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# VBB on Belgian Business Law

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## COMPETITION LAW

### ***Antwerp Enterprise Court Refers Request for Preliminary Ruling to Court of Justice of European Union in Excessive Pricing Case Against SABAM***

On 10 May 2019, the Antwerp Enterprise Court (*Onderneemingsrechtbank/Tribunal de l'entreprise* - the "Court") referred a request for a preliminary ruling to the Court of Justice of the European Union (the "ECJ") in two separate cases between Belgian festival organisers Weareone, World BVBA (the organisers of *Tomorrowland*) and Wecandance NV (the organisers of *Wecandance* - together the "festival organisers") and the Belgian Association of Authors, Composers and Publishers ("SABAM").

SABAM is a copyright management society that collects and distributes royalties for Belgian artists. This includes the collection of royalties from music festivals for the use of works from Belgian musicians in SABAM's portfolio.

The Court referred the request in two separate legal proceedings in which the festival organisers are disputing invoices for licence fees issued by SABAM, including the applied tariff-rate structure. The festival organisers claim that SABAM is abusing its dominant position on the market by charging excessive licence fees.

In order to address the arguments raised by the festival organisers, the Court referred the following two questions to the ECJ:

- Does the application of a remuneration model on organisers of musical events for the right to communicate musical works to the public, based among other things on turnover, which makes use of a flat-rate tariff in tranches, instead of a tariff that takes into account the precise share (making use of advanced technical tools) of the music repertoire protected by the management company played during the event, constitute an abuse of dominant position?

- Does the application of such a remuneration model which makes licence fees dependent on external elements such as, inter alia, the admission price, the price of refreshments, the artistic budget for the performers and the budget for other elements, such as decor, constitute an abuse of dominant position?

The referral by the Court constitutes the latest development in a history of disputes between Weareone, World BVBA and SABAM concerning excessive invoices. In recent years, SABAM itself has frequently been involved in legal disputes in which its collection of royalties is the subject of allegations of abuse of a dominant position.

## CONSUMER LAW

### *Dyson Found Guilty of Defamation and Unlawful Comparative Advertising*

On 26 June 2019, the President of the Antwerp Enterprise Court (*Ondernemingsrechtbank/Tribunal de l'entreprise* - the "Court") ordered Dyson Ltd and Dyson B.V. (collectively "Dyson") to cease and desist from (i) defaming BSH Home Appliances NV ("BSH") in violation of Article VI.104 of the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique* - "CEL"), *i.e.*, the prohibition on acts contrary to fair market practices by which a company harms or may harm the professional interests of at least one other company; and (ii) disparaging BSH's products and brands by resorting to unlawful comparative advertising within the meaning of Article VI.17 CEL (President of the Antwerp Enterprise Court, judgment of 26 June 2019 in case A/15/11078, *Dyson Ltd and Dyson BV v. BSH Home Appliances NV*).

Dyson and BSH both produce vacuum cleaners. While Dyson's vacuum cleaners operate without dust bags, the vacuum cleaners of BSH come with dust bags. Vacuums with dust bags lose suction as the bag fills with dust. Therefore, the cleaner's motor has to develop a higher power output to maintain the same suction power.

The proceedings before the Court had started on 20 October 2015 with Dyson seeking a cease-and-desist order against BSH. Dyson claimed, amongst others, that (i) BSH was misleading consumers by failing to mention that the energy performance tests of its vacuum cleaners were carried out with an empty dust bag; and (ii) several labels affixed to BSH's vacuum cleaners, other than the energy label, contained incorrect information about the vacuum cleaners' cleaning performance and energy efficiency.

At the time of initiation of the proceedings, Dyson had also sent a press release to several media agencies in which it accused BSH of engaging in unfair market practices by failing to specify that the energy performance tests of its vacuum cleaners were carried out with an empty dust bag. Furthermore, Dyson compared BSH's practices with the Volkswagen emissions scandal. Several media agencies published articles based on this press release.

Dyson's above assertions and claims caused BSH to bring two counterclaims against Dyson, accusing Dyson of acts of defamation and unlawful comparative advertising.

Following hearings on 4 May 2016 and 22 June 2016, the Court filed a request for a preliminary ruling with the Court of Justice of the European Union (the "ECJ") to learn whether BSH's practices were compatible with the prohibition on misleading omissions under Article 7 of Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the "UCPD"). The ECJ was asked to clarify whether (i) strict compliance with (now repealed) 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") can be regarded as a misleading omission within the meaning of Article 7 UCPD; and (ii) the Delegated Regulation precludes companies from supplementing the energy label with other symbols that convey the same information.

The (now repealed) Directive 2010/30 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 (the "Energy Labelling Directive") required energy-related products brought to the European Union market to include an energy label informing customers of the energy efficiency and energy consumption of such products. The Delegated Regulation specifically described the content and design of such labels for vacuum cleaners and provided that the measurement methods for energy efficiency and consumption should be based on tests carried out with empty vacuum cleaner receptacles. In 2013, Dyson had filed an application with the General Court (the "GC") to obtain the annulment of the Delegated Regulation. According to Dyson, the Delegated Regulation placed bagless vacuum cleaners (such as Dyson's vacuum cleaners) at a disadvantage. In its view, tests which only consider the energy consumption of empty receptacles do not take into account the decline in energy performance suffered by bagged vacuum cleaners which become less efficient "with use".

The ECJ delivered its preliminary ruling on 25 July 2018, *i.e.*, before the GC had been able to rule on Dyson's application for the annulment of the Delegated Regulation. The ECJ held that compliance with the Delegated Regulation *cannot* be regarded as a misleading omission within the meaning of Article 7 UCPD. Furthermore, it held that the Delegated Regulation prohibits the display of labels or symbols recalling the information contained in the vacuum cleaner's energy label, if such display is likely to mislead or confuse end-users with respect to the vacuum cleaner's energy consumption during its use (*See, this Newsletter, Volume 2018, No. 8, p. 5*).

A few months later, on 8 November 2018, the GC annulled the Delegated Regulation (*See, this Newsletter, Volume 2018, No. 11, p. 6*). As a consequence, it was no longer possible to rely on that Regulation to object to other information obligations pursuant to EU consumer law, including Article 7 UCPD.

As a result, Dyson withdrew some of its initial actions and brought new actions in the proceedings before the Court. Dyson now also criticised BSH for continuing to refer to the Delegated Regulation, the vacuum cleaner energy label and the vacuum cleaner categories, thereby misleading consumers.

However, the Court held that Dyson's initial actions had become moot and that its new actions were inadmissible.

The Court then turned to BSH's counterclaims and found them to be meritorious. Pursuant to Article VI.104 CEL, the Court took issue with the link which Dyson made with the Volkswagen emissions scandal, and in particular with the fact that Dyson did so at a time when there was great public attention for that case. According to the Court, "*Dyson insinuated that BSH would develop its products in such a way that they would pass the tests easily, but not in such a way that they would yield the best return for the consumer*". The Court held that this attack on the reputation of BSH's integrity and products qualified as defamation within the meaning of Article VI.104 CEL.

Furthermore, the Court held that a newspaper article can in some circumstances qualify as comparative advertising. That is the case when a company approaches the press and the press subsequently publishes an article that reflects the statements made by the company. More-

over, the Court found Dyson's insinuation to be disparaging BSH's goods and brands, and thereby harming BSH's reputation. As a result, it concluded that this conduct qualified as unlawful comparative advertising and ordered Dyson to cease and desist from the infringement on pain of a penalty of EUR 25,000 per infringement.

## DATA PROTECTION

### *Court of Justice of European Union Clarifies Scope of Joint Controllers in Facebook “Like” Button Case*

On 29 July 2019 the Court of Justice of the European Union (“ECJ”) ruled on a preliminary question referred to it by the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) on the interpretation of Articles 2, 7, 10 and 22 to 24 of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (“Data Protection Directive”).

The request for a preliminary ruling had been made in proceedings between Fashion ID GmbH & Co. KG (“Fashion ID”), a German online clothing retailer, and Verbraucherzentrale NRW, a German public service association tasked with safeguarding the interests of consumers. Fashion ID embedded on its website a social plugin in the form of the ‘Like’ button provided by Facebook Ireland Ltd (“Facebook”). With this ‘Like’ button, personal data of visitors of the Fashion ID website were transmitted to Facebook, allowing it to build detailed profiles. Visitors were not informed of this processing of their personal data. Moreover, the information would be transferred regardless of whether the visitors actually clicked the ‘Like’ button and regardless of whether the visitors would even be registered Facebook users. Verbraucherzentrale NRW filed a complaint against Fashion ID for the breaching of the data protection rules.

First, the ECJ examined whether the Data Protection Directive precludes consumer-protection associations from bringing or defending legal proceedings against a person allegedly responsible for an infringement of the protection of personal data. Contrary to the GDPR, the Data Protection Directive does not explicitly provide for the possibility for public service associations to become involved in legal proceedings in the interest of a data subject whose rights have allegedly been infringed.

The ECJ determined that the Data Protection Directive does not preclude consumer-protection associations from bringing or defending legal proceedings against a person allegedly responsible for an infringement of the protection of personal data. The ECJ noted that the explicit provision

providing for this possibility in the GDPR does not mean that the Data Protection Directive does not grant a similar right. On the contrary, the ECJ stated that this only confirms the interpretation of the Data Protection Directive and reflects the will of the legislator.

Second, the ECJ considered whether Fashion ID should be viewed as a controller within the meaning of Article 2 (d) of the Data Protection Directive. Fashion ID asserted in its defence that it could not be considered to be a controller within the meaning of Article 2 (d) of the Data Protection Directive because it had no influence over the data transmitted from its website by the visitor’s browser to Facebook, nor did it have any knowledge of how the data was used by Facebook.

The ECJ’s response was twofold. On the one hand, it established that several operators can jointly be considered as controllers when they determine the purposes and means of the processing of the personal data together. Second, it established that in such cases the joint controllership would only apply to those operations for which the entities jointly determine the purposes and means. Thus, in relation to Fashion ID, the ECJ held that it could indeed be regarded as a controller jointly with Facebook, but only in respect of the operations for which these parties determined the purposes and means together. Therefore, Fashion ID could only be held responsible as a controller to the extent that it collected and disclosed personal data and then disclosed the same personal data to Facebook. By contrast, Fashion ID could not be considered responsible for any subsequent operations involving the processing of data carried out by Facebook after the transmission of the data.

Finally, the ECJ examined whether consent, required under Article 7 (a) and 2 (h) of the Data Protection Directive, has to be given to Fashion ID (the operator of the website) or to Facebook (the provider of the social plugins). It also considered whether the duty to inform, required under Article 10 of the Data Protection Directive, is incumbent on Fashion ID (the operator of the website) or on Facebook (the provider of the social plugin).



The ECJ held that the operator of a website such as Fashion ID, as a (joint) controller in respect of the collection of the personal data of its website visitors and their transmission to Facebook, must obtain, at the time of their collection, the consent of its website visitors. It is also Fashion ID's responsibility to provide the required information to its website visitors. The ECJ added that the requirement to obtain consent and the duty to inform are solely necessary in respect of operations for which the (joint) controller (*i.e.*, Fashion ID) has actually determined the purposes and means, namely the collection and transmission of the personal data.

Although this judgment was given after the repeal of the Data Protection Directive by Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("GDPR"), the interpretation given by the ECJ will remain relevant under the GDPR.

#### ***European Court of Human Rights Holds that Right to Privacy is Not Breached When Employer Uses Private Communications in Relation to Dismissal***

On 6 June 2019, the European Court of Human Rights (the "ECHR") delivered a judgment on the application of Article 8 of the European Convention on Human Rights ("the Convention") to an employment relationship. The applicant, George Garamukanwa, complained that his employer, the National Health Service Trust ("the Trust"), had relied on telephone, personal e-mail and Whatsapp materials to dismiss him from employment and that this reliance constituted a breach of his right to privacy within the meaning of Article 8 of the Convention.

During the applicant's employment at the Trust, he had a relationship with a fellow member of staff, L.M. After this relationship had ended, the applicant had suggested in an email to a colleague that L.M had a relationship with another member of staff, D.S.. The applicant also sent emails to L.M and D.S in this regard. L.M and D.S thus appeared to be victims of stalking and harassment which resulted in a police investigation. The Trust suspended the applicant when it was made aware of the police investigation.

During their investigation, the police found evidence on the applicant's phone suggesting that the applicant had effectively harassed L.M. When the police shared this evidence with the Trust, the latter carried out its own investigation and scheduled a disciplinary hearing. During this hearing, the applicant voluntarily shared personal email and Whatsapp correspondence between him and L.M.. The Trust dismissed the applicant on the basis of gross misconduct, referring to various telephone materials, personal emails and Whatsapp messages which the applicant had sent to L.M.. The Employment Tribunal, Employment Appeal Tribunal and Court of Appeal subsequently dismissed the applicant's successive appeals.

The ECHR examined whether the applicant could be considered to have had a reasonable expectation of privacy in relation to the materials relied upon by the disciplinary panel to dismiss him. The ECHR noted that it does not consider that an email which relates to both professional and private matters or which has been sent from a workplace email address would automatically fall outside the scope of the applicant's private life for the purposes of Article 8 of the Convention.

However, in the case at hand, the ECHR noted that the applicant did not have a reasonable expectation of privacy in respect of the telephone materials and private communications relied upon by the Trust for a number of reasons. First, the applicant had sufficient prior notice that allegations of harassment has been made against him and could not have reasonably expected that any materials or communications post-dating these allegations and which were linked to the allegations would remain private. Second, the applicant did not seek to challenge the use of the telephone materials or private communications during the course of the disciplinary hearing and instead voluntarily provided further private communications. Accordingly, the ECHR held that the applicant's complaint was inadmissible.

## INTELLECTUAL PROPERTY

### ***Ghent Court of Appeal Allows Descriptive Use of "SPA" for Cosmetic Products***

On 3 June 2019, the Court of Appeal of Ghent (*Hof van Beroep/Cour d'appel*) (the "Court of Appeal") held that the "descriptive" use of the term "SPA" on packaging of cosmetics is acceptable, even if the term "SPA" is included in the sign under which the products are branded.

Spa Monopole holds an exclusive concession to exploit the local natural water resources and thermal baths in the municipality of Spa in Liège. It (i) produces and distributes the mineral water known as 'Spa', (ii) runs 'Les thermes de Spa' and (iii) associates the name 'Spa' with cosmetics and personal care products for which it has granted a licence to, among others, the cosmetic brand Yves Rocher. Spa Monopole is owner of the Benelux mark 'Spa' registered in class 3, which includes cosmetics, and in class 32 for mineral waters.

In 2015, Kruidvat, a drugstore chain operating throughout the Benelux, introduced a new range of cosmetic products under the signs "spa secrets", "sense of spa" and "Kruidvat natures aroma zoutscrub spa". Kruidvat also filed a combined trade mark which features the designation "spa secrets".

Spa Monopole objected to the trade mark application, in response to which Kruidvat summoned Spa Monopole before the Enterprise Court of Ghent to obtain a declaratory judgment confirming that the signs which it is using do not infringe the trade mark rights of Spa Monopole. At first instance, Kruidvat's action was dismissed, Kruidvat was found to infringe Spa Monopole's rights and Kruidvat was also ordered to cease the sale of offending products.

The Court of Appeal reversed the decision of the lower court and held that such use serves to designate a characteristic of the product, falling under the limitation of the effects of an exclusive right of Article 2.23 of the Benelux Convention on Intellectual Property ("BCIP"). According to Article 2.23.1.b of the BCIP, a trade mark "*shall not entitle the proprietor to prohibit a third party from using, in the course of trade: [...] signs or indications which are not distinctive or which concern the kind, quality, quantity, intended purpose,*

*value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services*".

Assuming that 'Spa' is used in relation to body care products and that this has to be understood as relating to a spa and a feeling of well-being, the Court of Appeal was of the opinion that the term 'Spa' has a generic or descriptive character. The Court of Appeal reasoned that, particularly in combination with personal care products and used in combination with other signs such as "secrets" or "sense of", the average Benelux consumer will perceive 'Spa' as referring to the place where the products in question can be used (*i.e.*, in a spa) or to a function and thus a characteristic of the product in question. The Court of Appeal added that, in the perception of the target group concerned, the word 'Spa' featuring on body care products will allude to that feeling of well-being but will not be perceived as referring to an unequivocal commercial origin such as the mineral water of Spa.

Previously, EU courts have always held that Benelux consumers would perceive the sign 'Spa' on cosmetics as referring to mineral waters and therefore likely to cause confusion with Spa Monopole's earlier rights in the Benelux (*See, for example, judgment of the General Court in the "SPA Village" case (Case T-625/15), this Newsletter, Volume 2016, No. 12, p. 13*).

### ***Brussels Court Refuses to Suspend Civil Proceedings after Converse Was Judged to Have Waited Unreasonably Long to Bring Criminal Action***

On 16 July 2019, the Dutch-language Brussels Enterprise Court (*Ondernemingsrechtbank/Tribunal de l'entreprise*) (the "Court") rejected a trade mark action brought by Converse. The Court refused to suspend the civil proceedings until a judgment in the parallel criminal proceedings has been delivered.

Converse, the US sneaker company, had brought various actions to protect its trade marks in the Netherlands and



Belgium. In the present case, it claimed that the Carrefour retailer had infringed its trade mark by selling Converse shoes without the permission of the trade mark holder.

The facts date from 2009, but in March 2018, after nearly 10 years of civil proceedings, Converse also filed a criminal complaint against Carrefour in which it accused Carrefour of having falsified exhibits in the civil proceedings to demonstrate the exhaustion of Converse's trade mark rights. Converse therefore requested the suspension of the civil proceedings, pending a final decision on the criminal complaint on the basis of Article 4 of the preliminary title of the Code on Criminal Procedure (*Wetboek Strafvordering/Code de procédure pénale*).

The Court rejected the suspension request. This is because Converse had been aware of the existence of the contested exhibits for a long time and Converse was therefore considered to have waited unreasonably long before filing the criminal complaint.

In addition to filing the criminal complaint, Converse also argued in the civil proceedings that specific exhibits of Carrefour had been falsified. The Court qualified this claim as an abuse of process since Converse had put forward this argument for the first time in its sixth brief (in 2017), while the relevant exhibits had been part of the litigation file since early in the proceedings.

As regards the trade mark infringement, Converse argued that the products sold by Carrefour infringed Article 2.20.1.a of the Benelux Convention on Intellectual Property ("BCIP"), *i.e.*, identical goods were sold with identical signs without the consent of the trade mark holder. However, in line with earlier interim decisions, the Court held that Converse bears the burden of proof of the alleged counterfeiting. According to the Court, unilateral statements made by staff, as provided by Converse itself and not based on verifiable objective elements, do not amount to evidence of the requisite quality. As a result, the Court also dismissed as unfounded Converse's claim for counterfeiting.

Finally, the Court held that Converse did not demonstrate that it had initially marketed the disputed shoes outside the EEA. Only if the trade mark proprietor can prove this, the alleged infringer has the burden of proving that the conditions of exhaustion are satisfied (*See, Case C-244/00, Van Doren + Q, ECLI:EU:C:2003:204*).

### **Brussels Court: Amazon Made Illegal Use of Louboutin's Well-Known Red Sole Trade Mark**

On 7 August 2019, the French-language Brussels Enterprise Court (*Ondernemingsrechtbank/Tribunal de l'entreprise*) (the "Court") ordered various companies of the Amazon Group (namely Amazon Europe Core sarl, Amazon EU sarl, and Amazon Services Europe sarl, together "Amazon") to stop using the Christian Louboutin "red sole high heels" trade mark in the advertising and sale of products.

Christian Louboutin sought an injunction against Amazon for the use of its well-known position trade mark (*i.e.*, a trade mark that describes the specific way in which the mark is placed or affixed to the product) consisting of a red sole on high heel shoes. In particular, the claim covered three different situations in relation to the advertising and sale of red soled high heel shoes on the Amazon platform: (i) the situation where such products were sold and dispatched directly by Amazon in the online shop "Amazon Mode"; (ii) the dispatching by Amazon of such products that were sold by third parties on its platform; and (iii) the promotion by Amazon as "sponsored products" of such products that were sold and dispatched by third parties.

Regarding the advertising of the product, the Court held that the use on the Amazon websites (*amazon.fr* and *amazon.de*) of high heel shoes with a red sole without the consent of Christian Louboutin violates the rights of the trade mark holder under Article 2.20 e, al. 3 of the Benelux Convention on Intellectual Property ("BCIP"). According to the Court, it was clear that the commercial messages included in Louboutin's file, even if they related to products sold by third parties, could be regarded as advertisements for Amazon's own products and services. The Court considered that such commercial messages, including advertisements on newspaper websites, used Amazon's trade marks and some of the messages identified Amazon as the author of the message (using terms as "we" or "us" to refer to Amazon).

The Court rejected the argument of Amazon pursuant to which Amazon only provides a service of hosting content and must thus be regarded an intermediate service provider that is not liable for the content placed on the platform by third parties. Even in the cases where the advertised goods are the property of independent third party sellers using the Amazon platform, the Court held that

Amazon is still actively advertising these products and can therefore be held liable for these actions.

However, in the cases where Amazon was only responsible for the dispatching and delivery of counterfeit products, the Court rejected the claims of Christian Louboutin, deciding that the claimant failed to bring sufficient proof that such activities were in effect provided by Amazon.

The Court prohibited Amazon from advertising signs identical to the "red sole" trade mark for high heel shoes that are placed on the market without the consent of Christian Louboutin under penalty of periodic penalty payment of EUR 50,000 per day with a maximum of EUR 50 million.

## LABOUR LAW

### ***Brussels Labour Court of Appeal Reminds Employers of Risk of Criminal Prosecution when Relying on Optimisation Measures when Paying Out Salary Components***

In a judgment dated 13 March 2018, which was only published recently, the Brussels Labour Court of Appeal held that an employer which allows the payment of the end of year premium (13th month) in the form of a lump sum as reimbursement of costs could be subject to criminal sanctions, as such behaviour could be qualified as an evasion of social security contributions.

#### *Judgment of Brussels Labour Court of Appeal and Brief Background of Case*

An employee entered into service on 1 October 2008. Pursuant to his employment agreement he was entitled to a lump sum of EUR 200 for the reimbursement of costs on top of his gross monthly salary of EUR 2,000. Such a lump sum cost reimbursement is not subject to social security contributions, provided that it is granted as a reimbursement of costs which the employee is assumed to incur in the framework of the performance of his employment agreement. The employee's employment agreement was terminated on 26 September 2012 with the observance of a three months' notice period.

The employee disputed his dismissal before the Brussels Labour Court where he claimed the payment of an end of year premium (13th month) for the period from 2009 to 2012 (the "End of Year Premium"), as provided for by the Collective Bargaining Agreement applicable within the Joint Committee to which his employer belonged (the "CBA"). The Brussels Labour Court confirmed that the employee was entitled to the End of Year Premium.

The employer challenged that decision and claimed that the End of Year Premium had already been paid out, as it was part of (i) the gross monthly salary and/or (ii) the lump sum cost reimbursement as provided for in the employment agreement.

On 13 March 2018, the Brussels Labour Court of Appeal rejected both grounds of appeal and therefore confirmed the previous judgment of the Brussels Labour Court.

First, the Brussels Labour Court of Appeal underlined that the CBA does not allow to pay out the End of Year Premium in monthly instalments together with the gross monthly salary.

Hence, the employer cannot validly claim that parties agreed to the opposite. Such an agreement would be regarded as null and void since it would be in conflict with a CBA which prevails over an individual agreement in the hierarchy of legal instruments.

Second, the Brussels Labour Court of Appeal held that the employer actually confessed to social fraud, namely the evasion of social security contributions. This is because the employer claimed that the End of Year Premium had been paid out in the form of a lump sum compensation of costs. In other words, the employer acknowledged that the cost reimbursements in the form of monthly lump sums were actually part of the employee's regular salary and should have been subject to social security contributions.

#### *Social Fraud*

The Brussels Labour Court of Appeal reminded that the End of Year Premium is subject to regular social security contributions, while a lump sum cost reimbursement is, subject to conditions, exempted from such contributions.

Hence, the payment of the End of Year Premium in the form of a net cost reimbursement infringes the Law of 27 June 1969 on the social security of employees, as it constitutes an evasion of social security contributions. It also qualifies as a criminal offence subject to criminal sanctions.

Pursuant to section 29 of the Code of Criminal Procedure, any public authority (including a Labour Court) that becomes aware of a criminal offence in the course of its duties must report it to the Prosecutor General. However, the Brussels Labour Court of Appeal did not report the alleged facts and simply decided to ignore the employer's position that the End of Year Premium had been paid out in the form of a net cost reimbursement.

*Practical Implications*

The judgment shows the risks for an employer if he agrees with an employee to evade the payment of social security contributions through the granting of a lump sum cost reimbursement.

First, the employer will never be able to enforce that agreement in court. Second, the employer runs the risk of criminal sanctions.

## LITIGATION

### *Court of Justice of European Union Rules on Jurisdiction in Private Damages Actions for Infringement of Competition Law in Absence of Contractual Link between Plaintiff and Participant to Cartel*

On 29 July 2019, the Court of Justice of the European Union (the "ECJ") handed down a judgment in which it held that a domestic court in an EU Member State has jurisdiction to rule on a follow-on competition damages claim even when no direct contractual link exists between the participant to a cartel and the victim.

The case concerned a civil action for damages initiated by Tibor-Trans Fuvarosó és Kereskedelmi Kft ("Tibor-Trans"), a freight transport company based in Hungary, against DAF Trucks NV ("DAF"), a trucks manufacturer headquartered in the Netherlands. The case was initiated before Hungarian courts by Tibor-Trans following the 2016 decision of the European Commission which found that, between 1997 and 2011, the international truck manufacturers, including DAF, had colluded on pricing and on the timing and the passing on of costs for the introduction of emission technologies (Case AT.39824 – *Trucks*).

Tibor-Trans brought its follow-on action for damages against DAF alleging that it had suffered financial harm as a result of the collusive arrangements between truck companies. Tibor-Trans said it had heavily invested in the purchase of new trucks between 2000 and 2008. In order to purchase those trucks, Tibor-Trans had secured financing from leasing companies which retained ownership of the vehicles until the expiry of the leasing agreements. The right of ownership only passed on to Tibor-Trans after performance of its obligations under the leasing agreements. Thus, although Tibor-Trans never purchased any DAF trucks, it claimed to be a direct victim of the anti-competitive infringement, considering that (i) the leasing companies only provided financing and completely passed on the overcharge to Tibor-Trans; and (ii) in Hungary, customers were only able to purchase trucks from independent dealers, and not directly from the original equipment manufacturers.

Tibor-Trans argued that Hungarian courts had jurisdiction to rule in that case. Tibor-Trans relied more particularly on Article 7(2) of Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the jurisdiction and enforcement of judgments in civil and commercial matters (the "Brussels Ibis Regulation") which provides that "[a] person domiciled in a Member State may be sued in another Member State: [...] in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".

Tibor-Trans also relied on the ECJ's case-law in which the ECJ interpreted Article 7(2) of the Brussels Ibis Regulation to mean that, in the case of an action for damages brought against defendants domiciled in different Member States as a result of a violation of competition rules, the victims of those competition law infringements were entitled to bring follow-on actions before the courts of the place where its own registered office was located (see Case C-352/13, *CDC Hydrogen Peroxide*).

DAF, on the other hand, disputed the jurisdiction of the Hungarian court, arguing that the German courts should have jurisdiction because (i) the collusive meetings took place in Germany; and (ii) neither DAF nor any other participants in the cartel had ever entered into a direct contractual relationship with Tibor-Trans, therefore DAF could not reasonably expect to face litigation in Hungary.

Uncertain as to the answer called for by this issue, the Hungarian court stayed the proceedings and referred the matter to the ECJ for a preliminary ruling.

In its judgment, the ECJ noted that the damages that can be recovered in follow-on competition law damages actions is not limited to the financial consequences suffered by the direct purchasers. Those damages also cover actions for reparation of harm caused by "additional costs



*incurred because of artificially high prices". According to the ECJ, such damage appears "to be the immediate consequence of an infringement pursuant to Article 101 TFEU and thus constitutes direct damage which, in principle, provides a basis for the jurisdiction of the courts of the Member State in which it occurred".*

Relying on its previous case-law in case C-27/71, *FlyLAL*, the ECJ then noted that, for the purpose of applying Article 7(2) of the Brussels *Ibis* Regulation to competition law infringements, the place where the damage occurred consists of the EU Member State on whose territory the alleged damage is purported to have occurred.

The ECJ therefore concluded that Article 7(2) of the Brussels *Ibis* Regulation must be interpreted, in the case at hand, "as meaning that, in an action for compensation for damage caused by [infringements of competition law] 'the place where the harmful event occurred' covers [...] the place where the market which is affected by that infringement is located, that is to say, the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel at issue with whom that victim had not established contractual relations".

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