible with the public policy of the requested State; and (iv) where the judgment would be inconsistent with a judgment given by a court of the requested State.

The Convention is open for signature by all States (at the time of writing, Uruguay had already signed the Convention). The Convention will then need to be ratified by the signatory States and will enter into force one year after the second ratification by a contracting State.

The Convention follows the adoption, in 2005, of the Hague Convention on Choice of Court Agreements which sought to require courts of contracting States to respect the exclusive forum clauses agreed upon by parties in their commercial contracts.

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