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September 2018

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Highlights

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Chambers Europe 2017

Topics covered in this issue

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BANKING & FINANCE

Updated Code of Conduct on Financing of Small and Medium-Sized Enterprises

Following the amendments to the law on the financing of small and medium-sized enterprises ("SMEs") in 2017 (*See, this Newsletter, Volume 2018, No. 1, p. 8*) (the "Law on SME Financing") an updated version of the Code of Conduct on the Financing of SMEs was published and given binding force on 27 August 2018 (the "Updated Code of Conduct") (Royal Decree of 17 August 2018 implementing Article 10, §1, second paragraph of the Law of 21 December 2013 on the financing of small and medium-sized enterprises (*Koninklijk Besluit houdende uitvoering van artikel 10, § 1, tweede lid, van de Wet van 21 december 2013 betreffende diverse bepalingen inzake de financiering voor kleine en middelgrote ondernemingen/Arrêté royal portant exécution de l'article 10, § 1er, alinéa 2, de la loi du 21 décembre 2013 relative à diverses dispositions concernant le financement des petites et moyennes entreprises*)).

The Law on SME Financing provides for specific protection for SMEs when these enter into credit agreements. It requires additional information to be supplied to SMEs; it prohibits specific clauses; and it limits prepayment indemnities. It applies to credit agreements entered into with SMEs registered in the European Economic Area provided that the lender (i) develops its commercial or professional activities in Belgium; or (ii) targets the Belgian market with such activities. The Updated Code of Conduct provides for additional rules and clarifications in relation to the Law on SME Financing.

The following are key novelties of the Updated Code of Conduct:

- A new website (Dutch/French) explains some of the information that must be provided to SMEs, including:

    1. the overview of government guarantees and similar measures; and

    2. an overview of securities and guarantees which credit institutions can require;

- The limitations applicable to prepayment indemnities are extended from credit facilities of EUR 1 million to credit facilities of EUR 2 million in line with the Law on SME Financing; and

- If a credit institution refuses a credit application, it must provide the applicant with a reasoned written answer.

CAPITAL MARKETS

Financial Services and Markets Authority to Issue Public Warnings about Suspected Infringements of Public Offering Rules

The Law containing miscellaneous provisions as regards Economy (*Wet van 30 juli 2018 houdende diverse bepalingen inzake Economie/Loi du 30 juillet 2018 portant dispositions diverses en matière d'Economie*) has amended the current Belgian public offering rules (*Law of 16 June 2006 on public offers of investment instruments and on the admission of investment instruments to trading on a regulated market*) (*Wet van 16 juni 2006 op de openbare aanbieding van beleggingsinstrumenten en de toelating van beleggingsinstrumenten tot de verhandeling op een gereglementeerde markt/Loi du 16 juin 2006 relative aux offres publiques d'instruments de placement et aux admissions d'instruments de placement à la négociation sur des marchés réglementés*) in order to allow the Belgian financial regulator, the Financial Services and Markets Authority ("FSMA"), to make a public announcement if it has reasonable grounds to believe that persons involved in an offer to the public, including an issuer, offeror, or an intermediary, failed to comply with applicable public offering rules.

This amendment results from an increase in the supply to the public of so-called "alternative investment products" in which FSMA observed breaches of public offering rules. Pursuant to this amendment, the FSMA will no longer have to wait until a breach is established, but will be able to communicate suspected breaches to the public as soon as it has reasonable grounds to suspect a breach in order to ensure a better level of protection for potential investors.

COMPETITION LAW

Belgian Competition Authority Publishes Draft Guidelines on Exchange of Information

On 12 September 2018, the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence* - the "BCA") published Draft Guidelines on the Exchange of Information on Markets and Prices (the "Draft Guidelines"). The BCA thus seeks to provide guidance to professional associations and other service providers as regards market information which they can exchange and tools which they can provide to their members and clients in order to assist them in their pricing considerations.

The Draft Guidelines include general comments on the applicable regulatory framework, as well as concrete examples and good practices. They offer guidance on (i) the exchange of periodic overviews of market data; (ii) price comparisons; (iii) the exchange of information on expected market developments; (iv) the availability of tools and applications for cost determination and price breakdowns; and (v) the exchange of information within distribution networks.

The Draft Guidelines are the subject of a public consultation for which the BCA welcomes comments until 14 November 2018. The Draft Guidelines are available in Dutch and in French.

Belgian Competition Authority Imposes Interim Measures on Producer of Electricity Meter Boxes

On 3 September 2018, the Competition College (*Mededingingscollege/Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence* - the "BCA") imposed interim measures on ABB Industrial Solutions BVBA ("ABB").

This decision follows a complaint lodged by Teco NV ("Teco") with the BCA on 11 May 2018. Teco and ABB produce intelligent electricity meter boxes. Following a public tender process, ABB obtained the exclusive right to produce the lid frames for such electricity meter boxes and to distribute them to the Flemish grid net operator and other producers of such electricity meter boxes.

Teco argued in its complaint that ABB applies discriminatory practices as regards delivery terms and pricing. In its decision, the BCA found *prima facie* that ABB abused its dominant position by (i) charging a discriminatory price for lid frames to Teco, higher than the (below cost) price charged to the Flemish grid net operator following the public tender process; (ii) subsequently lowering its own prices for electricity meter boxes which, in combination with the above discriminatory price to Teco, allowed the Flemish grid net operator and ABB to squeeze the margin of the other players on the market for electricity meter boxes; and (iii) failing to apply a strict supply policy (first in-first out – "FIFO") which created uncertainties regarding supplies to Teco, consequently undermining its reliability on the market.

The interim measures imposed by the BCA seek to remedy the above concerns by (i) requiring ABB to maintain a non-discriminatory pricing policy for its lid frames; and (ii) requiring ABB to apply a non-discriminatory processing of orders in accordance with the FIFO principle.

If ABB fails to observe these interim measures, the BCA is entitled to impose penalty payments.

CONSUMER LAW

Council of European Energy Regulators Launches Consultation on Cross-Sectoral Guide on Bundled Products

On 19 September 2018, the Council of European Energy Regulators ("CEER") launched a public consultation on a draft cross-sectoral Guide on Bundled Products (the "Guide"). The consultation runs for eight weeks, *i.e.*, until 14 November 2018.

A bundled product/service is a package of two or more stand-alone products and/or services sold together at a single price and is often marketed at a discount compared to the stand-alone prices of the products or services concerned. Bundled products or services are common in many sectors, including the banking and insurance, energy, telecommunications and water sectors. However, bundling may make it difficult for consumers to compare offers and evaluate the price of each component of the bundle.

Aiming to increase consumer trust by better protecting consumers who buy bundled products, the Guide puts forward ten principles for companies offering bundled products, irrespective of their sector of economic activity.

The ten principles cover the entire lifecycle of a bundled product or service from a consumer perspective. For instance, they call for simplicity, transparency and clear liability principles. Consumers must be informed of the main characteristics of each product/service in an accessible manner. In addition, the Guide generally comments on conditions governing issues such as contract formation, termination and renewal, any refund arrangements that apply if the contracted service level is not met, as well as the conditions to change supplier.

When it comes to liability and complaint handling, the Guide advocates that consumers should not have to interact with different parties for the different elements of the bundled product. It encourages companies to establish a ''single point of contact per bundle'' or, alternatively, a "first port of call rule", meaning that the first of the parties involved in the bundle that is contacted by a consumer would deal with the case. Transparency of general terms and conditions, prices and applicable taxes is also a key principle according to the Guide.

In addition to the above, the Guide lists five principles that, in CEER's view, should be observed by national regulatory authorities overseeing sectors with bundled products/services. CEER thus calls for clear, cross-sectoral rules on joint offers in general consumer law, including as regards the termination terms to avoid lock-in situations, and for protection from disconnection if the bundled products include an essential service such as energy.

The initiative of CEER would seem to signal a need for more elaborate rules on bundling which is already governed by consumer law (*See*, in Belgium, Articles VI.80 and VI.81 of the Code of Economic Law) and, in the case of dominant companies, competition law. The merit of CEER's initiative is that it considers the possibility of having a uniform regulatory framework on bundling across sectors and across Europe.

The Guide is available here.

Court of Justice of European Union Clarifies Concepts of "Aggressive Commercial Practice" and "Inertia Selling"

On 13 September 2018, the Court of Justice of the European Union (the "ECJ") handed down a judgment clarifying the concepts of "aggressive commercial practice" and "inertia selling" within the meaning of Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ("Directive 2005/29/EC") (ECJ, 13 September 2018, Joined Cases C-54/17 and C-55/17, *Autorità Garante delle Concorrenza e del Mercato v. Wind Tre SpA and Vodafone Italia SpA*). Inertia selling is the practice involving the request for immediate or deferred payment of products supplied by the trader, but not solicited by the consumer. The practice falls within the category of aggressive commercial practices which are in all circumstances considered unfair and, hence, prohibited.

The ECJ delivered its judgment in response to a request for a preliminary ruling from the Italian Council of State (the "Council of State") in proceedings between two Italian mobile telephone operators, Vodafone Italia SpA ("Vodafone") and Wind Tre SpA ("Wind"), and the Italian competition authority (the "Competition Authority"). Under Ital-

ian law, the Competition Authority has the competence to challenge improper commercial practices of traders.

Vodafone and Wind had been selling mobile phones with SIM cards including certain pre-loaded and pre-activated paying telephony services (including internet browsing and voicemail services) without first providing information to or obtaining permission from the consumer, thereby exposing consumers to possible debts which they were unaware of.

Considering that this practice qualifies as an aggressive commercial practice within the meaning of Directive 2005/29/EC, the Competition Authority imposed fines on Vodafone and Wind in the amount of EUR 250,000 and EUR 200,000.

On appeal by Vodafone and Wind, the Regional Administrative Court of Lazio, Italy, (the "Court") annulled these fining decisions on the ground that the Competition Authority lacked the competence to impose fines. The Court held that the Italian Communications Regulator had exclusive competence to sanction the practices at issue as (i) these practices are covered by specific Italian legislation giving the Communications Regulator the exclusive power to inspect, prohibit and sanction with regard to electronic communication services; and (ii) Article 3(4) of Directive 2005/29/EC provides that "[i]*n the case of conflict between the provisions of this Directive and other [EU] rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects*" (*i.e.*, the so-called "principle of specification").

The Competition Authority appealed the Court's judgments to the Council of State, which decided to stay the proceedings and question the ECJ on whether:

1. the practices of Vodafone and Wind qualify as aggressive commercial practices and/or as inertia selling within the meaning of Directive 2005/29/EC; and

2. Directive 2002/21/EC of 7 March 2002 "on a common regulatory framework for electronic communications networks and services" (the "Framework Directive") and Directive 2002/22/EC of 7 March 2002 "on universal service and users' rights relating to electronic communications networks and services" (the "Universal Service Directive"), which provide for a specific sector regulator and concern the provision of electronic communications networks and services to end-users, preclude the application of Directive 2005/29/EC having regard to the principle of specification and whether, as a result, they cause the Competition Authority to lack the competence to sanction the practices in question.

Inertia Selling

The ECJ first confirmed that the practices of Vodafone and Wind qualify as inertia selling. It noted that the services were unsolicited as the customers did not freely choose the provision of the services in question. They were neither informed about the cost of the services, nor about the fact that these were pre-loaded and pre-activated on the purchased SIM cards.

The ECJ found it irrelevant that the use of the services in question required, in certain cases, conscious action on the part of the consumer. Similarly, the ECJ deemed it irrelevant that the consumers could have opted to disable the service, since it was highly unlikely that they would genuinely be able to make use of this option before being charged for the service.

Competence of Competition Authority to Act on Basis of Directive 2005/29/EC

Second, as regards the question whether the Framework Directive and the Universal Service Directive preclude the Competition Authority from sanctioning Vodafone and Wind for violations of Directive 2005/29/EC, the ECJ held that a conflict within the meaning of Article 3(4) of Directive 2005/29/EC only arises if (i) the conflict is between EU rules and not between national rules; and (ii) provisions, other than those of Directive 2005/29/EC, regulating specific aspects of unfair commercial practices, introduce obligations which are incompatible with those laid down in Directive 2005/29/EC, leaving them no margin of discretion.

On the facts of the case, the ECJ held that the Competition Authority was competent to sanction Vodafone and Wind on the basis of Directive 2005/29/EC. It considered that the provisions in the Framework and Universal Service Directives pertaining to end-users do not qualify as rules regulating specific aspects of unfair commercial practices, such as inertia selling. Consequently, the ECJ found that there is no conflict between the provisions of Direc-

tive 2005/29/EC and the rules laid down in the Universal Service Directive with respect to the rights of end-users. Moreover, the ECJ noted that the Universal Service Directive provides expressly that its provisions concerning end-users' rights are to apply without prejudice to the EU rules on consumer protection, which include Directive 2005/29/EC.

The Council of State will now have to rule on the merits of the case, applying the interpretation put forward by the ECJ in its judgment.

CORPORATE LAW

New Rules for Shareholder Identification and Exercise of Shareholders' Rights in Listed Companies

On 3 September 2018, the European Commission adopted a new implementing Regulation aiming to facilitate the transmission of information between listed companies, their shareholders and intermediaries (*Commission implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights* - the "Regulation"). The Regulation aims to facilitate shareholder identification and the exercise of rights by shareholders of listed rights.

The Regulation applies to listed companies which have their registered office in an EU Member State in cases where a shareholder will be required to exercise its shareholder rights. The Regulation imposes minimum information and formatting requirements in relation to the transmission of information during the shareholder identification process as well as during the subsequent exercise of shareholders' rights. In addition, the Regulation introduces deadlines to ensure the timely transmission of information by the listed companies and intermediaries.

The new rules set forth in the Regulation will enter into force on 3 September 2020.

DATA PROTECTION

New Belgian Data Protection Laws Enter into Force

Data Protection Law

On 5 September 2018, the new Data Protection Law ("New DPL"), which brings Belgian national law in line with the General Data Protection Regulation, was published in the Belgian Official Journal (*Wet van 30 juli 2018 betreffende de bescherming van natuurlijke personen met betrekking tot de verwerking van persoonsgegevens/Loi du 30 juillet 2018 relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel*). The New DPL immediately entered into force upon publication. The only exception concerns Article 20, which foresees that the federal government should formalise protocols in relation to the transfer of personal data to another government or private organisations and which will enter into force on 20 April 2019.

The New DPL abolishes the current data protection law of 8 December 1992 and will have a considerable impact on how the GDPR is applied in Belgium. It complements the GDPR, contains additional obligations and implements Directive 2016/680 which regulates the protection of personal data by law enforcement agencies.

While the GDPR intends to provide 'full harmonisation' for the protection of personal data, it leaves some margin of manoeuvre for Member States to implement additional national requirements.

For a discussion of the highlights of the New DPL, *see this Newsletter, Volume 2018, No. 7, p. 7-9*.

Law regarding Establishment of Information Security Committee

The Law regarding the establishment of the Information Security Committee was published in the Belgian Official Journal on 10 September 2018 (*Wet van 5 september 2018 tot oprichting van het informatieveiligheidscomité en tot wijziging van diverse wetten betreffende de uitvoering van Verordening (EU) 2016/679 van 27 april 2016 van het Europees Parlement en de Raad betreffende de bescherming van natuurlijke personen in verband met de verwerking van persoonsgegevens en betreffende het vrije verkeer van die gegevens en tot intrekking van richtlijn 95/46/EG /Loi du 5 septembre 2018 instituant le comité de sécurité de l'information et modifiant diverses lois concernant la mise en oeuvre du règlement (UE) 2016/679 du Parlement européen et du Conseil du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, et abrogeant la directive 95/46/CE*).

The Law regarding the establishment of the Information Security Committee entered into force on 10 September 2018.

For more information on the establishment of the Information Security Committee, *see this Newsletter, Volume 2018, No. 7, p. 10*).

European Court of Human Rights: United Kingdom Surveillance Fails to Protect Privacy and Provides Insufficient Safeguards for Freedom of Expression

On 13 September 2018, the Strasbourg-based European Court of Human Rights (the "ECtHR") handed down its landmark judgment in *Big Brother Watch and Others v. the United Kingdom*. In the highly anticipated judgment, the ECtHR held that several aspects of U.K. secret surveillance programmes violated Article 8 (right to respect for private life) and Article 10 (freedom of expression) of the European Convention on Human Rights (the "Convention").

The cases before the ECtHR were brought by journalists and human rights activists following the Snowden revelations. In 2013, Edward Snowden revealed the existence of far-reaching surveillance and intelligence sharing programmes in the United States and the United Kingdom. The claims brought before the ECtHR relate to three surveillance regimes used by the UK government under the UK Regulation of Investigatory Powers Act of 2000: (i) bulk interception of communications; (ii) intelligence-sharing with foreign governments; and (iii) acquisitions of communications data from communications service providers.

Violations under Article 8

Article 8 of the Convention protects an individual's right to respect for private and family life both at home and in correspondence. According to established case law, the ECtHR considers interception of communications to represent "one of the gravest intrusions" into an individual's private life. Therefore, interception by public authorities needs a legitimate purpose and is limited to what is lawful and "necessary in a democratic society".

The judgment identified two important forms of protection that were lacking in the UK government's bulk interception regime, namely insufficient independent oversight of the "selectors and search criteria used to filter intercepted communications" and inadequate safeguards "applicable to the selection of related communications data for examination." The ECtHR argued that the lack of these protections in the surveillance regimes made it impossible to limit the interception to what is "necessary in a democratic society" and consequently violated an individual's right to privacy under Article 8.

The ECtHR added that according to EU Law, any regime allowing access to data held by communications service providers had to be limited to the purpose of combating "serious crime". Such access is required by EU Law to be subject to prior review by a court or an independent administrative body. The U.K. regime allowed access for the general purpose of combating crime (without any limitation to "serious" crime) and without making access subject to prior review. Therefore, the ECtHR held that the UK regime failed to meet the "in accordance with the law" requirement of Article 8 of the Convention.

Violations under Article 10

Article 10 of the Convention protects an individual's right to freedom of expression. The ECtHR considered that the UK law lacked sufficient protections for confidential journalistic material. An interception is incompatible with Article 10 of the Convention "unless it is justified by a prevailing requirement in the public interest." The UK surveillance regimes do not contain such requirements that would limit the agency's ability to search and examine confidential journalistic material. Therefore, the ECtHR held that the bulk interception regime falls short of the requirements under Article 10 of the Convention.

In addition, the ECtHR found the regime for obtaining communications data from communications service providers to provide insufficient safeguards to conform to Article 10 of the Convention. In particular, it held that the system contained insufficient safeguards limiting the access to the data.

Interestingly, the ECtHR held that metadata should not be treated any differently than communications content in terms of privacy safeguards.

The UK has updated the relevant laws and regulations since the proceedings have been initiated. Therefore, it will now be for the UK government – and other EU countries – to assess whether their surveillance programmes comply with the requirements set out by the ECtHR.

INTELLECTUAL PROPERTY

3-D Pattern Covering Soles of Birkenstock Shoes Cannot Be Protected as Figurative Mark

On 13 September 2018, the Court of Justice of the European Union (the "ECJ") held in case C-26/17 P, *Birkenstock v EUIPO*, that Birkenstock's pattern of wavy lines crisscrossing at right angles in a repetitive sequence could not be protected as a figurative mark.

In 2012, Birkenstock GmbH ("Birkenstock") obtained an international registration for a figurative mark representing a pattern of wavy lines crisscrossing at right angles in a repetitive sequence. Birkenstock sought an extended protection for the goods for Nice Classes 10 (orthopaedic footwear, foot support and orthopaedic shoe components), 18 (leatherwear) and 25 (footwear, comfort footwear and sandals, foot and shoe inserts, in particular of natural cork or thermal cork).

In 2014, the European Union Intellectual Property Office ("EUIPO") refused to grant protection for the international mark in the European Union, based on the lack of distinctive character of the pattern for the purposes of Article 7(1)(b) of Regulation No 207/2009 on the Community trade mark (the "CTM Regulation"). The EUIPO found that this pattern could indeed extend indefinitely in all four directions and could be applied to any two- or three-dimensional surface. Hence, it could immediately be perceived by the relevant public as a surface pattern, rather than an indication of any particular commercial origin. Therefore, the EUIPO applied the case law relating to the signs that are indissociably linked to the appearance of the products in question. According to this case law, average consumers do not usually presume the commercial origin of goods based on signs that are indissociably linked to the goods themselves. Such signs acquire distinctive character only if they depart significantly from the sectoral standards or usual practices.

Birkenstock sought to annul EUIPO's decision before the General Court of the European Union, claiming that the EUIPO had not examined the sign in its registered form, in particular: an image with a clearly delimited surface that is not indissociably linked to the shape of the goods, but had unjustifiably asserted that the sign could be reproduced and continued. But the General Court found, in essence, that it is only when the use of a surface pattern can be considered unlikely, in the light of the nature of the products at issue, that such a sign could claim protection. It held that in the case at hand the sign was likely to be used as surface pattern and, therefore, upheld EUIPO's decision in this respect.

Birkenstock further appealed to the Court of Justice of the European Union (the "ECJ").

In the appeal before the ECJ, Birkenstock claimed that it was not sufficient that a trade mark could be used as a surface pattern in order for the case law relating to signs that are indissociably linked to the appearance of the goods to apply. Instead, it argued that the surface pattern had to be the sign's "most likely use". The ECJ dismissed that argument, considering that there was an inherent probability that a sign consisting of a repetitive sequence of elements would be used as a surface pattern. Therefore, the sign was indissociably linked to the appearance of the goods concerned and the relevant case law was rightfully applied by the EUIPO and the General Court.

The ECJ furthermore agreed with the General Court that the pattern in question, consisting of a simple combination of wavy, crisscrossing lines, repeating indefinitely, did not depart from this usual practice. In addition, the ECJ insisted that the applicant bears the burden of proving that a trade mark applied for is distinctive and of providing evidence showing that this trade mark had either an intrinsic distinctive character or a distinctive character acquired through use. In this respect, the ECJ found that Birkenstock had not provided the images establishing the standards and usual practices of the sectors concerned. Lastly, the evidence brought by Birkenstock – consisting of images of the inner soles of shoes – was insufficient to establish that there was a significant departure by the sign from the standards and usual practices of the sector.

As a consequence, the ECJ dismissed the appeal in its entirety.

Brussels Court of Appeal Holds that Leonidas infringed Longchamp's Copyright on Le Pliage Handbag

On 26 July 2018, the Brussels Court of Appeal confirmed the judgment of the Brussels Commercial Court of 25 October 2017 on whether Longchamp, owned by the Jean Cassegrain company ("Longchamp") had a copyright in its famous handbag design "Le Pliage" and whether this copyright had been infringed by S.A. Confiserie Leonidas ("Leonidas").

The dispute arose in 2016 when Leonidas started to give away to its customers shopping bags resembling Longchamp's Le Pliage as a reward for any purchase in excess of 28 EUR.

In a cease-and-desist procedure (*stakingsvordering/action en cessation*) initiated by Longchamp, the President of the Brussels French-language Commercial Court ordered Leonidas to cease the distribution of the handbags at issue.

Leonidas appealed this judgment to the Brussels Court of Appeal (the "Court") and invoked a judgment handed down by the Ghent Commercial Court in 2014, which held that Longchamp did not have a copyright in Le Pliage. Leonidas argued that this 2014 judgment should be enforceable against and by third parties to the proceedings, similar as administrative decisions relating to patents, trade marks and designs, which are also valid *erga omnes*. The Court did not uphold this argument. Instead, it pointed at numerous judgments which had acknowledged copyright protection for Longchamp's handbags and which had no lesser value than the 2014 judgment.

In addition, Leonidas claimed that, in any case, Longchamp's handbag design did not bear a sufficient distinctive character to benefit from copyright protection. The Court dismissed this argument as well and found that a combination of elements constituted a determined, concrete and original form, giving rise to a copyright in Longchamp's Le Pliage.

Finally, Leonidas argued against any copyright infringement. In this respect, the Court held that Longchamp's design derived its distinctiveness from a combination of otherwise ordinary elements. Accordingly, an infringement would arise if the same combination was apparent in the design of the handbags distributed by Leonidas. The Court confirmed that this was the case.

According to the Court, both designs were giving off an identical "overall impression". As a result, the Court found that Leonidas had infringed Longchamp's copyright and upheld the judgment in first instance.

Sport Direct's Use of Trade Name and Website Causes Damage to Sportsdirect.com

In a judgment of 26 June 2018, the Brussels Court of Appeal held that, by using its trade name "Sport Direct" and its website sportdirect.com towards Belgian customers, Sport Direct BV ("Sport Direct") was causing damage to the Belgian company Sportsdirect.com Belgium NV ("Sportsdirect.com").

The dispute arose between Sportsdirect.com, the Belgian division of an international group operating shops in Europe selling *inter alia* sports and outdoor apparel, and Sport Direct, a Dutch company offering similar goods for sale to consumers in Belgium and Luxembourg. Sportsdirect.com has 45 shops in Belgium, 37 of which under the trade name "Sportsdirect.com" and also sells its goods via its websites "sportsdirect.be" and "sportsdirect.com". Sport Direct, for its part, does not operate brick and mortar stores. Instead, it sells its goods via its website "sportdirect.

com" to which all its other domain names (incl. "sportdirect.be", "sportdirect.nl", "sportdirect.eu" etc) redirect.

In 2016, Sportsdirect.com brought an action before the President of the Commercial Court of Leuven and argued that Sport Direct was infringing Articles VI.98, 1° and VI.104 of the Belgian Code of Economic Law ("CEL") which prohibit misleading trade practices and unfair trade practices. In particular, Sportsdirect.com sought a cease-and-desist order against Sport Direct, both as regards the use of its trade name and the use of its website. The Leuven Commercial Court partly sided with Sportsdirect.com and ordered Sport Direct to cease using its trade name. However, contrary to what Sportsdirect.com had claimed, the Leuven Commercial Court refused to prevent Sport Direct from selling its goods via its website "sportdirect.com" in Belgium. Both parties appealed the judgment to the Brussels Court of Appeal (the "Court").

In its judgment, the Court first examined whether the trade name "sportsdirect.com" has a distinctive character and is therefore eligible for protection. In this respect, it held that the combination of the two words "sports" and "direct" was not descriptive of Sportsdirect.com's activities. Moreover, the Court underlined that, while it was true that the distinctive character of "Sportsdirect" was initially weak, it had increased over the years following the intensive use of that trade name since 30 June 2006 when Sportsdirect.com's first brick and mortar store had opened. The Court further noted that, since 30 June 2006, Sportsdirect.com had opened numerous other stores throughout Belgium.

Both parties claimed the "first use" of their own trade name. Sportsdirect.com referred to the opening of its first shop on 30 June 2006 under the name "sportsdirect.com" and Sport Direct referred to the registration date of its domain names in 1997, 1999, 2004 and 2006 and the accessibility of these domain names in Belgium since 2006, to the distribution of catalogues in Belgium since 2007 and to the date of sales of its goods on the Belgian market. The Court underlined that the evidence brought forward by Sportsdirect.com was convincing and fully proved the public, visible and continuous use of its trade name "sportsdirect.com" in Belgium since 30 June 2006. By contrast, the Court held that Sport Direct had not proven its claim, especially since the proof of registration of a domain name does not necessarily entail a visible, continuous and public use of a trade name in Belgium. The Court therefore sided with Sportsdirect.com and held that the party rightfully claimed the first visible, public and continuous use of its trade name "sportsdirect.com".

The Court then examined whether Sport Direct's use of its trade name "sportdirect.com" constituted a misleading trade practice under Article VI.98, 1° of the CEL. The Court held that this was the case as both trade names were almost visually and aurally identical and were both used for similar, if not identical, goods. For the same reasons, the Court also found an infringement of Article VI.104 of the CEL which prohibits unfair trade practices.

Finally, the Court held that Sport Direct's behaviour could unduly draw the consumers away from Sportsdirect.com and cause a loss of turnover and, therefore, damage to Sportsdirect.com. The Court therefore confirmed the judgment in first instance and, in addition, granted Sportsdirect.com's request to order Sport Direct to make its website inaccessible to visitors with a Belgian IP-address.

LABOUR LAW

New Point of View of National Social Security Office regarding Qualification of Salary Subject to Social Security Contributions

Background and Previous Interpretation

Based on current legislation, all benefits with monetary value to which the employee is entitled by virtue of his/her employment and which are due by the employer are considered as salary and subject to social security contributions.

The National Social Security Office ("NSSO") considered that benefits are due by the employer if the employer either (i) directly or indirectly, participates in the financing of the benefits; (ii) has discretionary powers regarding the granting of the benefits; or (iii) is the contact point for the employees in relation to the benefits.

This discussion is most relevant for groups of employers in which a parent company (or another foreign company belonging to the same group) grants benefits, such as restricted stock units or stock options taxable upon exercise, to employees of the local Belgian employer.

Current Interpretation

At the beginning of September 2018, the NSSO published its new and broader interpretation, stating that benefits are considered as due by the employer if (i) there is a financial participation of the employer in the financing of the benefits (e.g. via a recharge of costs); or (ii) the grant of such benefits follows from the activities performed in the framework of the employment contract with the (local) employer or is linked to the function that the employee exercises at the (local) employer.

Hence, according to the NSSO, it is no longer necessary to assess whether the local employer has discretionary powers regarding the granting of the benefits or is the contact point for the employees in relation to such benefits. Even if no local intervention occurs, the benefits would become subject to social security contributions as long as the grant of the benefits follows from the employee's activities performed or the employee's function exercised.

As a result of this new interpretation, employers should re-assess carefully the social security treatment of employee benefits granted by a parent company or another affiliated foreign entity within the group.

LITIGATION

Brussels Court of Appeal Holds FIFA and UEFA Arbitration Clauses To Be Inapplicable

In a case involving FIFA (the International Football Association) and UEFA (the European Football Association), the Brussels Court of Appeal (the "Court of Appeal"), handed down an important judgment on 28 August 2018 in which it refused to refer a dispute to arbitration despite the existence of arbitration clauses providing for the jurisdiction of the Court of Arbitration for Sport (the "CAS").

The case at hand (still pending on the merits), concerned a dispute between, on the one hand, Belgian football club Seraing ("RFC Seraing") and the investment fund Doyen Sports Investment Limited ("Doyen Sports"), and, on the other hand, FIFA, UEFA and the Belgian football association. RFC Seraing and Doyen Sports contested the validity of sanctions imposed against them by the football associations for violations of FIFA and UEFA rules prohibiting Third-Party Ownership ("TPO") (a practice whereby a physical or legal person, who is not a football club but usually an investment fund or an agent, invests in the economic rights of a professional football player).

RFC Seraing and Doyen Sports had brought their action before a Belgian court arguing that the arbitration clauses contained in the FIFA/UEFA statutes (and which, in principle, compelled them to refer their dispute against FIFA and UEFA to arbitration) did not comply with the requirement, under Belgian law, that such clauses must relate to a "defined legal relationship" and should delimitate the scope of the potential dispute arising between the parties (Articles 1681 and 1682, Belgian Code on Civil Procedure). More specifically, RFC Seraing and Doyen Sports contended that – despite the existence, in RFS Seraing's bylaws, of a clause explicitly showing RFC Seraing's commitment to follow FIFA and UEFA's statutes – the arbitration clauses at stake were of a general nature and did not relate to "*a defined legal relationship*" as they merely referred to any kind of dispute, irrespective of its object.

FIFA and UEFA on the other hand argued that the arbitration clauses at stake were sufficiently specific since (i) they only applied to cases arising out of the activities and corporate purpose of FIFA/UEFA; and (ii) they only applied to sport litigation (since the bylaws of the CAS limit the jurisdiction of the latter to sport-related disputes).

The Court of Appeal rejected all of FIFA and UEFA's arguments and refused to refer the case to arbitration.

First, the Court of Appeal recalled that the requirement, under Belgian law, according to which an arbitration clause must refer to a "defined legal relationship" is based on (i) the right of access to justice; (ii) the parties' agreement (which makes sure that parties are not compelled to arbitrate disputes that they never intended to refer to arbitration); and (iii) the need to avoid that a party with strong bargaining power imposes its will on the weaker party.

Second, the Court of Appeal found that the fact that the arbitration clauses at issue only concerned matters falling under the activities and corporate purpose of FIFA/UEFA did not define the legal relationship in a sufficient manner.

Third, the fact that the bylaws of the CAS provide that the latter only had jurisdiction in sport-related disputes was not relevant since the CAS can always amend its own bylaws in the future.

Finally, based on the finding that the arbitration clauses contained in the FIFA/UEFA statutes were inapplicable and that FIFA and UEFA are both domiciled in Switzerland, the Court of Appeal applied Article 6.1 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Lugano Convention") which aims to extend the EU Brussels I Regulation's regime on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU to Iceland, Norway and Switzerland.

Article 6.1 of the Lugano Convention provides that, in cases involving multiple defendants, all defendants can be sued in the State where any one of them is domiciled, provided that the claims against them are so closely connected that it is expedient to hear them together to avoid irreconcilable judgments.

The Court of Appeal applied that provision to the case at hand and found (i) that the Belgian football association was domiciled in Belgium; (ii) RFC Seraing was also domiciled in Belgium; (iii) the Belgian football association was the football governing body in Belgium and a member of FIFA; and (iv) FIFA and the Belgian football association share regulatory and disciplinary powers. In the light of all those elements, the Court of Appeal found that there was a sufficient degree of connection between the claims, which justified the jurisdiction of the Belgian courts to hear the case.

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