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COMMERCIAL LAW

Supreme Court Holds that Formal Notice Letter Sent by Registered Mail without Acknowledgment of Receipt Does Not Interrupt Limitation Period

On 15 June 2020, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) held that a notice letter (*ingebrekestelling / mise en demeure*) can only interrupt (*stuiten / interrompre*) a limitation period (*verjaringstermijn / délai de prescription*) if it is sent by registered mail with acknowledgment of receipt (Supreme Court, 15 June 2020, *E.B. v. Legrand Group Belgium NV*, S.19.0055.N).

The case brought before the Supreme Court pitted E.B. (the ***claimant***) against Legrand Group Belgium NV (the ***defendant***). The claimant had sent a formal notice letter by registered mail to the registered office of the defendant and argued that this letter had interrupted the limitation period applying to her claim.

The Supreme Court disagreed and held that the effect of interruption of a formal notice is conditional upon satisfying the requirements laid down in Article 2244, §2 of the Civil Code. Accordingly, the notice letter must be accompanied by an acknowledgment of receipt. The Supreme Court clarified that a formal notice letter by registered mail without acknowledgement of receipt does not interrupt the limitation period, even if the letter reached its addressee.

Sending a formal notice letter by registered mail with acknowledgment of receipt starts a new, one-year, limitation period. However, the new limitation period triggered by the formal notice letter may not end before the expiry date of the initial limitation period. A notice letter within the meaning of Article 2244, §2 of the Civil Code can only interrupt the initial limitation period once, without prejudice to other grounds for interruption.

COMPETITION LAW

Entry into Force of Ban on Abuse of Economic Dependency

On 12 August 2020, the Belgian Official Journal (*Belgisch Staatsblad / Moniteur Belge*) published a Royal Decree of 31 July 2020 which incorporated the ban on abuse of economic dependency in the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* – the ***CEL***). It also determined that the date of entry into force of the ban would be 22 August 2020 (*Koninklijk Besluit van 31 juli 2020 tot wijziging van de boeken I en IV van het Wetboek van Economisch Recht met betrekking tot misbruiken van economische afhankelijkheid / Arrêté royal du 31 juillet 2020 modifiant les livres Ier et IV du Code de droit économique en ce qui concerne les abus de dépendance économique* – the ***Royal Decree***).

The Royal Decree was adopted following the delay of the entry into force of the ban on abuse of economic dependency earlier this year (*See, this Newsletter, Volume 2020, No. 5., p. 6*). The bill initially introducing the abuse of economic dependency as an additional competition law infringement was tabled almost five years ago, in November 2015 (*See, this Newsletter, Volume 2015, No. 11, p. 7*). Since then, it has been subject to important changes and only moved forward in March 2019 (*See, this Newsletter, Volume 2020, No. 5., p. 6*). The law was finally adopted on 4 April 2019 and published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) on 24 May 2019 (*See, this Newsletter, Volume 2019, No. 5, p. 4*).

The new ban prevents companies from abusing the economic dependency of other companies if competition on the Belgian market, or a substantial part thereof, is likely to be affected. The infringement is separate from the existing abuse of a dominant position, provided for in Article IV.2 CEL.

Situation of Economic Dependency

The existence of a situation of economic dependency is assessed based on two criteria: (i) the absence of a reasonable and equivalent alternative available within a reasonable time period and under reasonable conditions and costs, and (ii) the possibility for a company to impose terms and conditions that would not prevail in normal circumstances. Hence, it is only necessary to show that a business finds itself in a position of "relative" dominance (vis-à-vis certain companies) but not that it holds an "absolute" dominant position on the market, a requirement that applies to the regular prohibition of an abuse of dominant position.

A situation of economic dependency may result from various factors such as (i) the market power of the company, (ii) the significant share of the company in the turnover of the allegedly dependent company, (iii) the technology or know-how controlled by the company, (iv) the reputation of the brand, the scarcity or perishable nature of the product, or a loyal consumer buying behaviour, (v) access to essential resources or facilities, (vi) the fear of serious economic harm, retaliation or termination of a contractual relationship, (vii) the regular application of exceptional conditions (which are not granted to similar companies), and (viii) the deliberate choice to place itself in such a situation of economic dependency (or, conversely, the lack of choice to do so)

Abusive Conduct

A violation of the ban on abuse of economic dependency may be found if a company:

- refuses to sell, buy or apply other transactional conditions;
- directly or indirectly imposes unreasonable purchase or sales prices or other unreasonable contractual conditions;
- limits production, distribution or technical development;
- applies different conditions to equivalent services affecting the competitive position of the other party; or
- ties certain performances to the conclusion of agreements which are not connected according to their nature or market practices.

These are just examples and other practices may be deemed to fall within the scope of the prohibition.

The Belgian Competition Authority is responsible for investigating and prosecuting abuses of economic dependency. It will receive and handle complaints relating to this infringement and has the power to impose fines of up to 2% of the company's annual turnover on the Belgian market. In addition, the scope of institutional and procedural rules governing penalties in competition law enforcement is extended to abuses of economic dependency.

Belgium joined the ranks of a range of countries which already have rules in place governing abuse of economic dependency, such as France and Germany. It remains to be seen how the new legal concept will be applied in practice. In France, for instance, the ban on abuse of economic dependency has rarely been enforced.

Draft Parliamentary Resolution on Sustainable Price Reduction and Improved Monitoring of Supermarket Prices

On 14 July 2020, several Members of the Chamber of Representatives (*Kamer van Volkvertegenwoordigers / Chambre des représentants*) of the federal Parliament submitted a proposed resolution "on a sustainable price reduction and improved monitoring of supermarket prices" (*Voorstel van resolutie met het oog op een duurzame verlaging en een betere monitoring van de supermarktprijzen / Proposition de resolution relative à une reduction durable et à un meilleur prix dans les supermarchés*). The members of parliament maintain that supermarket prices in Belgium have increased during the COVID-19 pandemic. Prices are supposedly structurally higher in Belgium than in neighbouring countries due to the limited size of the Belgian market, the high level of taxes and "rigid" labour rules which "do not allow us to meet today's needs". In addition, the members of parliament point to a "lack of competition" in the Belgian retail market, stating that "[c]artelisation [...] has a very significant negative impact on our economy, with price increases of up to 10%".

The authors of the proposed resolution do not support the idea of imposing maximum prices (a proposal on price regulation which was recently considered and rejected – *See, this Newsletter, Volume 2020, No. 4, p. 4*, and *this Newsletter, Volume 2020, No. 5, p. 5*). By contrast, they want regulators to be "allowed to make recommendations and intervene where necessary". Moreover, they call for a merger of the "market regulators" in Belgium. Although the proposed resolution does not specify the entities at issue, it would seem to target at least the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) and the Pricing Observatory (*Prijzenobservatorium / Observatoire des prix*). The members of parliament also advocate a more flexible regulation of the retail market and suggest that the Pricing Observatory should use the OECD's "Product Market Regulation" (PMR) indicator to examine the possibility of relaxing and adapting the existing rules. Furthermore, they want the Pricing Observatory to monitor prices in supermarkets. Additionally, the members of parliament request that the BCA finalise and transmit its study on the functioning of the retail sector and to discuss its recommendations with the Chamber of Representatives. Lastly, the BCA should report annually to the Chamber of Representatives on market developments.

CORPORATE LAW

Supreme Court Clarifies Definition of Loan and Revolving Credits in View of Application of Statutory Limitation on Early Repayment Fee

On 27 April 2020 and 18 June 2020, the Supreme Court (*Hof van Cassatie / Cour de cassation* - the ***Court***) gave two judgments that clarify the definition of loan agreements and revolving credits in view of determining whether the statutory limitation on early repayment fees (*wederbeleggingsvergoeding/indemnité de remploi*) applies.

Background

Pursuant to Article 1907bis of the Civil Code (*Burgerlijk Wetboek / Code Civil*), an early repayment fee on a loan cannot exceed six months of interest on the outstanding principal amount. This limitation does not apply to revolving credits, regardless of the name given to the facility. The relevant criterion to distinguish a loan from a revolving credit is whether or not the borrower has the freedom to draw down money under the credit facility. There are currently two schools of thought regarding the extent of the freedom that is required to decide one way or the other.

Under the first approach, as soon as soon as the draw down freedom is limited (e.g. because there is a short draw down period; the facility may only be used for specific purposes; a cancellation fee is due if part of the sums is not drawn down; or the amount must be withdrawn at once and repaid according to a fixed schedule) the facility must be considered to be a loan agreement.

By contrast, under the second approach, the freedom to draw down money under the credit facility must not be absolute. Even if the right to draw down money is subject to specific terms agreed between the parties (e.g. as regards the period within which money must be drawn down), the facility still qualifies as a revolving credit. Only if there is no such freedom, the full amount has to be taken up at once when the loan agreement is entered into and in conjunction with the security to be provided, the credit facility will amount to a loan.

Banks in Belgium do not always apply the mandatory limitation principle and sometimes apply significant early repayment break fees or try to requalify loan agreements as revolving credits to avoid the application of the mandatory limitation.

Supreme Court Judgments

In two recent judgments, the Court gave guidance on when credit facilities are considered to be loan agreements or revolving credits.

The Court defined the terms "loan" and "revolving credit" in both judgments. According to the Court, a "loan agreement" is an agreement whereby the lender makes available an amount of money to the borrower subject to the obligation to repay this amount plus interest. Furthermore, the Court defined a "revolving credit" as a reciprocal agreement whereby the creditor makes available to the borrower either a specific amount or creditworthiness during a given period and up to a certain amount. The borrower may draw down certain sums under the revolving credit in one or multiple draw downs but the borrower is not obliged to draw down any sums under the facility.

Additionally, on 27 April 2020, the Court held that an agreement amounts to a revolving credit even if (i) compensation is due if the total amount under the credit facility is not drawn down; (ii) the purpose of the draw down must be demonstrated; and (iii) upon repayment, the sums can only be drawn down again with the consent of the lender. The Court added that the fact that an amortisation table with fixed periodic repayments as from the first month of the repayment term was agreed, does not affect the qualification of the facility as a revolving credit, as a new amortisation table would be agreed if the amount were not fully drawn down.

Lastly, on 18 June 2020, the Court ruled that the draw down of specific sums under a revolving credit cannot give rise to a loan agreement as this faculty is an essential aspect of the revolving facility.

DATA PROTECTION

Schrems II Case: European Data Protection Board Publishes Frequently Asked Questions on Transfers of Personal Data to US Following Invalidation of EU-US Privacy Shield

The European Data Protection Board (***EDPB***) published answers to frequently asked questions (***FAQs***) received by supervisory authorities following the judgment delivered by the Court of Justice of the European Union (***CJEU***) in the *Facebook Ireland and Schrems case* (C-311/18, ***Schrems II cas***e; our Note on this judgment is available here). The EDPB continues to assess the consequences of the *Schrems II* judgment and may complement its FAQs where necessary. Questions included in the FAQs relate to the implications of the *Schrems II* judgment on transfer tools other than the EU-US Privacy Shield; what to do with transfers of personal data to a US importer that rely on Standard Contractual Clauses (***SCCs***); and whether a company can continue to use SCCs or Binding Corporate Rules (***BCRs***) to transfer personal data to a third country other than the US.

Implications of Schrems II

The FAQs explain that the CJEU examined (i) the validity of Commission Decision 2010/87/EC on controller-to-processor SCCs and considered the decision (and thus the use of SCCs) to be valid; and (ii) the validity of Commission Decision 2016/1250 on the adequacy of the protection provided by the EU-US Privacy Shield and found this adequacy decision to be invalid.

The FAQs add that, according to the CJEU, the EU-US Privacy Shield 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. In this regard, the limitations of 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. Certain surveillance programmes enabling access to personal data transferred from the EU to the US by US public authorities for national security purposes are not limited to what is strictly necessary. There are no limitations on the power conferred on the US authorities nor guarantees for potentially targeted non-US persons. Moreover, data subjects are not granted judicial protection before the courts against US authorities.

According to the EDPB, the threshold set by the CJEU in *Schrems II* applies to all appropriate safeguards under Article 46 of the General Data Protection Regulation (Regulation 2016/679 – the ***GDPR***) that are used to transfer data from the EU (and the European Economic Area – ***EEA***) to any third country. The judgment thus has important implications on transfer tools other than the EU-US Privacy Shield, such as SCC or Binding Corporate Rules (***BCR***).

The EDPB indicates that there is no grace period during which the transfer of personal data to the US remains possible without an assessment of the legal basis for the transfer. The CJEU invalidated the EU-US Privacy Shield without maintaining its effects and the US law assessed by the CJEU does not provide for an essentially equivalent level of protection to the EU. These premises must be considered before any transfer of personal data from the EU to the US takes place.

Are Transfers of Personal Data to US Still Possible Following Invalidation of EU-US Privacy Shield?

The EDPB makes it clear that transfers of personal data to the US on the basis of the EU-US Privacy Shield are illegal. By contrast, the CJEU did not invalidate the SCCs. However, transfers on the basis of SCCs or on the basis of BCRs will have to be assessed on a case-by-case basis. In such an assessment, the circumstances of the transfer and possible supplementary measures to ensure appropriate safeguards will have to be considered. If there are no appropriate safeguards, the transfer of personal data must be suspended. If a company intends to keep transferring data despite this conclusion, it must notify the competent supervisory authority.

The EDPB will further assess the consequences of the *Schrems II* judgment to see whether transfer tools other than SCCs and BCRs foreseen by Article 46 of the GDPR could be relied upon.

The transfer of data from the EU to the US on the basis of the derogations provided for by Article 49 of the GDPR (such as explicit consent, "necessary for the performance of a contract" or "necessary for important reasons of public interest") remain possible provided the relevant conditions are satisfied. If transfers are based on the consent of the data subject, it should be (i) explicit; (ii) specific for the particular data transfer or set of transfers; and (iii) informed. Information must particularly be given in relation to the possible risks of the transfer. When transfers are necessary for the performance of a contract between the data subject and the controller, personal data may only be transferred when such a transfer is occasional. This derogation can only be relied upon if the transfer is objectively necessary for the performance of the contract.

Are Transfers of Personal Data To Third Countries Other Than US Still Possible?

In *Schrems II*, the CJEU considered that SCCs can be relied upon to transfer data to a third country, provided that the applicable legislation does not prevent the recipient from complying with its contractual obligations under the SCCs. This threshold set by the CJEU for transfers to the US applies to any transfer of data to other third countries. The same goes for BCRs. It is the responsibility of the data exporter and the data importer to assess whether the level of protection required by EU law is respected in the third country concerned in order to determine whether the guarantees provided for by the SCCs or the BCRs can function in practice.

If SCCs or BCRs are used to transfer data to third countries, supplementary measures can be introduced by the data exporter and the data importer. This will again require a case-by-case evaluation of all the circumstances of the transfer and of whether the law of the third country ensures an adequate level of protection. The EDPB is currently still analysing which kind of supplementary measures could be adopted and will provide further guidance on this matter.

Is Data Controller Responsible For Data Processor?

If a company relies on the services of a processor – for which it is responsible as a controller – the EDPB notes that the contract with the processor must be concluded in accordance with Article 28(3) of the GDPR. This means that the contract must provide whether or not transfers of personal data by the processor are authorised. The contract must also include a provision determining whether processors may entrust sub-processors with the transfer of personal data to third countries.

If a current contract with a processor indicates that data may be transferred to the US but there are no supplementary measures and no derogations under Article 49 GDPR are available, the only solution is to negotiate an amendment of the contract that prohibits transfers to the US. As a result, the data must not be stored or administered in the US. If the data may be transferred to another third country, a verification of whether the legislation of that third country satisfies the requirements of *Schrems II* is necessary.

The full FAQ of the EDPB can be found here.

EDPB Brexit Note for Organisations Relying on BCRs

On 22 July 2020, the European Data Protection Board (***EDPB***) adopted an information note on Brexit for organisations that currently rely on Binding Corporate Rules (***BCRs***) for international data transfers (the ***Note***). Under the current Brexit agreement, 31 December 2020 marks the end of the Brexit transition period and after that day the UK will become a third country from the perspective of the European Union (***EU***) and the European Economic Area (***EEA***).

Under the General Data Protection Regulation (Regulation 2016/679 – the ***GDPR***), transfers to third countries that have not been recognised as providing an adequate level of protection for personal data are prohibited. The EU is currently still assessing the UK's data protection regime and has not yet adopted an adequacy decision that would recognise that the UK has an appropriate level of data protection.

As a result, data transfers of personal data to the UK can only continue after the transition period if these data transfers comply with specific EU rules and safeguards relating

to the transfer of personal data to third countries. The use of BCRs is one tool set out in the GDPR to accomplish that objective. BCRs are defined in Article 4, (20) of the GDPR as "*personal data protection policies which are adhered to by a controller or processor established on the territory of a Member State for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings, or group of enterprises in a joint economic activity*". BCRs must include all essential principles and enforceable rights to ensure appropriate safeguards for transfers or categories of transfers of personal data. To be valid, BCRs must be approved by the competent supervisory authority under Article 47 of the GDPR.

However, since the supervisory authority in the UK (the Information Commissioner's Office (***ICO***)), will no longer be an EEA supervisory authority that can approve and oversee BCRs (***BCR Lead SA***) as of 1 January 2021, BCRs that were approved by ICO will have to be re-approved by a new EEA BCR Lead SA to remain valid. A new BCR Lead SA will have to be identified before the end of the implementation period.

The Note also contains a detailed checklist of elements that have to be amended and can be consulted here.

Organisations that review their BCR in the light of Brexit should also assess the consequences of the judgment given by the Court of Justice of the European Union in *Facebook Ireland and Schrems II* (C-311/18) (*See, this Newsletter, Volume 2020, No. 7, p. 8*). The EDPB is currently still assessing these consequences with regard to BCRs and the Note does not reflect these consequences.

LABOUR LAW

Covid-19 : Is Employer Authorised To Require Employee To Self-Isolate Upon Return From Risk Area?

An employer cannot prevent its employees from travelling to a Covid-19 risk area and cannot require employees to share their travel destination. However, if employees communicate travel information to their employer on a voluntary basis, the employer should act as follows:

The employee returns from a "green" area

The employer cannot oblige the employee to self-isolate and the employee can therefore return to work as normal.

The employee returns from an "orange" area

The employer cannot oblige the employee to self-isolate as quarantine is only recommended, not imposed, by the Federal Public Service Foreign Affairs (*Federale Overheidsdienst Buitenlandse Zaken / Service public fédéral Affaires étrangères*). Therefore, the employee can, but is not obliged to, self-isolate.

If the employee decides to self-isolate, he/she must inform his/her employer immediately and, if requested by the employer, provide a medical certificate or a quarantine certificate (*i.e.*, a medical certificate which only requires him/her to self-isolate without any confirmed Covid-19 test).

Current temporary rules provide that an employee who submits a quarantine certificate is entitled to temporary unemployment benefits due to Covid-19 force majeure (rather than guaranteed salary at the employer's expense) if no telework can be organised.

The employee returns from a "red" area

The employer can refuse access to the workplace for 14 days after the employee's return from a red area, as the Federal Public Service Foreign Affairs imposes self-isolation in this case.

The employee who is required to self-isolate must immediately inform his/her employer and, if requested by the employer, provide a medical certificate or a quarantine certificate.

In case of a quarantine certificate, temporary unemployment due to Covid-19 force majeure will apply (rather than guaranteed salary at the employer's expense) under the same conditions as upon the employee's return from an "orange" area unless the travel destination was already classified as a "red" area at the time of departure. In that case, the Federal Public Service Employment, Labour and Social Dialogue (*Federale Overheidsdienst Werkgelegenheid, Arbeid en Sociaal Overleg / Service public federal Emploi, Travail et Concertation sociale*) and the National Employment Office (*Rijksdienst voor Arbeidsvoorziening / Office National de l'Emploi*) consider that temporary unemployment due to Covid-19 force majeure cannot be invoked to suspend the employment contract during the self-isolation period imposed on the employee. This is because the employee is considered not to have acted prudently when travelling to a "red" area. The employee will therefore not be entitled to temporary unemployment benefits and if he/she is unable to perform his/her employment contract (for example, because telework is not possible) and/or to use holiday or compensatory rest days to cover the period of self-isolation, his/her employment contract will be suspended without pay.

LITIGATION

Court of Justice of European Union Finds that Public Authorities' Cease and Desist Orders Fall Within Brussels Ibis Regulation

On 16 July 2020, the Court of Justice of the European Union (***CJEU***) handed down a judgment (*CJEU, 16 July 2020, Case C-73/19, Belgische Staat v Movic and Others*) in which it held that a cease and desist action brought by a public authority against a private party, by which that authority was seeking an order finding and stopping an unfair commercial practice, formed part of the category of "civil and commercial matters". The action thus fell within the scope of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (***Brussels Ibis Regulation***).

The case involved legal proceedings brought by Belgian authorities before the Antwerp Commercial Court (the ***Commercial Court***) against three companies incorporated in the Netherlands (the ***Businesses***). The Businesses were active on the market for the sale and resale of tickets for events taking place in Belgium. The Belgian authorities sought a cease and desist order to stop the Businesses from reselling, via their website, event tickets in Belgium at a price higher than the original ticket price. According to the Belgian authorities, such commercial practices violate the Belgian Law of 30 July 2013 regarding the resale of event admission tickets (*Wet betreffende de verkoop van toegangsbewijzen tot evenementen/ Loi relative à la revente de titres d'accès à des événements*) (the ***Law of 30 July 2013***) and the Belgian Code of Economic Law (the ***CEL***).

The Businesses argued that, by seeking a cease and desist order, the Belgian authorities had been acting in the exercise of their public powers and that, as a result, this action fell outside the scope of Brussels Ibis Regulation. They relied on the fact that Article 1(1) of the Brussels Ibis Regulation limits its scope to civil and commercial matters and excludes issues relating to revenue, customs or administrative matters. Consequently, the Businesses contended that Belgian courts could therefore not rely on the Brussels Ibis Regulation to exercise jurisdiction over the case.

By contrast, the Belgian authorities argued that they were not defending any public interest of their own, but rather an even wider general interest, which consisted of promoting respect for the national regulation of commercial practices. These in turn sought to protect the private interests of both businesses and consumers. Consequently, they argued that the case fell within the scope of "civil and commercial matters" within the meaning of Article 1(1) of the Brussels Ibis Regulation and that the Belgian courts were thus entitled to rely on that Regulation to assert their jurisdiction.

The Commercial Court ruled in favour of the Businesses.

The Belgian authorities then appealed the judgment of the Commercial Court to the Antwerp Court of Appeal, which requested the CJEU to clarify whether cease and desist actions brought by public authorities constitute "civil and commercial matters" and thus fall within the scope of the Brussels Ibis Regulation.

In its judgment, the CJEU held that, pursuant to the Law of 30 July 2013 and the CEL, the Belgian authorities, similarly to consumer organisations, could obtain a cease and desist order from local courts in order to stop specific commercial behaviour. In addition, the CJEU found that, pursuant to the CEL, public authorities, in the same way as other categories of applicants, were not exempted from showing an interest in bringing proceedings. Finally, the CJEU noted that the Belgian authorities were acting in the general interest, on the basis of a power granted to them by the legislator with the aim to combat certain unfair commercial practices. Thus, they were not acting in the exercise of their public powers.

On this basis, the CJEU concluded that legal proceedings brought by the public authorities of a Member State against businesses established in another Member State and aimed at obtaining a cease and desist order to stop allegedly unfair commercial practices fall within the scope of the Brussels Ibis Regulation.

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