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COMPETITION LAW

Supreme Court Confirms Annulment of Decision of Belgian Competition Authority to Fine Lobbying as Restrictive Practice

On 22 June 2018, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) confirmed the judgment of the Brussels Court of Appeal (the "Court") that had annulled the decision of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – "BCA") to impose a fine on specific cement companies for restrictive lobbying practices.

In its decision of 30 August 2013, the BCA had held that the lobbying efforts of the cement companies CCB, CRB, Holcim, the Federation for the Belgian Cement Industry and the National Centre for Scientific and Technical Research for the Cement Industry ("the Defendants") to delay the approval process of ground granulated blast furnace slag constituted a concerted practice restricting competition by object. The BCA therefore imposed a fine of EUR 1.4 million (*See, this Newsletter, Volume 2013, No. 9, p. 6*).

The Court, in turn, annulled that decision on 30 June 2016. In its judgment, the Court considered lobbying as an activity that seeks to influence policy making and decisional processes that constitute activities outside of the market. The Court concluded that such conduct could not be in violation of competition law, which requires the conduct of enterprises on the market (*See, this Newsletter, Volume 2016, No. 8, p. 4*).

In addition, the Court held that the lobbying efforts in question were not excessive, as the Defendants had been invited to the approval process by the public authorities; their presence was appropriate in the light of their expertise; they did not hold a majority decisional power over the approval process; and the lobbying efforts were conducted in openness, objectivity, transparency and non-discrimination.

The Court's judgment was appealed by the BCA to the Supreme Court which dismissed the appeal and confirmed the judgment of the Court in a judgment of 22 June 2018.

Brussels Court of Appeal Annuls Decision to Suspend Participation Rules for Horse-Jumping

On 27 June 2018, the Brussels Court of Appeal (the "Court") annulled the decision of the Competition College of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - "BCA") to suspend a memorandum of understanding between the organisers of the Global Champions League ("GCL"), the Global Champions Tour ("GCT") and the *Fédération Eques-tre Internationale* ("FEI") containing participation rules for horse-jumping events (the "MoU").

Background

The Court judgment constitutes the latest episode in a dispute that started in June 2015 when GCL complained to the BCA that the exclusivity clause included in the General Regulations of FEI, the governing body for show-jumping, was anticompetitive. Pursuant to this clause, riders and horses could not compete in FEI approved events if they had participated in an event not approved by FEI over the previous six months. Since the FEI had refused to approve the GCL – an innovative form of horse-jumping competitions based on paying teams – the GCL argued that FEI's exclusivity clause made the development of their events impossible.

This complaint resulted in the BCA temporarily suspending the exclusivity clause on 27 July 2015 (*See, this Newsletter, Volume 2015, No. 7, p. 4*). On appeal, the Court upheld the interim measures on 28 April 2016 (*See, this Newsletter, Volume 2016, No. 5, p. 4*).

In January 2017, GCL and FEI announced that they had concluded a MoU, pursuant to which FEI approved GCL events, the parties agreed on participation rules for GCL and GCT events (the GCT, in existence since 2006, is a more traditional form of individual horse-jumping competitions) and GCL withdrew its complaint to the BCA. However, on 13 November 2017, a Dutch horse rider based in Belgium and a Belgian horse stable lodged a new complaint with the BCA because the new GCT participation rules, as laid down in the MoU, reduced the percentage of invitations to riders based on their FEI ranking from 60% to 30%, with the remainder of the invitations being reserved to either riders who are also a member of a GCL paying team (60%) or FEI wild cards and national invitations (10%). The presence in a paying team would thus have an impact on the ability to participate in individual competitions and therefore to win such competitions and the related prize-money and FEI ranking points.

The BCA responded on 20 December 2017 by imposing interim measures on FEI, GCL and GCT seeking to ensure that, as was the case before the MoU, 60% of the invitations for GCT events are sent to riders on the basis of their official FEI ranking and do not depend on whether the riders are a member of a GCL paying team (*See, this Newsletter, Volume 2017, No. 12, p. 5*).

This decision to impose interim measures was further sharpened when, on 13 April 2018, the BCA imposed penalty payments on GCL/GCT and FEI in the amounts of EUR 466 and EUR 182, respectively, per day of non-compliance with the interim measures (*See, this Newsletter, Volume 2018, No. 4, p. 5*).

Judgment

In its judgment of 27 June 2018 (available here), the Court considered that the decision of the BCA of 20 December 2017 did not only suspend the GCT participation rules, but also suspended the MoU itself. Yet, the BCA had previously excluded the MoU from its investigation file. In the Court's view, this constitutes (i) a contradiction in the decision itself because the MoU was first excluded from the file only to be suspended later; and (ii) a contradiction in the reasoning at the basis of the decision because the decision first excluded the MoU and then based its reasoning on a *prima facie* qualification of the MoU as an agreement restricting competition.

Consequently, the Court annulled the BCA's interim decision of 20 December 2017 on account of inappropriate reasoning.

The case is now back before the BCA. The BCA, with a Competition College composed differently, as required by the Court in a subsequent judgment given on 7 August 2018 (Court of Appeal Brussels, 7 August 2018, nr. 2018/AR/1293, available here), will have to adopt a new decision on the request for interim measures.

CONSUMER LAW

Court of Justice of European Union Clarifies Concept of "Misleading Omission" with respect to Energy Classification Labelling of Vacuum Cleaners

On 25 July 2018, the Court of Justice of the European Union (the "ECJ") handed down its judgment concerning energy labels in a case involving Dyson and BSH (ECJ, 25 July 2018, Case C-632/16, *Dyson Ltd and Dyson BV v. BSH Home Appliances NV*). The ECJ held that not providing consumers with information on the testing conditions that resulted in the energy classification indicated on the energy label, does not constitute a "misleading omission" within the meaning of Article 7 of Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the "Unfair Commercial Practices Directive").

Moreover, the ECJ held that suppliers and manufacturers of vacuum cleaners are prohibited from displaying, in a place other than the energy label, any labels or symbols conveying additional information which could mislead or confuse end-users with respect to the energy consumption of the vacuum cleaner at issue. Such an action would be regarded as an infringement of (the now repealed) Directive 2010/30/EU of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products ("Directive 2010/30/EU") and Commission Delegated Regulation (EU) No 665/2013 of 3 May 2013 supplementing Directive 2010/30/EU with regard to energy labelling of vacuum cleaners (the "Delegated Regulation").

The ECJ delivered its judgment in response to a request for a preliminary ruling from the Antwerp Commercial Court in a dispute between two producers of vacuum cleaners, Dyson Ltd ("Dyson") and BSH Home Appliances NV ("BSH"). Dyson produces vacuum cleaners operating without dust bags while the vacuum cleaners of BSH came with dust bags.

In accordance with Directive 2010/30/EU and the Delegated Regulation, all vacuum cleaners sold in the EU are subject to mandatory energy labelling requirements in order to provide consumers with accurate and relevant information on their specific energy consumption, which could influence the end-user's choice of product. Furthermore, Directive 2010/30/EU and the Delegated Regulation dictate a uniform design and content for the labelling of vacuum cleaners as well as a standardised test to determine their energy consumption.

However, as claimed by Dyson, the standardised test disregards the fact that vacuum cleaners with dust bags require more power to generate suction (due to the clogging of the pores of the bag when filled with dust). By contrast, vacuum cleaners without dust bags, such as those produced by Dyson, are unaffected by this power requirement. Therefore, the test fails to acknowledge the fact that the energy consumption of vacuum cleaners with dust bags gradually increases as the bags become fuller. Since the differences in energy consumption between vacuum cleaners operating with and without dust bags are not duly conveyed by the EU energy labels, Dyson challenged the energy labelling of vacuum cleaners produced by BSH.

In Dyson's opinion, for consumers to be fully informed of all product characteristics, information relating to the testing conditions which resulted in the energy classification must be provided to the consumers. Dyson claimed that not providing consumers with such information constitutes a "misleading omission" within the meaning of Article 7 of the Unfair Commercial Practices Directive. A commercial practice is considered to be misleading if it omits material information that the average consumer needs, in view of the context, to take an informed transaction decision.

The ECJ rejected Dyson's argument as it considered the reproduction of the EU Ecolabel as the only additional reference which can be added to the energy label under Directive 2010/30/EU and the Delegated Regulation. The ECJ added that information relating to the vacuum cleaner's testing conditions is not covered under the exhaustive list of information that must be brought to the attention of the end-user by means of an energy label. Consequently, such information is not material information for the average consumer and is, therefore, not capable of constituting a misleading omission within the meaning of Article 7 of the Unfair Commercial Practices Directive.

In addition, Dyson claimed that BSH's practice of attaching additional labels and symbols namely, a green label stating "*Energy A*", a black label stating "*Class A Performance*" and an orange label stating "*AAAA Best rated: A in all classes*", is also misleading. Therefore, the referring court asked the ECJ whether Directive 2010/30/EU and the Delegated Regulation prohibit the display of other labels or symbols besides the energy label which contain information relating to the energy consumption of vacuum cleaners.

The ECJ decided that such a display of supplementary labels is indeed prohibited. First, the ECJ noted that the labels and symbols used by BSH are not provided for and do not satisfy the requirements of the Delegated Regulation. Second, the ECJ stated that such labels or symbols could potentially mislead or confuse the consumer with respect to the energy consumption because some of the labels used by BSH repeat the same information conveyed by the normal energy label while relying on a distinct graphic. In accordance with this guidance of the ECJ, it is ultimately for the Antwerp Commercial Court to assess the facts of the particular case.

Interestingly, in 2013, Dyson brought an action for the annulment of the Delegated Regulation. These proceedings are still ongoing as in May 2017, the ECJ set aside the judgment of the General Court in this case and referred the proceedings back to the General Court for reconsideration (ECJ, 11 May 2017, Case C-44/16 P, *Dyson Ltd v. Commission*). The General Court is still to deliver its second judgment (GC, Case T-544/13 RENV, *Dyson Ltd. v. Commission*).

CORPORATE LAW

New Belgian Ultimate Beneficial Owner Register

The Royal Decree of 14 August 2018 (the "Royal Decree"), which will enter into force on 31 October 2018, defines the regulatory framework for the new central register of beneficial ownership (the "UBO Register"). All Belgian companies and other entities will be required to communicate information in relation to their ultimate beneficial owner(s) for inclusion in the UBO Register.

Scope

Pursuant to the Royal Decree, all Belgian companies (including listed companies) and other entities (*e.g.*, not-for-profit organisations, foundations and trust and trust-like arrangements) will be required to communicate information in relation to their ultimate beneficial owner(s) to the UBO Register.

The following categories of individuals are considered to be ultimate beneficial owner(s) of a company ("UBOs"):

1. individual(s) who (in)directly hold(s) a sufficient percentage of the share or voting rights or ownership interests in that company (the Royal Decree provides that 25% will be considered to be a "*sufficient percentage*");

2. individual(s) who control(s) the company through other means (*e.g.*, a private individual who has the power to appoint or remove a majority of the members of the administrative, management or supervisory body of that company); and

3. to the extent, after due inquiry, no individuals have been identified under (i) or (ii), or in case it is doubtful that the individual(s) identified qualify as ultimate beneficial owner(s), the individual(s) who hold the senior managing positions are to be reported as UBOs.

Information to be Provided

The following information in respect of each UBO will have to be provided to the UBO register:

1. name and first name;

2. date of birth;

3. nationality;

4. address;

5. date on which he or she first qualified as UBO of the company;

6. whether they are an isolated UBO or acting in concert with other individuals;

7. identification number in the Belgian National Registry (or similar identification number in the country of residence/origin);

8. whether he or she is a direct or indirect UBO, and in the latter case, the company details of all intermediaries (including, at least the legal name, date of incorporation, trading name, legal form, address of the registered seat, company number or, where applicable, any other similar identifier issued by the country in which such intermediary is registered); and

9. the nature and size of the beneficial interest.

Timing and Means of Communication

Companies will be required to communicate the information set forth above to the UBO Register for the first time by 30 November 2018. The company will subsequently be required to update this information at least once a year and in any case within one month after it has become aware of any change.

As the Treasury still has to provide technical guidance on the practical implementation of the Royal Decree, it is not yet clear how the registration of the information will occur in practice.

Access

The UBO Register can be accessed by (i) specific public administrations (including, tax authorities and the anti-money laundering task force); (ii) entities that are required to perform due diligence obligations on their customers pursuant to anti-money laundering legislation; and (iii) the general public (it being understood that members of the general public will only be allowed to perform a search in the UBO Register on the basis of the name or registration number of a company and will only be able to gain access to limited information).

Information in the UBO Register can be made inaccessible by the Treasury if disclosure is liable to entail a serious risk of fraud, kidnapping, blackmail, violence or intimidation. Access is also restricted if the UBO is a minor or is incapacitated.

Enforcement

Failure to comply with the obligation to obtain and hold information of their UBOs may result in criminal fines for the directors of the company ranging between EUR 400 and EUR 40,000. Failure to communicate such information timely to the UBO Register may entail administrative sanctions ranging between EUR 250 and EUR 50,000 for the directors.

Reform of Criminal Liability of Legal Persons

The Law of 11 July 2018, which entered into force on 30 July 2018, amended the rules that apply to the criminal liability of legal persons.

The first change relates to the end of criminal immunity for specific public law legal persons, including the Federal State, the Regions, Communities and Provinces.

The second involves the rules which determine when an individual and a legal person may both be held criminally liable for the same crime. Under current rules, if a crime is committed by a legal person, only the person (*i.e.*, the legal person or the individual) deemed to have committed the most serious wrongdoing can be held criminally liable. This rule does not apply if the individual is considered to have committed the crime intentionally, in which case both the legal person and the individual can be held liable for the same crime. This approach created legal uncertainty and came in for criticism.

Under the new rules, a legal person's criminal liability will not prevent a natural person from being held guilty for the same crime. As a result, directors and other individuals acting on behalf of legal persons will be at greater risk of criminal liability.

INTELLECTUAL PROPERTY

Debranding and Rebranding Imported Products Constitutes Trade Mark Infringement

On 25 July 2018, the Court of Justice of the European Union (the "ECJ") held in case C-129/17, *Mitsubishi Shoji Kaisha Ltd & MCFE BV v. Duma Forklifts NV and GSI International BVBA*, that the debranding and rebranding by Duma Forklifts NV ("Duma") and GSI International BVBA ("GSI") of forklift trucks manufactured by Mitsubishi Shoji Kaiska Ltd ("Mitsubishi") constituted an infringement of Mitsubishi's trade mark.

The dispute arose after Duma and GSI, two affiliated companies active in the forklift trucks sector (one having as its main activity the purchase and sale of forklift trucks and the other one specialising in the construction and repair of forklift trucks) proceeded to make parallel imports in the European Economic Area ("EEA") of forklift trucks bearing the Mitsubishi trade marks (the well-known three-pointed star design). Duma and GSI also brought into (and outside) the EEA forklift trucks on which signs identical to the Mitsubishi trade marks had been removed (debranding) and replaced with Duma's and GSI's own signs (rebranding).

Mitsubishi and its authorised manufacturer and distributor in the EEA, MCFE, brought cease and desist proceedings before the Dutch-language Commercial Court of Brussels which rejected their claims. Mitsubishi and MCFE appealed to the Court of Appeal of Brussels (the "Court"). Their claims were twofold. First, they sought the prohibition of the parallel importation of forklift trucks bearing the Mitsubishi trade mark. Second, they argued that debranding Mitsubishi forklift trucks without Mitsubishi's consent infringed Mitsubishi's rights as the owner of the trade mark to control the entry on the EEA market of the goods bearing the trade mark and harmed the essential function of the trade mark which is to guarantee to consumers the origin of the product or service, as well as other functions of the mark, such as, in particular, that of guaranteeing the quality of the product, or those of communication, investment and advertising.

With respect to the parallel import into the EEA of forklift trucks bearing the Mitsubishi trade mark, the Court sided with Mitsubishi and MCFE.

By contrast, as regards the trade in debranded and rebranded forklift trucks, the Court stayed the proceedings and referred a request for a preliminary ruling to the ECJ as regards the interpretation of Article 5 of Directive 2008/95/EC of 22 October 2008 to approximate the laws of the EU Member States relating to trade marks (the "Directive") and Article 9 of Council Regulation 207/2009 of 26 February 2009 on the European Union trade mark (the "Regulation"). These articles provide, in essence, that the owner of a trade mark is entitled to prevent all third parties from using, in the course of trade and without its consent, either an identical sign to its trade mark in relation to identical goods, or an identical or similar sign in relation to identical or similar goods provided that there is a likelihood of confusion. The Court asked if these articles also cover the right to oppose a debranding/rebranding where the goods are intended to be introduced on the EEA market for the first time. The Court furthermore sought to know whether the fact that the goods could still be identified by average consumers as originating from Mitsubishi would alter the answer to the previous question.

The ECJ first noted that Article 5 of the Directive and Article 9 of the Regulation must be interpreted identically since their content is identical. The ECJ also recalled that, to ensure protection of the rights conferred by a trade mark, it is essential that its owner has the possibility to control the entry on the EEA market of all goods bearing that trade mark. The ECJ added that the exclusive rights afforded by these provisions must enable the owner of a trade mark to protect its specific interest and, in particular, ensure that the trade mark fulfils its functions, *i.e.*, that of guaranteeing the origin and quality of the product and those of investment and advertising.

In this respect, the ECJ observed that because the debranded Mitsubishi forklift trucks did not bear the Mitsubishi trade mark when entering the EEA market for the first time, Mitsubishi had been deprived of the benefit of its essential right to control the initial marketing in the EEA of its products.

The ECJ added that debranding and rebranding goods before their first entry on the EEA market affected the functions of the trade mark. First, such practices precluded Mitsubishi from being able to retain customers by virtue of the quality of its goods. Second, because the consumers will know the products before associating them with the relevant trade mark, these practices substantially hinder the trade mark owner's efforts to acquire a reputation and to use that trade mark to promote sales or as an instrument of commercial strategy. In addition, Mitsubishi had also been robbed of the possibility to obtain, by putting the goods on the EEA market first, the economic value of the product bearing that trade mark and, therefore, of its investment.

Finally, the ECJ clarified that, since the Mitsubishi forklift trucks had been debranded and rebranded with a view to importing them into the EEA market, this practice could qualify as a "use in the course of trade" pursuant to Article 5 of the Directive and Article 9 of the Regulation.

On this basis, the ECJ held that, by debranding and rebranding Mitsubishi's forklift trucks, Duma and GSI had infringed Mitsubishi's right to control the first entry on the EEA market of goods bearing its trade mark and adversely affected the functions of Mitsubishi's trade mark. The ECJ concluded that Mitsubishi was therefore entitled, as owner of the trade mark, to oppose such practices.

Lastly, the ECJ found that its ruling applied regardless of whether the goods could still be identified by relevant average consumers as originating from the trade mark owner on the basis of their outward appearance and model.

Court of Justice of European Union Holds that Unauthorised Re-posting of Protected Content Constitutes Copyright Infringement

On 7 August 2018, the Court of Justice of the European Union (the "ECJ") delivered its first copyright judgment of 2018. The ECJ held in case C-161/17, *Renckhoff*, that the unauthorised re-posting of a copyrighted work is an act of communication to the public under Article 3(1) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of specific aspects of copyright and related rights in the information society (the "InfoSoc Directive").

The case arose after a German photographer had brought an action against a school for the unauthorised use of copyright-protected material. The unauthorised use related to an image found online by one of the pupils. The pupil used the image for an assignment with a reference to the website from which the photograph had been downloaded ("the original website"). Since the original website did not mention the name of the photographer, the reference made by the pupil only referred to that website and not to the photographer. Once finalised, the assignment was uploaded on the school's website by the pupil and the teacher. The photographer claimed infringement of his copyright in the photograph since he had granted a license to use the photograph to the original website only.

Faced with the issue of the publication of the photograph by the school, the German Federal Court of Justice referred a preliminary question to the ECJ as regards the interpretation of Article 3(1) of the InfoSoc Directive. Article 3(1) of the InfoSoc Directive provides that EU Member States should grant authors the exclusive right to authorise or prohibit any communication of their work to the public.

The ECJ held that the reposting of protected content freely available with the consent of the right holder on a third-party website is a new act of communication to the public. Pursuant to well-established case law of the ECJ, the concept of "communication to the public" includes two cumulative criteria; (i) an "act of communication" of a work; and (ii) the communication of that work to a "public". In the case at hand, by posting the photograph on the school's website, the photograph was made available to a new public. Hence, the ECJ found that such posting should be treated as an "act of communication" within the meaning of Article 3(1) of the InfoSoc Directive.

According to the ECJ, holding otherwise would mean that a copyright holder would lose any control over his or her work once it has been made available online for the first time. In such a case, even if the copyright holder decided no longer to communicate his or her work on the original website, the photograph would remain available on the school's website. To hold that the posting on a website of a work that was previously communicated on another website with the consent of the copyright holder does not constitute making available to a new public would amount to applying an exhaustion rule to the right of communication. This would infringe Article 3(3) of the Infosoc Directive pursuant to which such a right is not exhausted by unauthorised acts of communication to the public or making available to the public. Such findings would also deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his or her work.

In its reasoning, the ECJ declared it irrelevant that the copyright holder had not limited the ways in which internet users could use the photograph published on the original website. Deciding otherwise would impose an undue burden on the exercise of the copyright by its holder.

The ECJ therefore concluded that the posting of the photograph on the school's website was an act of communication to a new public that required the consent of the author.

The ECJ added that the exception to both the reproduction and communication rights provided for by Article 5(3)(a) InfoSoc Directive when the work is used for the sole purpose of illustration for teaching or scientific research, did not apply to the case at hand. Indeed, the ECJ insisted that its findings were not based on whether the photograph used by the pupil was educational in nature, but on the fact that the posting of that work on the school website made it accessible to all the visitors to that website.

European Union Intellectual Property Office Analyses Protection of Trade Secrets across European Union

On 17 August 2018, the European Union Intellectual Property Office (the "EUIPO") published a 436-page report analysing the regulatory framework governing trade secrets as well as trade secrets litigation across the EU (the "Report"). The Report covers all 28 EU Member States and addresses how each jurisdiction dealt with the definition of trade secrets, the scope of protection, enforcement of trade secrets and cross border issues prior to the implementation of Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (the "Trade Secrets Directive") (*See, this Newsletter, Volume 2016, No. 5, pp. 10 and 11 and No. 6, p. 19*). The Report was commissioned by the EUIPO as a preliminary assessment to prepare for its future analysis of the impact of the Trade Secrets Directive following its implementation.

To qualify as a trade secret under the Trade Secrets Directive, the following cumulative criteria must be satisfied: (i) the information is a secret; (ii) the information has a commercial value due to its secrecy; and (iii) the information has been subject to reasonable steps in order to be kept secret.

The Report reveals wide discrepancies across EU Member States in terms of procedure, enforcement and remedies in cases of misappropriation and disclosure of trade secrets. First, the Report finds that many jurisdictions lacked a precise definition of "trade secret". This, in turn, made it difficult for companies to ascertain whether the information and data which they hold qualifies as a trade secret. While Sweden was the only EU Member State to have a *sui generis* law on trade secrets (providing for a clear definition of trade secrets) and Portugal and Italy had a definition of trade secrets in their intellectual property laws, all other EU Member States, including Belgium, did not provide for such a definition. Most EU Member States instead had concepts akin to trade secrets embodied in a series of different legislative acts (unfair market practices, criminal law, tort law, etc.)

As regards Belgium in particular, the Report pinpoints its fragmented regulatory framework dealing with trade secrets prior to the implementation of the Trade Secrets Directive. After listing the various legislative acts providing for some type of protection against the misappropriation of knowhow and trade secrets (*e.g.*, Article VI.104 of the Code of Economic law, Article 1282 of the Civil Code, Article 308 of the Belgian Criminal Code, etc.), the Report invites Belgium to adopt a specific law on trade secrets. This invitation has now become redundant given that the Belgian law implementing the Trade Secret Directive has been adopted (*See, this Newsletter, Volume 2018, No. 8, p. 12*).

The Report adds that harmonisation was needed the most in the area of remedies mechanisms for aggrieved parties in case of misappropriation of trade secrets. While cease and desist orders against alleged infringers are available across the EU, they may not always be granted against third parties who acquired the trade secrets in good faith. Numerous national legislations indeed held that the need to protect the legitimate interest of third parties unaware of the secrecy of the information prevails over the interests of the proprietary rights. Even the method for calculation of economic damages varied substantially among the different EU Member States, as many did not have a specific criterion in this respect. Instead, most EU Member States adhered to the general rule of extra-contractual liability with regards to damages and loss of profits.

Finally, the Report acknowledges that ordinary proceedings last too long to achieve the trade secret holders' main goal of maintaining the economic value of trade secrets and the concomitant needs to avoid continued misappropriation or disclosure. Yet, the Report did not identify a high number of cases where cease-and-desist/interim injunctions were actually issued by courts. The Report indicates that the main reason is probably that companies are reluctant to disclose litigation resulting from a misappropriation of trade secrets. Such a disclosure could erode trust as the company would be seen as unable to protect sensitive and economically valuable data. To avoid such damage to their reputation, companies therefore generally prefer dealing with trade secrets misappropriation in extrajudicial settlements.

Implementation of Trade Secrets Directive in Belgian Law

On 30 July 2018, the Belgian law transposing the Trade Secrets Directive was adopted (*Wet betre ende de bescherming van bedrijfsgeheimen/Loi relative à la protection des secrets d'a aires*). No significant change was made to the Draft Bill which had been approved by the Belgian Council of Ministers earlier this year (*See, this Newsletter, Volume 2018, No. 1, p. 12*). The law entered into force on 24 August 2018.

LABOUR LAW

Adoption of Collective Bargaining Agreement No. 108/2 Introducing New Rules regarding Successive Daily Contracts for Temporary Work

Background and Previous Regulatory Framework

Under specific conditions, companies may use successive daily contracts for temporary work. This concerns employment contracts for temporary work with a duration of no more than 24 hours that are concluded on a successive basis, implying that they immediately follow each other or are separated at most by a public holiday or by the usual days of inactivity within the company.

The applicable terms and conditions were contained in collective bargaining agreement No. 108 of 16 July 2013 concerning temporary employment and temporary work of the National Labour Council.

New Regulatory Framework

For the purpose of reducing the number of successive daily contracts and their improper use, the National Labour Council adopted on 24 July 2018 collective bargaining agreement No. 108/2 ("CBA No. 108/2") in which the conditions for the use of successive daily contracts were changed. CBA No. 108/2 will enter into force on 1 October 2018.

Successive daily contracts for temporary work will only be available if the user, *i.e.*, the company that uses the temporary worker from the temporary staffing agency, demonstrates a need for flexibility, when the volume of work (i) depends on external factors; (ii) very much fluctuates; or (iii) is linked to the specific nature of the assignment.

In addition, a specific information and consultation procedure regarding the use of successive daily contracts should be respected in the Works Council or the trade union delegation.

In this respect, the following information should be provided at the beginning of each semester:

- detailed information regarding the number of successive daily contracts in the previous semester and the number of temporary workers employed on the basis of successive daily contracts;
- proof and supporting documents of the "need for flexibility"; and
- if expressly requested by the employees' representatives, information regarding the number of temporary workers per tranche of successive daily contracts.

In addition, the Works Council or trade union delegation should be consulted annually (coinciding with one of the two semestrial information meetings) about the use of successive daily contracts for temporary work and the justification grounds for continuing using such successive day contracts.

Considering that CBA No. 108/2 will enter into force on 1 October 2018, the first (renewed) information meeting with the Works Council or trade union delegation should take place at the start of the first semester in 2019 and should assess the use of successive daily contracts during the second semester in 2018.

Court of Justice of European Union Held that Belgium Violates Applicable European Legislation by Having Possibility to Put Aside Unilaterally Fraudulently Acquired A1 Social Security Certificate

The Court of Justice of the European Union ("ECJ") held on 11 July 2018 that Belgium, by giving the judge, the National Social Security Office ("NSSO") and the Social Inspectorate the possibility to put a fraudulently acquired A1 social security certificate aside in the event they consider there is abuse or fraud, violates European law and the principle of sincere cooperation between EU Member States.

Regulatory Framework

The Belgian Programme Law of 27 December 2012 ("Programme Law") provides for the possibility for the courts, the NSSO and the Social Inspectorate to subject unilaterally an employee or self-employed person to the Belgian social security legislation in the event of abuse or fraud. This possibility also applies if another EU Member State has already issued an A1 certificate for the individual concerned, thus certifying that this individual is subject to social security in that Member State.

Regulation No. 883/2004 of 29 April 2004 on the coordination of social security systems, Regulation No. 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation No. 883/2004 and applicable administrative decisions of the European Parliament and Council set forth (i) the specific rules that should be complied with for the determination of the applicable social security regime and the issuance of an A1 certificate in case of a cross-border European employment; and (ii) the dialogue procedure that should be respected between the EU Member States concerned in case of conflicts regarding the validity of issued A1 certificates.

Nevertheless, the unilateral submission to Belgian social security as provided for by the Programme Law came into force without regard to these rules. It was sufficient for the Belgian authority concerned to invoke a violation of the European rules with the aim of evading the Belgian social security legislation.

Merits of Case

The ECJ held that national regulations which make it possible to undermine the binding power of an A1 certificate by unilaterally subjecting an individual to the Belgian social security regime without respecting the applicable European dialogue procedure, are not compatible with applicable European law and the principle of sincere cooperation between EU Member States.

LITIGATION

Cross-Border Debt Recovery: Parliament Implements European Account Preservation Order Procedure

On 7 June 2018, the Chamber of Representatives adopted the Law to promote alternative dispute resolution mechanisms (the "Law") (*Wet houdende diverse bepalingen inzake burgerlijk recht en houdende wijziging van het Gerechtelijk Wetboek met het oog op de bevordering van alternatieve vormen van geschillenoplossing/Loi portant dispositions diverses en matière de droit civil et portant modification du Code judiciaire en vue de promouvoir des formes alternatives de resolution des litiges*) (*See, this Newsletter, Volume 2018, No. 6, p. 20*). In addition to promoting alternative dispute resolution mechanisms, the Law also implements and completes European Regulation 655/2014 of 15 May 2014 (the "Regulation") establishing a European Account Preservation Order (the "EAPO") procedure to facilitate cross-border debt recovery in civil and commercial matters.

The Regulation allows creditors to preserve the amount owed in a debtor's bank accounts located in any participating EU Member State through a single application for an EAPO before a national court. However, in order to initiate such an EAPO procedure, the creditor should in principle be able to identify a debtor's bank account. If this is not possible (but if the creditor provides sufficient elements suggesting that the debtor owns a bank account in Belgium), the creditor may request the national court to obtain the necessary information (*See, this Newsletter, Volume 2017, No. 1, p. 6*).

The Law was adopted in order to implement this EAPO procedure. It provides for the following:

- Only the *beslagrechter/juge des saisies* has jurisdiction to issue an EAPO and impose other remedies provided for in the Regulation (such as the possibility to request additional financial information about the debtor's bank account). The Court of Appeal has jurisdiction to rule on appeals against those decisions.

- The Bailiffs' National Chamber is designated as the Belgian "information authority". The information authority can be requested by the *beslagrechter/juge des saisies* to supply the requisite information allowing the identification of a debtor's bank account (in the case where a creditor is not able to identify the bank account owned by his debtor). In order to obtain that information, the Bailiffs' National Chamber can request information from the "Central Point of Contact for Bank Accounts and Financial Contracts" established by the Belgian National Bank.

The Law also provides that this procedure will apply to purely domestic Belgian cases (*i.e.*, cases without any cross-border character).

The Law was published in the *Belgian Official Journal* on 2 July 2018 and entered into force on the same day. However, the rules regarding the possibility to avail oneself of the information sharing procedure in purely domestic cases will only enter into force on 1 January 2019.

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