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July 2020

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Topics covered in this issue

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COMPETITION LAW

Belgian Competition Authority Rejects Requests for Interim Measures in Professional Football Sector

On 29 June 2020, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) refused to grant the interim measures requested by the Belgian football club Royal Excelsior Virton (***Virton***) against the Royal Belgian Football Association (the ***RBFA***) (*See, this Newsletter, Volume 2020, No. 6, p. 6*). More information on this case has emerged since the publication of our June issue.

On 8 April 2020, the RBFA refused to issue a new operating licence to Virton and this decision was confirmed by the Belgian Arbitral Court for Sport (*Belgisch Arbitragehof voor de Sport / Cour belge d'Arbitrage pour le Sport* - the ***BACS***) on 12 May 2020. The BACS also found on 10 May 2020 that RBFA's rules complied with the competition rules. As a result, Virton was relegated to a lower tier in the competition.

Virton filed a complaint with the BCA, arguing that this decision amounted to a decision of an association of undertakings that restricted competition. Although Virton's complaint was based on both the prohibition of anticompetitive agreements and concerted practices (Article IV.1 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* - ***CEL***) and Article 101 of the Treaty on the Functioning of the European Union (***TFEU***)) and the prohibition of abuses of a dominant position (Article IV.2 CEL and Article 102 TFEU), the Competition College did not distinguish between these provisions and did not consider the issue of dominance.

The Competition College first made clear that it is not bound by the BACS's views that the RBFA's rules did not breach the competition rules as the BACS is neither a Belgian court nor an EU institution. As a result, the Competition College did not find it necessary to review the BACS's assessment of RBFA's rules but only its decision of 12 May 2020 to uphold the RBFA's refusal to grant a licence to Virton, as this led to Virton's relegation to a lower tier.

This latter decision was based on two grounds: (i) Virton's breach of Article P407 of the federal Regulation setting out the conditions to obtain a licence, as Virton did not prove that it was not defaulting on its social security contributions and on a debt vis-à-vis Lokeren football club; and (ii) Virton's failure to comply with the continuity principle as Virton did not produce a comfort letter, sponsoring contract or any other element that would cover Virton's negative net working capital in accordance with the RBFA's rules.

Firstly, the Competition College found that subjecting the participation in the championship to the condition of obtaining a licence and requiring that the clubs concerned comply with the continuity principle may restrict competition. However, these conditions seem prima facie to be of such a nature as to allow for the orderly conduct of the competition, which constitutes a legitimate objective.

Secondly, the Competition College examined whether the application of the continuity principle in this case is proportionate to the legitimate objective pursued. In this regard, the BCA found that "it cannot be *prima facie* ruled out" that some of the criteria applied by the RBFA may be disproportionate, such as the rule that sponsoring contracts concluded with linked entities or linked persons can only be taken into consideration to determine that a club complies with the continuity principle if the club received the net amount anticipatively. However, the Competition College considered that Virton did not establish that it would have satisfied the conditions to obtain a licence absent these problematic criteria. The Competition College pointed out that, while Virton had obtained a comfort letter from a private person to guarantee its negative net working capital, the amount guaranteed exceeded the maximum authorised by the RBFA for comfort letters issued by individuals and Virton refused to provide any additional element (such as a bank guarantee) as required under RBFA rules. As a result, Virton did not establish that RBFA could not have refused the licence if it had not applied the problematic criteria.

Thirdly and lastly, the Competition College found that the protection of the general economic interest did not justify imposing any interim measures. The Competition College observed that the current rules, which include criteria that "can *prima facie* be incompatible with competition law", only apply for the 2020-2021 season. It is incumbent upon the RBFA to ensure that the criteria used for the next season and their implementation are compatible with competition law. Even if the investigation on the merits were to lead to a finding that some of the criteria used by RBFA infringe competition law, this final decision would have effects for all future applicants for a licence, not just Virton.

The Competition College therefore rejected Virton's request for interim measures.

Belgian Competition Authority Offers Guidance on Mergers of Local Hospital Networks

On 22 July 2020, the Belgian Competition Authority (***BCA***) published a note (the ***Note***) which discusses the application of the Belgian merger control rules to the creation of local hospital networks (*locoregionale ziekenhuisnetwerken / réseaux hospitaliers locorégionaux*).

The Note was prompted by various requests from the sector where hospitals may now be required by the Law of 28 February 2019 "modifying the consolidated law of 10 July 2018 regarding hospitals and other institutions of care, as regards the clinical networking between hospitals" to establish a local network of hospitals (*Wet van 28 februari 2019 tot wijziging van de gecoördineerde wet van 10 juli 2008 op de ziekenhuizen en andere verzorgingsinrichtingen, wat de klinische ziekenhuisnetwerking tussen ziekenhuizen betreft / Loi du 28 février 2019 modifiant la loi coordonnée du 10 juillet 2008 sur les hôpitaux et autres établissements de soins, en ce qui concerne le réseautage clinique entre hôpitaux* - the ***Law***). It explains that the creation of such a network may give rise to a concentration that is notifiable under the Belgian merger control rules (the Note does not mention the possible application of the European merger control rules). This will depend on whether there is a change of control on a lasting basis over at least some of the hospitals involved in the transaction and whether the financial turnover-related thresholds are reached. This double assessment will be made on a case-by-case basis.

The Note offers extensive guidance on the concept of change of control against the specific background of the Law and will be welcomed by stakeholders. This is because, as the Note points out, the Law and the merger control rules pursue different goals and are not always easy to reconcile.

More broadly, unlike the situation in neighbouring countries such as The Netherlands, the sector is still coming to grips with the application of the competition rules. Merger control is only one aspect of a wider category of rules which also includes bodies of law such as the public procurement procedures and the anti-cartel rules. As recently as October of last year, the BCA started an investigation into alleged competition infringements that aimed to prevent biosimilar medicines from entering the market (*See, this Newsletter, Volume 2019, No. 10, p. 6*). The procedure reportedly targeted not only pharmaceutical firms, but also specific hospitals.

CONSUMER LAW

Court of Justice of European Union Excludes National Supplementary Rules from Scope of Unfair Contract Terms Directive

On 9 July 2020, the Court of Justice of the European Union (the ***CJEU***) ruled that Article 1(2) of Directive 93/13/EEC on unfair contract terms (the ***UCTD***) must be interpreted as meaning that contractual terms fall outside the scope of the UCTD if they have not been individually negotiated but reflect a rule that, under national law, applies between the contracting parties if no other arrangements have been established in that respect (CJEU, 9 July 2020, Case C-81/19, *Banca Transilvania*). Article 1(2), UCTD excludes "*contractual terms which reflect mandatory statutory or regulatory provisions*" from the scope of the UCTD.

The case was referred to the CJEU for a preliminary ruling by a Romanian Court of Appeal (the ***Court***) after a loan agreement concluded between two consumers and a Romanian bank, in the national Romanian currency, had been replaced by a contract denominated in Swiss francs. Due to fluctuations in the exchange rate, the amount borrowed by the consumers increased significantly. According to the consumers, the bank had failed to provide them with sufficient information on this exchange rate risk. The bank, in turn, argued that the contested term, which provides that all payments must be made in the currency of the loan agreement, reflects the principle of "monetary nominalism" laid down in the Romanian Civil Code which, due to its mandatory nature, is not subject to the UCTD.

In view of the different approaches taken by the Romanian courts in relation to the definition of "mandatory provisions", the Court decided to stay the proceedings and requested the CJEU to clarify whether a contractual term which has not been individually negotiated but which reflects a rule that, under national law, applies between the contracting parties if no other arrangements have been established in that respect, falls within the scope of the UCTD.

The CJEU held that such a term is excluded from the scope of the UCTD, and thus exempt from the fairness assessment under the UCTD, provided that two conditions are met. First, the contractual term must reflect a statutory or regulatory provision. Second, that provision must be mandatory. The CJEU added that the phrase "mandatory statutory or regulatory provisions" also encompasses supplementary rules, *i.e.*, rules that only apply between contracting parties if no other arrangements have been established. In this regard, the CJEU explained that it is reasonable to assume that national legislators have already tried to strike a balance between the rights and obligations of the parties when establishing supplementary provisions.

Court of Justice of European Union Rules that Consumers May Waive Rights of Action under Unfair Contract Terms Directive

On 9 July 2020, the Court of Justice of the European Union (the ***CJEU***) ruled that consumers can waive their rights of action under Directive 93/13/EEC on unfair contract terms (the ***UCTD***), provided the waiver is free and informed and does not concern future disputes (CJEU, 9 July 2020, Case C-452/18, *Ibercaja Banco*).

The judgment was handed down in response to a reference for a preliminary ruling by a Spanish Court of First Instance (the ***Court***). First, the Court sought guidance as to the consequences to be drawn from Article 6(1), UCTD, pursuant to which unfair contract terms cannot be binding on the consumer in a situation where the consumer waived the right to rely on the nullity of the unfair term. In this regard, the CJEU noted that the system of protection against the use of unfair terms by suppliers or sellers, to the benefit of consumers, does not go as far as making that system mandatory. Accordingly, consumers may waive the right to rely on the unfairness of a contract term provided the waiver is the result of free and informed consent. In other words, the waiver will only be valid if the consumer was aware, at the time of the waiver, of the non-binding nature of the unfair term and of the consequences resulting from it.

Second, the Court asked the CJEU to clarify whether Article 3 of the UCTD, which contains the definition of an unfair contractual term, should be interpreted as meaning that a term in an agreement concluded between a seller or supplier and a consumer for the purpose of amending a potentially unfair term in a previous contract may itself be deemed unfair. The CJEU answered in the affirmative, noting that a handwritten signature by which the consumer indicates that (s)he has understood the contractual term cannot lead to the conclusion that that term was individually negotiated.

Finally, the CJEU noted that a term by which a consumer waives the right to take legal action may be considered as unfair particularly if the consumer was not provided with the relevant information necessary to understand the legal consequences arising from the waiver. It added that a term whereby the consumer waives the right to legal action under the UCTD in respect of future disputes cannot be binding on the consumer as the consumer cannot fully appreciate the consequences of such a waiver.

Court of Justice of European Union Clarifies Obligation of Traders to Inform Consumers on Alternative Dispute Resolution Entities

Ruling on the interpretation of Article 13 of Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes (the ***ADR Directive***), the Court of Justice of the European Union (the ***CJEU***) held on 25 June 2020 that a supplier should inform consumers about the ADR entities by which that supplier is covered, both on the supplier's website and in its general terms and conditions. It is not sufficient to only make this information available in separate documents that can be accessed on the website or upon conclusion of the contract (CJEU, 25 June 2020, Case C-380/19, *Bundesverband der Verbraucherzentralen und Verbraucherverbände*).

Article 13 of the ADR Directive requires traders to inform consumers about the ADR entity or ADR entities by which they are covered "*in a clear, comprehensible and easily accessible way on the traders' website, where one exists, and, if applicable, in the general terms and conditions of sales or service contracts between the trader and a consumer*".

In proceedings pitting the German Federal Union of Consumer Organisations and Associations against DAÄB, a German cooperative bank, the Higher Regional Court of Düsseldorf sought guidance from the CJEU as to whether the trader meets its information obligations if, instead of providing the information about the ADR entities in the general terms and conditions accessible on its website, it makes this information available in other documents featuring on its website or in a document distinct from the general terms and conditions that is available when the supplier enters into a contract with the consumer.

First, the CJEU observed that the ADR Directive seeks to offer consumers a high level of protection and to enable them to file complaints against their suppliers before ADR entities. To ensure that consumers can use this possibility efficiently, they must be able to identify the competent ADR entities rapidly and be informed about the participation of the supplier in the proceedings before these entities. For this reason, this information must appear in the trader's general terms and conditions if they are available on the website. It is not sufficient to provide this information in other documents accessible on the trader's website or under other tabs of that website.

Second, the CJEU pointed out that the ADR Directive applies without prejudice to information obligations on alternative dispute resolution mechanisms laid down in other EU legal instruments. Pursuant to Article 6 of Directive 2011/83 of 25 October 2011 on consumer rights, consumers must be informed about the access to alternative dispute resolution mechanisms well in advance of entering into a contract with the supplier. Accordingly, it is not sufficient for the consumer to receive the information about ADR entities only at the time of the conclusion of the contract.

CORPORATE LAW

Supreme Court Rejects Directors' Post-Contractual Non-Compete Obligation based on General Principles of Loyalty and Good Faith

On 25 June 2020, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) delivered a judgment regarding the non-compete obligation of directors following the end of their mandate.

The Supreme Court first observed that pursuant to Article II.3 of the Code of Economic Law (***CEL***) everyone is free to conduct the economic activity of his or her choice. This freedom includes the freedom of competition, which can only be subject to contractual or statutory restrictions.

The Supreme Court added that the law does not explicitly provide for a non-compete obligation for directors of a company. However, pursuant to Article 1134 *in fine* of the Civil Code, all agreements must be implemented in good faith. Further, pursuant to Article 1135 of the Civil Code, the parties to an agreement are bound by the agreement, as well as by all its consequences that are fair or that follow from the law or applicable customs.

This means that directors must exercise their mandate in good faith and are bound by an obligation of loyalty towards the company. Consequently, and unless agreed otherwise, the director cannot engage in any kind of activity that competes with the company's activities during the director's mandate.

On 9 November 2017, the Antwerp Court of Appeal held that the former directors of a company were not only bound by such a non-compete obligation during the term of their mandate, but also had to observe a post-contractual non-compete obligation after the end of their mandate. According to the Antwerp Court of Appeal, this post-contractual non-compete obligation resulted from the director's obligation of loyalty and his or her obligation to act in good faith.

By contrast, the Supreme Court held that this loyalty obligation, and the attending non-compete obligation, ended together with the expiry of the director's mandate. The reasons cited by the Antwerp Court of Appeal did not justify the imposition of a non-compete obligation on a director that goes beyond the duration of the director's mandate.

As a result, the Supreme Court overturned the judgment under review and referred the case to the Ghent Court of Appeal.

Supreme Court Rules on Validity of Decisions of Board of Directors Breaching the Articles of Associations

On 18 June 2020, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) delivered a judgment on the validity of decisions of the board of directors adopted in breach of the articles of association of a company.

The judgment of the Supreme Court involves the review of a judgment of 7 June 2018 of the Antwerp Court of Appeal which held that the shareholders of a company could invoke the non-enforceability of a decision of the board of directors violating the articles of association, even though the decision had not yet been declared null and void by a court.

The Supreme Court held that decisions of corporate bodies remain legally binding as long as such decisions have not been declared null and void by a court. Consequently, when the board of directors adopts a decision in violation of the articles of association, the shareholders can only invoke the non-enforceability of such a decision in legal proceedings if a court declared the decision null and void in a separate judgment.

DATA PROTECTION

Court of Justice of European Union Invalidates EU-US Privacy Shield

On 16 July 2020, the Court of Justice of the European Union (***CJEU***) delivered its judgment in the Facebook Ireland and Schrems case (C-311/18, ***Schrems II case***). The CJEU invalidated Commission Decision 2016/1250 on the adequacy of the protection provided by the EU-US Privacy Shield. The CJEU held that the EU-US Privacy Shield does not provide adequate protection and can therefore no longer serve as a legal instrument permitting the transfer of personal data from the EU to the US. As a result, transfers of personal data between the EU and the US that rely on the EU-US Privacy Shield are now illegal. However, the CJEU also considered that Commission Decision 2010/87 on standard contractual clauses (***SCCs***) for the transfer of personal data to processors established in third countries is valid and can be relied upon, provided that the applicable legislation does not prevent the recipient from complying with its contractual obligations under the SCCs.

International Transfers under GDPR

The General Data Protection Regulation (Regulation 2016/679 – the ***GDPR***) ensures that personal data are protected in the EU (and the European Economic Area – ***EEA***). However, if personal data are transferred outside the EU/EEA, this protection must travel with such data. The GDPR permits personal data transfers to those third countries that the European Commission has declared to provide for an adequate level of protection for personal data by way of a so-called "adequacy decision". In this adequacy decision, the European Commission looks at the laws and regulations of a third country (or a part thereof) to determine whether the level of protection that is provided for personal data is "essentially equivalent" to the protection afforded under the GDPR.

If the data importer is not covered by an adequacy decision, an exporting data controller (*i.e.*, the party determining the purpose and means of the processing) should implement appropriate safeguards to permit the international transfer of personal data, unless one of the derogations of Article 49 of the GDPR applies.

In most cases, such appropriate safeguards take the form of a contractual arrangement between the exporter and the importer containing standard contractual clauses set out by the European Commission and aimed at ensuring the adequate protection of personal data transferred outside the EU. The *Schrems II case* concerns the validity of the SCCs adopted by the European Commission in Decision 2010/87/EU. The case questions the adequacy of the level of protection related to the SCCs mechanism.

History of Case

In 2015, the CJEU delivered its judgment in the *Schrems I case* (C-362/14), which invalidated the Commission adequacy decision on the EU-US Safe Harbour scheme, the predecessor of the Privacy Shield (Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (OJ 2000 L 215, p. 7)).

The case originated from a complaint filed in 2013 by Mr. Schrems with the Irish Data Protection Commission (***IDPC***) challenging Facebook Ireland's transfers of user data to Facebook Inc. which is located in the United States. In view of the then recent revelations by Edward Snowden on the methods used by US national security agencies, Mr. Schrems argued that US legislation did not offer adequate protection against surveillance of the data transferred to that country, and asked the IDPC to suspend the data transfer to the US. The IDPC rejected the request and Mr. Schrems appealed to the Irish High Court which referred questions to the CJEU for a preliminary ruling. In response to these questions, the CJEU invalidated the European Commission's Safe Harbour decision.

Following the *Schrems I* judgment, Facebook continued its transfers of personal data, now relying mainly on SCCs, and later on its registration under the EU-US Privacy Shield scheme which had replaced the Safe Harbour and

received an "adequacy" finding from the European Commission on 12 July 2016 (Commission Decision 2016/1250). At the same time, the case was referred back to the Irish High Court which now had to determine the validity of the SCCs adopted by Facebook Ireland. The Irish High Court subsequently referred new questions to the CJEU asking whether the US ensures the adequate protection of EU citizens' personal data and whether the SCC mechanism and/or the EU-US Privacy Shield offer sufficient safeguards for the protection of EU citizens' freedoms and fundamental rights.

CJEU Judgment

The CJEU started by recalling that EU law, in particular the GDPR, applies to the transfer of personal data for commercial purposes by an economic operator established in the EU to another economic operator established in a third country, even if the data may be processed by the authorities of the third country for the purposes of public security, defence and State security.

With regard to the protection required for such a transfer, the CJEU held that the requirements laid down by the GDPR must be interpreted as meaning that data subjects must be granted a level of protection essentially equivalent to that guaranteed within the EU by the GDPR, read in conjunction with the Charter of the Fundamental Rights of the European Union (the ***Charter***). When assessing the level of protection, the CJEU would look at both the substantive provisions of the contractual clauses, and the relevant aspects of the legal system of that third country.

On this basis, the CJEU examined the validity of Commission Decision 2010/87 (on controller-to-processor SCCs) and found that it establishes the level of protection required by EU law since: (i) it imposes an obligation on both the data exporter and the recipient to verify, prior to any transfer, whether the level of protection required by EU law is respected in the third country, and (ii) it requires the data recipient to inform the data exporter of any inability to comply with the SCCs, in which case the data exporter must suspend the transfer of data. In other words, the CJEU found that a correct application of the SCCs requires the parties to assess whether they can comply with their respective obligations under the SCCs in light of the facts at hand and the legal system in the third country where the data recipient is established.

The CJEU added that supervisory authorities are required to stop or prohibit a transfer of personal data to a third country if the SCCs are not or cannot be complied with in that country, and if the protection of the data that is required by EU law cannot be ensured by other means.

Finally, the CJEU examined the validity of Commission Decision 2016/1250 (on the EU-US Privacy Shield) in the light of the requirements of the GDPR, read together with the provisions of the Charter governing respect for private and family life, personal data protection and the right to effective judicial protection. In that regard, the CJEU noted that the decision allows the requirements of US national security, public interest and law enforcement to have primacy and therefore interfere with fundamental rights of persons whose data are transferred to the US. The CJEU also noted that the limitations on the protection of personal data arising from US law are not restricted in a way that satisfies the requirement of equivalent protection under EU law, since certain surveillance programmes are not limited to what is strictly necessary. In addition, there are no limitations on the power of such surveillance programmes and insufficient guarantees for non-US citizens. Moreover, the CJEU considered that the Ombudsman mechanism set up under the EU-US Privacy Shield provides insufficient judicial protection against the possible interference by US authorities.

On this basis, the CJEU declared Commission Decision 2016/1250 to be invalid. As a result, it can no longer form the basis for the transfer of personal data from the EU to the US. By contrast, transfers of personal data from the EU to the US can still take place in reliance on SCCs, provided that the contracting parties assess whether their obligations under the SCC are not in conflict with applicable US laws, including surveillance laws. This guidance on the application of SCCs will also be relevant for recipients in third countries other than the US which receive personal data from EU controllers based on SCC.

Another important consequence of this judgment is that EU supervisory authorities will be called into action to assess on a case-by-case basis whether the use of SCCs is justified.

The full text of the *Schrems II* judgment can be found here.

Belgian Data Protection Authority Fines Google EUR 600,000 for Misinterpreting Right to be Forgotten

On 14 July 2020, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* - the ***DPA***) imposed a fine of EUR 600,000 on Google Belgium SA (***Google***) for infringing a citizen's right to be forgotten after it refused to delete search results referring to old articles that were harmful to the data subject's reputation. This is by far the highest fine ever imposed by the Belgian DPA.

Factual Background

The plaintiff, who plays a role in public life in Belgium, requested Google Belgium to remove search results linked to his name by completing the appropriate form on Google's website. On the one hand, the request related to possible links of the plaintiff to a political party, which the data subject had shown not to exist. On the other hand, the plaintiff sought the removal of references to articles relating to a harassment complaint against him, which had been declared unfounded many years earlier. Google rejected the request and decided not to remove any of the relevant pages from the search results. The plaintiff thus filed a formal complaint with the DPA.

Google Belgium as Subsidiary of Google LLC

Google alleged that the claim was inadmissible because it had been submitted against Google Belgium, while the entity responsible for the processing is Google LLC, established in California. The Litigation Chamber of the DPA (*Geschillenkamer / Chambre contentieuse* - the ***Litigation Chamber***) did not agree. It considered the activities of Google Belgium and Google LLC as intertwined, thus creating the basis for the liability of Google Belgium.

Moreover, the Litigation Chamber considered that the present case did not qualify for the application of the one-stop-shop principle under the General Data Protection Regulation (Regulation 2016/679 – the ***GDPR***). Indeed, it considered that the complaint had been brought against Google Belgium and the processing had been performed by Google LLC. Accordingly, the processing did not take place in the context of the activities of Google Ireland Ltd., Google's main establishment in Europe, and therefore the Irish Data Protection Commissioner could not be competent to deal with this case.

Right To Be Forgotten

Under Article 17 of the GDPR, a citizen has the right to obtain the erasure of personal data under specific circumstances. The Litigation Chamber observed that erasing search results, if such a request is justified, is a clear obligation for search engines resulting from the Google Spain case (Case C-131/12).

To assess whether a request for the removal of a search result was justified, the Litigation Chamber considered that the possible negative effect of the search result on the rights and freedoms of the data subject, in this case a public figure, had to be balanced against the right of the public to have access to this information.

First, on the articles that linked the plaintiff to a political party, the Litigation Chamber considered that the preservation of these pages was necessary in the general interest because the complainant plays a role in public life. It thus agreed with Google's decision not to remove the search results. Interestingly, the Litigation Chamber did not consider the possible link to a political party to constitute a "special" category of data which is subject to stricter protection under Article 9 of the GDPR.

Conversely, on the second claim, the Litigation Chamber concluded that Google had committed a serious infringement by refusing to erase links to the harassment complaint from its search results. It considered that Google had received ample evidence of the obsolete and unfounded character of the complaint. Indeed, the complaint had formally been declared to be unfounded ten years ago. Google's refusal to take action seriously harmed the data subject's reputation. The Litigation Chamber considered that the data subject's rights and interests prevailed over the right of the public to have access to this information.

DPA's Highest Fine So Far

For the above reasons, the DPA decided to impose an administrative fine of EUR 600,000 on Google for violating Articles 17 (right to erasure) and 12.1 and 4 (data subject rights) of the GDPR. In addition, the DPA ordered Google to delete the search results referring to the harassment case and update the forms that Google makes available for data subjects to exercise their right to be forgotten in order to provide more clarity on the responsible Google entities.

While the DPA insists that the amount of the fine is low in relation to Google's worldwide turnover, it also considered the existence of aggravating factors to justify this amount. First, it held that Google knew about the seriousness of the elements justifying dereferencing but still did not take any measures to limit the damage suffered by the data subject. Second, the Litigation Chamber pointed out that Google has already been subject to numerous decisions concerning its application of the right to erasure. Third, the Litigation Chamber also noted that Google is a widely used search engine and that it had failed to provide transparent reasoning for its refusal to comply with the request.

Google can still appeal against the decision of the Litigation Chamber. The full text of the decision is available here (currently only available in French).

Personal Data Protection Aspects of European Commission Communication on Brexit Readiness and of Stakeholder Notice

On 9 July 2020, the European Commission (the ***Commission***) published a Communication on readiness at the end of the transition period in the relationship between the EU and the UK – "*Getting ready for changes*" (the ***Communication***). The aim of the Communication is to help businesses, national authorities, and citizens prepare for the end of the transition period on 31 December 2020, the date on which EU law will cease to apply to the UK.

The Communication addresses the main areas of 'inevitable changes' regardless of the outcome of the ongoing negotiations on the future partnership. It does not seek to prejudge the outcome of these negotiations and therefore does not address the implications of a possible failure to reach an agreement or the need for contingency measures.

The Communication considers the changes regarding personal data transfers and data protection. Until 31 December 2020, the UK is bound by the General Data Protection Regulation (Regulation 2016/679 – the ***GDPR***). As of 1 January 2021, the UK will become a third country under the GDPR. Transfers of personal data to the UK can continue, but these data transfers will have to comply with specific EU rules and safeguards relating to the transfer of personal data to third countries. Among the tools provided for by the GDPR which ensure the level of protection of personal data guaranteed within the EU is the possibility for the EU to adopt an adequacy decision.

According to the Communication, the EU will use its best endeavours to complete the assessment of the UK's data protection regime by the end of 2020 with a view to adopting an adequacy decision if necessary. However, if no adequacy decision is adopted in time, the transfer of personal data to the UK will have to be ensured by other appropriate safeguards such as binding corporate rules or approved codes of conduct. Conversely, for transfers of personal data from the UK to the EU, the Communication notes that the UK Data Protection Act conferred adequacy on EU Member States until the end of 2024.

In addition to the Communication, the Commission is reviewing the stakeholder's notices published during the withdrawal negotiations. On 6 July 2020, the Commission issued an updated stakeholder notice on data protection (the ***Notice***) which offers an overview of the different appropriate safeguards under the GDPR for international data transfers such as the binding corporate rules and codes of conduct. Additionally, the Notice explains certain relevant provisions regarding data protection of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

The Communication can be consulted here while the Notice can be reviewed here.

European Data Protection Board Final Guidelines on Right to Request Delisting from Search Engine Results

On 7 July 2020, the European Data Protection Board (***EDPB***) adopted finalised guidelines on the right to request delisting from search engine results (the ***Guidelines***). In December of last year, the EDPB had already published a draft of these guidelines for public consultation.

Following the judgment of the Court of Justice of the European Union (***CJEU***) in *Google Spain* (Case C-131/12), a data subject may request the provider of an online search engine to erase links to web pages from the lists of results displayed following a search made on the basis of his or her name (the ***right to be forgotten***).

The Guidelines aim to interpret the right to be forgotten in light of Article 17 of the General Data Protection Regulation (Regulation 2016/679 – the ***GDPR***) that entails the data subject's right to erasure/right to be forgotten. On the basis of Article 21 of the GDPR, a data subject can also file a delisting request. The latter contains the right to object to the processing of personal data.

In the Guidelines, the EDPB first describes the different grounds of the right to request delisting (Article 17(1) of the GDPR). One of the grounds to request delisting is if the data subject's personal data returned in the search results are no longer necessary for the purposes of the search engine's processing. Second, the EDPB describes the exceptions that can apply (Article 17(3) of the GDPR). The primary exception that would justify a refusal to delist, is if the processing is necessary for exercising the right to freedom of expression and information. Importantly, the Guidelines only apply to processing by search engine providers. As a result, they do not apply to processing carried out by the third-party websites that originally published the online content.

The Guidelines contain only minor changes to the draft that was published in December of last year (*See, this Newsletter, Volume 2019, No. 12, p. 5*) and can be consulted here.

Court of Justice of European Union Finds Petitions Committee of Federated State Parliament to Be Subject to GDPR

On 9 July 2020, the Court of Justice of the European Union (***CJEU***) held that the petitions committee (the ***Petitions Committee***) of the Parliament of a Federated State is subject to the General Data Protection Regulation (Regulation 2016/679 – the ***GDPR***). The Petitions Committee must be characterised as a data controller under the GDPR. This implies that citizens who submit a petition to that committee have, as a general rule, a right of access to the personal data concerning them.

In the case at hand, a data subject participated in a petition of the Petitions Committee of the Parliament of the Land Hessen, Germany. Subsequently, the data subject requested access to his personal data. The President of the Parliament rejected the request and argued that the GDPR did not apply.

In its judgment, the CJEU finds that a Petitions Committee is a data controller under the GDPR in so far as it, alone or with others, determines the purposes and means of the processing of personal data. The reference to a "public authority" in the definition of a data controller is sufficiently wide to include the Petitions Committee. The activities carried out by that Petitions Committee do not fall within the scope of any exception laid down by the GDPR such as data processing operations concerning public security, defence, State security or activities in areas of criminal law.

The text of the CJEU's judgment can be found here.

European Data Protection Supervisor Publishes Opinion on Artificial Intelligence White Paper

On 19 February 2020, the European Commission published its white paper on artificial intelligence (***AI***) – "A European approach to excellence and trust" (the ***White Paper***); *See, this Newsletter, Volume 2020, No. 2, p. 13*). On 29 June 2020, the European Data Protection Supervisor (***EDPS***) published its opinion on the White Paper (the ***Opinion***).

The Commission's White Paper has a twofold aim: (i) setting out policy options to promote the uptake of AI, and (ii) addressing the risks associated with the use of this new technology. To achieve these goals, the White Paper proposes a set of actions to foster the development of AI and a new regulatory framework that would address concerns specific to AI which the current regulatory framework does not address.

In its Opinion, the EDPS acknowledges AI's growing importance and impact. However, anyone adopting a technology, and especially public administrations which process great amounts of personal data, should consider the benefits, costs and risks that come with it.

According to the EPDS, the Commission's proposals in the White Paper require adjustments and clarifications on, for instance, the relationship between the risks posed by AI and the related legislative gaps. Also, the definition of AI itself should allow better definition of the scope of the proposed legislation. In order to develop the safeguards and controls with respect to protection of personal data, the EDPS makes the following recommendations with regard to any new future regulatory framework for AI:

- the regulatory framework should apply to both EU Member States and to EU institutions, offices, bodies and agencies;
- the regulatory framework must be designed to protect from any negative impact, not only on individuals, but also on communities and society as a whole;
- a more robust and nuanced risk classification scheme should be adopted, ensuring any significant potential harm posed by AI applications is matched by appropriate mitigating measures;
- an impact assessment must be provided for that clearly defines the regulatory gaps which it intends to fill;
- any overlap of different supervisory authorities must be avoided and a cooperation mechanism must be put in place.

The text of the Opinion can be consulted here.

ENERGY

Flemish Parliament Validates Flemish Regulatory Framework Governing Wind Turbines on Land

On 24 July 2020, a decree was published in the Belgian Official Journal which confirms the validity of the Flemish regulatory framework regarding wind turbines until 24 July 2023.

On 25 June 2020, the Court of Justice of the European Union (the ***CJEU***) held that the Flemish regulatory framework regarding wind turbines is in breach of 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.

Since the decision of the CJEU could have far-reaching consequences for existing wind turbines, as well as for pending or future permit applications in Flanders, the Flemish Parliament adopted a validation decree that safeguards the application of the current Flemish regulatory framework to existing and future permits for an additional term of three years. By the end of the three-year term of the validation decree, new sector provisions must have been adopted which should be in line with the SEA Directive.

More information on the decision of the CJEU of 25 June 2020 can be found in the June 2020 issue of this Newsletter.

INSOLVENCY

Company in Liquidation Can Still Be Declared Bankrupt

On 5 June 2020, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) held that a company in liquidation could still be declared bankrupt if the conditions for bankruptcy are satisfied.

In the case at hand, a company in financial difficulties had gone into liquidation instead of filing for bankruptcy. However, the Brussels Court of Appeal found that some elements indicated that the decision to liquidate the company would damage the creditors and deprive them of the potential benefit of specific actions that can be brought by a bankruptcy trustee, such as the action for wrongful trading against the former directors.

The Brussels Court of Appeal added that the company had lost the confidence of its creditors. As a result, the conditions for bankruptcy under Belgian law were met since the company had stopped paying its debts as they fell due and had lost its creditworthiness. Consequently, the Brussels Court of Appeal confirmed the judgment of the Brussels French Speaking Enterprise Court opening the bankruptcy procedure for the company.

According to the Brussels Court of Appeal, the fact that the liquidation procedure and the appointed liquidator complied with the applicable legal rules and that there was no evidence of any fraud on the part of the directors or liquidator did not change that analysis. On the other hand, the Brussels Court of Appeal pointed out that it could rely on the enduring confidence of a majority of the creditors and on the liquidation process to find that the company had not lost its creditworthiness.

The Supreme Court confirmed the judgment of the Brussels Court of Appeal.

Limitation of Directors' Liability for Social Security Debts in Case of Bankruptcy

On 18 June 2020, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) confirmed a judgment of 23 February 2017 of the Antwerp Court of Appeal in relation to the directors' liability for social security debts in the context of a bankruptcy. The Antwerp Court of Appeal had ruled that this liability can be limited to a symbolic EUR 1 on the basis of various elements, such as the fact that the directors acted in good faith.

Background

Pursuant to Article XX.226 of the Code on Economic Law (***CEL***; formerly Article 530, §2 of the now abolished Companies' Code), the directors of a bankrupt company can be held personally liable for the unpaid social security debts of that company if, over the course of five years prior to the bankruptcy, they have been involved as directors in two or more bankruptcies or liquidations with unpaid social security debts.

The Supreme Court held in a judgment of 24 March 2016 that the good faith of the directors is not relevant to determine whether directors can be held liable under Article XX.226 CEL. However, courts may take the directors' good faith into account when calculating the extent of this liability and thus limit the amount of the social security debts that the directors are personally liable for.

Supreme Court Judgment

In its judgment, the Supreme Court confirmed that courts have a broad margin of discretion in calculating the extent of the directors' personal liability under Article XX.226 CEL and may take several factors into account.

In the case at hand, the Supreme Court confirmed that the Antwerp Court of Appeal had the power to reduce the directors' personal liability under Article XX.226 CEL to a symbolic EUR 1 for the following reasons:

- the four bankrupt companies in the case at hand had been incorporated to pursue different activities and not to avoid social security contributions;
- the social security debts had been incurred in a period shortly before the bankruptcies of the different companies;
- the bankruptcies of the four companies had been filed closely one after the other;
- the amount of the social security debts pointed to a relatively high level of employment;
- the non-payment of the social security debts in itself did not result from faults of the directors;
- directors should be given the chance and time to find solutions for difficulties in view of securing the continuation of the activities of the company; and
- it had not been demonstrated that the bankruptcies were the result of faults of the directors or that the social security debts were the result of a late filing .

The judgment of the Supreme Court confirms that the directors' liability for social security debts in the context of a bankruptcy can be limited for directors who did not act wrongfully in the run-up to or in filing for bankruptcy.

INTELLECTUAL PROPERTY

Court of Justice of European Union Rules on Information to Be Provided to Right Holders in Case of Illegal Uploading of Films onto Online Platforms

On 9 July 2020, the Court of Justice of the European Union (***CJEU***) held that the right holder of a film that is unlawfully uploaded on a video platform such as YouTube is entitled to require the operator of the platform to provide it with the postal address of the user responsible for the upload but not the email address, the IP address or the telephone number of that user.

The CJEU had been asked by the German Federal Court to offer guidance on EU law in proceedings pitting Constantin Film Verleih against YouTube and its parent company, Google, after the films Parker and Scary Movie 5 had been uploaded on YouTube without Constantin Film's consent. In its capacity as holder of the exclusive exploitation rights of these films, Constantin Films requested YouTube to provide it with the email address, IP address and telephone numbers of the parties responsible for uploading the films without prior authorisation.

The questions referred to the CJEU concerned the interpretation of Article 8(2)(a) of Directive 2004/48/EC on the enforcement of intellectual property rights (***Directive 2004/38***), which states that judicial authorities may order the disclosure of the "addresses" of the producers, manufacturers or distributors of the goods or services which infringe an intellectual property right. In particular, the German Federal Court sought to know whether the term "addresses" should be understood as covering the email address, the telephone number and the IP address of the user who uploaded files which infringe an intellectual property right.

First, the CJEU held that the term "address" should be defined independently and uniformly throughout the European Union. Since Directive 2004/38 does not provide for a definition of the term, it should be interpreted with regard to its usual meaning, that is "*the place of a given person's permanent address of habitual residence*". According to the CJEU, the preparatory works of Directive 2004/38 and the context in which the term "address" is usually used confirm that it should not be understood as comprising the email address, the telephone number or the IP address of the individuals concerned.

Second, the CJEU observed that the right to information aims to ensure the effective exercise of intellectual property rights by right holders who are given the possibility to identify the infringers of their rights. However, the right to information must be interpreted strictly because of (i) the minimum harmonisation character of Directive 2004/38; and (ii) its general purpose to achieve a fair balance between the protection of intellectual property rights and the protection of fundamental rights of users of protected files, such as the right to protection of personal data.

Finally, the CJEU noted that, although they are not obliged to do so, Member States are allowed to enable right holders to request the email address, the IP address and the telephone number of users who infringe intellectual property rights. Member States which decide to avail themselves of that possibility should strike a fair balance between the fundamental rights at hand and the need to comply with the other general principles of EU law.

District Court of The Hague Rules on Use of Customs Information in Relation to Parallel Imports

On 15 April 2020, the District Court of The Hague (the ***Court***) delivered its judgment in *Giorgio Armani S.P.A. v. International Time Group B.V.* (case C/09/572719 / HA ZA 19-430) which opens interesting perspectives for the use of information obtained from an anti-counterfeiting procedure in the fight against the unauthorised importation of genuine branded goods from third countries.

The judgment, in which the Court found that there was a trademark infringement since the importer did not prove that the goods had been authorised to be marketed in the European Economic Area by the intellectual property (***IP***) right holder, confirms that information acquired during a

customs seizure under Regulation No 608/2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 (the ***Anti-counterfeiting Regulation***) may be used in an action against parallel imports from a third country.

Factual Background

The dispute arose when Armani (the right holder for a number of Armani trademarks), upon being informed by Dutch customs of the detention/suspension of the release of specific goods featuring the Armani brand, requested Dutch customs to seize a shipment of watches containing the Armani logo on the basis that the products infringed its trademarks either because they were counterfeit or because they formed the subject of unauthorised parallel importation.

The importer, International Time Group (***ITG***), relied on Article 21 of the Anti-counterfeiting Regulation and argued that the information obtained by Armani through Dutch customs should not be considered, since it had been used as the basis for a claim against the unauthorised parallel importation of genuine goods while Armani was permitted to rely on such information only to block counterfeit goods.

Judgment of Court

The Court rejected ITG's defence and noted that, while unauthorised parallel imports fall outside the scope of the Anti-counterfeiting Regulation, the information obtained from Dutch customs was provided to Armani in accordance with its purpose, which grants customs authorities certain powers to prevent infringing goods from entering the European Union market.

The Court then concluded, without assessing whether the goods were counterfeit, that trademark infringement had occurred since the importer did not prove that the goods were authorised to be marketed in the European Economic Area by Armani (or by an authorised licensee).

The judgment shows that information obtained from customs authorities in their activities against counterfeit goods under the Anti-counterfeiting Regulation may be used as proof to stop genuine goods imported from a third country from entering the European Union if the IP right holder did not authorise the importation of the goods.

However, the judgment does not necessarily reflect the position in other EU Member States. Even so, it may create an important precedent outside the Netherlands as well.

The text of the judgment can be consulted here.

LABOUR LAW

Social Elections Postponed Due to Covid-19 Will Be Held in November 2020

Social elections were scheduled to be held in more than 7,000 Belgian companies between 11 and 24 May 2020. These social elections designate the employee representatives in the works council (*Ondernemingsraad/Conseil d'entreprise* - the ***Works Council***) and in the committee for prevention and protection at work (*Comité voor preventie en bescherming op het werk / Comité pour la prévention et la protection au travail* - the ***Committee***).

However, due to the Covid-19 pandemic, the social elections were postponed by the Law of 4 May 2020 (*Wet tot regeling van de opschorting van de procedure sociale verkiezingen van het jaar 2020 ingevolge de coronavirus Covid-19-pandemie / Loi visant à réglementer la suspension de la procédure des élections sociales de l'année 2020 suite à la pandémie du coronavirus Covid-19* - the ***Law***). The Law did not determine new dates for the social elections as it was impossible at that time to know how long the pandemic would last.

A Royal Decree of 15 July 2020 (*Koninklijk Besluit tot regeling van de herneming van de procedure sociale verkiezingen 2020 die werd opgeschort op basis van de wet van 4 mei 2020 tot regeling van de opschorting van de procedure sociale verkiezingen van het jaar 2020 ingevolge de coronavirus Covid-19-pandemie / Arrêté royal visant à réglementer la reprise de la procédure des élections sociales 2020 suspendue sur la base de la loi du 4 mai 2020 visant à réglementer la suspension de la procédure des élections sociales de l'année 2020 suite à la pandémie du coronavirus Covid-19* - the ***Royal Decree***) has now determined that the social elections will be organised between 16 and 29 November 2020.

The actual date of the social elections in a given company corresponds to the date on which the social elections originally were supposed to have taken place (unless the Works Council, the Committee, or the employer decides otherwise). This means, for example, that if the original date of the social elections was 11 May 2020, the new date will be 16 November 2020. The timetable for the social elections as originally foreseen remains the same (again unless the Works Council, the Committee or the employer decides otherwise, although the voting period that was originally provided for cannot be reduced).

The social elections' procedure itself, which was suspended by the Law, must be resumed 54 days prior to the new date of the social elections. During that period, several formalities must be accomplished, *e.g.*, the display of the lists of candidates, the handling of complaints regarding the lists, the appointment of the presidents of the voting booths, the replacement of candidates, etc. The dates of these formalities must be determined in light of the new date of the social elections.

At least 61 days prior to the new date, the Works Council, the Committee or the employer must inform the employees of that new date and of the new dates on which the formalities must be accomplished. That information must conform to a template notice included in an appendix to the Royal Decree (to be found here).

LIFE SCIENCES

Constitutional Court Rejects Request for Suspension of Key Provisions of Latest Medicine Shortages Law

On 16 July 2020, the Constitutional Court rejected several requests for suspension of Articles 2, 3 and 4 of the Law of 20 December 2019 modifying various laws to tackle medicine shortages (*Wet van 20 december 2019 tot wijziging van diverse wetgevingen wat de tekorten aan geneesmiddelen betreft / Loi du 20 décembre 2020 modifiant diverses législations, en ce qui concerne les pénuries de medicaments* – the ***Law***). The requests had been introduced by the Belgian Association of Parallel Importers and Exporters, various other parties active in the parallel trade in medicines and pharmacists in the Democratic Republic of the Congo and Rwanda (the ***Applicants***).

The challenged provisions, broadly, created the following rules:

- They tightened the notification requirement of temporary medicine supply cessations.
- They equated a partial or interrupted supply of medicines to wholesaler-suppliers and pharmacists with a temporary cessation of supplies that gives rise to notification.
- Medicines affected by notifiable supply cessations may be made subject to a temporary export limitation or prohibition. A Royal Decree is supposed to determine detailed rules, but has not yet been adopted.
- Wholesalers with a public service obligation and pharmacists started to benefit from a supply obligation of three working days in their favour.

The Applicants objected to what they regarded as an illegal export prohibition of medicines and maintained that this prohibition essentially replicated a similar export ban which the Constitutional Court had found to be illegal as an unjustifiable restriction of trade between Member States (See, Constitutional Court, 17 October 2019, Case No 146/2019). By contrast, the Belgian government was confident that a focused export restrictions procedure that may result in narrow export limitations would pass muster under European law.

The Constitutional Court sided with the Belgian government and concluded that the new export prohibition is not similar to the blanket export prohibition which it annulled. However, it did not proceed with an assessment of the merits of the new export ban and its attendant provisions and declined to suspend the challenged provisions because the applicants failed to show that the application of these provisions would cause them serious harm which is difficult to repair.

LITIGATION

Political Agreement to Make Cross-Border European Justice in Civil and Commercial Matters Faster and More Accessible

On 30 June 2020, the European Parliament (the ***EP***) and the Council of the European Union (the ***Council***) reached an agreement to amend Council Regulation (*EC*) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (the ***Taking of Evidence Regulation***) and Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (the ***Service of Documents Regulation***) (together the ***Regulations***).

The amendments to the Regulations aim to make cross-border European justice more accessible, faster, cheaper and more straightforward, in particular by increasing legal certainty and decreasing judicial delays and undue costs for citizens.

The Taking of Evidence Regulation establishes an EU-wide system for the swift transmission of requests for the taking and execution of evidence between national courts. It creates a framework for cross-border judicial assistance between EU Member States. However, in 2017, the European Commission (the ***Commission***) noted that contacts between each national authority designated in the Taking of Evidence Regulation (and responsible for the transfer of evidentiary documents between EU Member States' courts), were almost exclusively paper-based and that videoconferencing was rarely used to hear persons located in other Member States. These findings prompted the adoption of the current proposal for a Regulation to amend the Taking of Evidence Regulation whose main objectives are the following:

- To introduce mandatory electronic communications for the transmission of requests for evidence;
- To increase the use of videoconferencing as a means for the direct taking of evidence;
- To improve the taking of evidence by diplomatic officers or consular agents; and
- To prohibit rejecting evidence collected in accordance with the law of the Member State solely due to its digital nature.

The Service of Documents Regulation provides fast-track channels and uniform procedures for the service of documents between EU courts and parties located in different EU Member States. The Service of Documents Regulation also lays down minimum standards on the protection of the rights of defence and sets uniform legal requirements to serve a document by post across borders. In 2017, the Commission found that the system of transmission of documents was underperforming and that technological developments were not used to their full potential. The current proposal, therefore, aims to ensure a smoother transmission of documents. In particular:

- Regarding judicial documents, the proposal clarifies that the Service of Documents Regulation applies to all situations in which the domicile of the addressee is located in another Member State;
- Communications and exchanges of documents between national authorities will be carried out electronically, through a decentralised IT system composed of national interconnected IT systems;
- In line with the relevant case-law of the Court of Justice of the European Union, the proposal improves the procedure of the right of the addressee to refuse the document if it is not drawn up or translated into an appropriate language;
- The postal service providers will be obliged to use a specific return slip when serving documents by post; and

- The electronic service of documents is introduced as an additional alternative method of service.

The final version of the political agreement on the proposals amending the Regulations must be formally endorsed by the EP and the Council before their final adoption and publication in the Official Journal of the European Union. The Regulations will enter into force twenty days following their publication. The Commission will monitor the output and evaluate the impact of the Regulations on the judicial cooperation between Member States in civil and commercial matters.

The press release of the EP is available here.

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