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VBB on Belgian Business Law

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IFLR1000, 2019

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COMPETITION LAW

Court of Justice of European Union Overturns General Court's Judgment in Belgian "Excess Profit" Tax Scheme Case and Confirms European Commission's Finding of Aid Scheme

On 16 September 2021, the Court of Justice of the European Union (the ***CJEU***) set aside the judgment delivered by the General Court (the ***GC***) on 14 February 2019 to the extent that the GC had annulled the finding of the European Commission (the ***Commission***) that the Belgian "excess profit" tax rulings constituted an aid scheme (Joined Cases T-131/16 and T-263/16, *Belgium and Magnetrol International v. Commission*).

Under Belgian law, Belgian entities of multinational corporate groups could obtain an advance ruling from the Belgian tax authorities exempting those entities from paying taxes on so-called "excess profits", *i.e.*, the difference between the actual recorded profit of a multinational compared with the hypothetical average profit of a standalone company in a comparable situation (the ***Excess Profit Exemption System***). On 11 January 2016, the Commission decided that the Excess Profit Exemption System constituted a state aid scheme that was incompatible with the internal market and thus ordered the recovery of the aid from 55 beneficiaries (*See*, this Newsletter, Volume 2016, No. 1, p. 21 and this Newsletter, Volume 2016, No. 5, p. 17).

In February 2019, the GC annulled the decision of the Commission as it found that the Commission had erred in con-cluding that the Excess Profit Exemption System consti-tuted an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (the ***Regulation 2015/1589***). (*See*, this Newsletter, Volume 2019, No. 2, p. 17). The Commission challenged this judgment before the CJEU.

In an opinion delivered on 3 December 2020, Advocate General Kokott considered that the Commission rightly qualified the Excess Profit Exemption System as a state aid scheme and invited the CJEU to set aside the judgment of the GC and refer the case back to the GC.

In its judgment of 16 September 2021, the CJEU agreed with AG Kokott and decided that the GC made several errors of law in its interpretation of the notion of "aid scheme" defined in Regulation 2015/1589. The CJEU held that the finding of an aid scheme requires three cumulative conditions, namely that (i) the aid is granted to undertakings based on an act; (ii) the aid is granted without further implementing measures being required; and (iii) beneficiaries of the aid are defined in a general and abstract manner.

Concerning the first condition, the CJEU held that the term "act" not only refers to formal legislative measures but also covers a consistent administrative practice when this practice reveals a systematic approach on the part of the national authorities. Therefore, by limiting its analysis to formal measures and by ignoring the Belgian authorities' administrative practice, the GC wrongly applied the term "act".

Concerning the second condition, the CJEU held that the fact that the Belgian tax authorities had systematically granted the Excess Profit Exemption when specific conditions were fulfilled showed that these authorities did not have any discretionary power in applying Belgian law and that, therefore, no further implementing measures were required to grant state aid.

The CJEU noted that the third condition is intrinsically linked to the existence of an act (*i.e.*, the first condition) and to the absence of implementing measures (*i.e.*, the second condition). As a result, the errors of law made by the GC as regards the first and second conditions necessarily affected its assessment of the definition of beneficiaries. In particular, the GC erred in law in finding that the definition of such beneficiaries had to take place through further implementing measures.

While the CJEU found that the GC erroneously concluded that the Commission did not correctly qualify the Excess Profit Exemption System as an aid scheme, the CJEU nonetheless indicated that it was not able to give a final judgment on whether the Excess Profit Exemption System satisfied the other conditions to be classified as state aid, namely in view of the pleas alleging the absence of any advantage or selectivity. The CJEU also considered that the state of the proceedings did not enable it to take a position on other pleas relating to the violation of the principles of legality and the protection of legitimate expectations. Accordingly, the CJEU annulled the GC's judgment and referred the case back to the GC to decide on these other aspects of the original appeal brought against the Commission decision.

Bill Implementing Directive 2019/633 on Unfair Trading Practices in Agricultural and Food Supply Chain Published

On 4 June 2021, the Belgian Council of Ministers (*Ministerraad / Conseil des Ministres*) approved a bill (the ***Bill***) that will implement Directive (EU) 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (the ***UTP Directive***). After being reviewed by the Council of State and approved again by the Council of Ministers, the Bill was submitted to Parliament on 7 September 2021. The Bill seeks to transpose the UTP Directive into Book IV of the Code of Economic Law (the ***CEL***) and will apply to sales if the supplier, the buyer, or both are established in Belgium.

The UTP Directive aims to protect farmers, farmer organisations and small and medium sized suppliers of agricultural and food products against unfair trading practices implemented by stronger buyers by giving the former the possibility to lodge complaints against the latter if they engage in unfair trading practices and by requiring each EU Member State to designate a national enforcement authority to handle such complaints.

Contrary to the UTP Directive, which defines its scope of application based on a scale of relative annual turnovers of the supplier vis-à-vis the buyer, the Bill does not limit its scope on the basis of turnover thresholds. The government considers that (i) such thresholds are impractical for the parties involved in a transaction because they must verify the turnover of their contract partner; and that (ii) turnover figures are subject to annual change. Instead, the Bill provides that it does not apply to suppliers with a consolidated annual turnover exceeding EUR 350 million, as these suppliers are not considered to be weak parties.

Furthermore, in line with Article 3 of the UTP Directive, the Bill provides for a blacklist of unfair commercial practices that are prohibited in all circumstances and a grey list of trading practices that are in principle prohibited unless they have been previously agreed upon in clear terms by the supplier and the buyer. These lists may be extended by Royal Decree.

According to the Bill, the General Directorate of Economic Inspection, which is competent to ensure compliance with the provisions of the CEL (except for the provisions on competition law set out in Book IV of the CEL), will receive complaints about non-compliance with the new provisions and will have the power to impose administrative fines where appropriate.

Belgium already missed the deadline of 1 May 2021 for the adoption and publication of implementing legislation of the UTP Directive. This led the Commission to start infringement proceedings against Belgium and a number of other Member States in July 2021 (*See*, this Newsletter, 2021, No. 7, p. 9). The Bill provides that it will enter into force on 1 November 2021, which corresponds with the deadline set out in the UTP Directive for the entry into force of the implementing national legislation (*See*, this Newsletter, Volume 2021, No 6, p. 7). However, this target date now looks unlikely to be met.

Agreements existing at the time of the entry into force of the new legislation will have to be brought in line with its provisions no later than one year after this entry into force.

Belgian Competition Authority Prosecutes Tobacco Manufacturers and Suppliers on Account of Anticompetitive Information Exchange

On 1 October 2021, the College of Competition Prosecutors (*Auditoraat / Auditorat*), the investigatory arm of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) (the ***BCA***), announced that it had concluded its investigation into the possibly illegal exchange of information among tobacco manufacturers and suppliers.

The companies concerned are British American Tobacco Belgium (a subsidiary of British American Tobacco PLC), Établissements L. Lacroix Fils (a subsidiary of Imperial Brands PLC), JT International Company Netherlands (a subsidiary of Japan Tobacco Inc) and Philip Morris Benelux (a subsidiary of Philip Morris International Inc). Together they account for more than 90% of the cigarettes consumed in Belgium.

The investigation started on 8 May 2017 and the BCA carried out inspections in June 2017. The College of Competition Prosecutors concludes from its investigation that the parties engaged in anticompetitive practices that lasted several years and consisted of repeated exchanges of commercially sensitive information through wholesalers. According to the College of Competition Prosecutors, manufacturers sent information on their future prices to their wholesalers and received information on the future prices of their competitors via the wholesalers.

The College of Competition Prosecutors transferred the case to the BCA's decision-making body, the Competition College (*Mededingingscollege / Collège de la Concurrence*), which now must take a final decision on the existence of a competition law infringement and on possible fines.

CONSUMER LAW

Court of Justice of European Union Holds that Ban on Advertorial May Apply If Advertised Company Provides Non-Pecuniary Consideration for Editorial Content

On 2 September 2021, the Court of Justice of the European Union (the ***CJEU***) handed down a judgment concerning the ban on "advertorial" contained in point 11 of Annex I to Directive 2005/29/EC concerning unfair business-to-consumer commercial practices (the ***Directive***). Point 11 of Annex I to the Directive blacklists, as a commercial practice which is in all circumstances considered unfair, "[u]*sing editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)*" (CJEU, 2 September 2021, Case C-371/20, *Peek & Cloppenburg*).

The dispute pitted two economically and legally independent companies active in the retail sale of clothing both named "Peek & Cloppenburg" against each other. One is based in Düsseldorf (***P&C Düsseldorf***), while the other is located in Hamburg (***P&C Hamburg***). P&C Düsseldorf and P&C Hamburg operate retail outlets in two distinct areas of Germany, and market and promote their products separately. The case arose when P&C Düsseldorf launched a nationwide advertising campaign in a magazine, inviting readers to participate in a private sale. The images used in the campaign had been provided to the publisher free of charge and the private sale event had been financed jointly by the magazine and P&C Düsseldorf.

P&C Hamburg sought an injunction prohibiting P&C Düsseldorf from having advertisements published which are not clearly identified as such on the basis of paragraph 3(3) of the German Law against Unfair Competition (the ***UWG***). Paragraph 3(3), UWG transposes point 11 of Annex I of the Directive in German law and thus prohibits "advertorials", that is, the use of editorial content, paid for by a trader in order to promote a product, without the link with that trader being clearly identifiable from that content or from the visual or acoustic presentation.

At first instance, the Regional Court of Hamburg granted the injunction sought by P&C Hamburg, and P&C Düsseldorf's subsequent appeal was dismissed. P&C Düsseldorf then brought an action before the German Federal Court of Justice, which decided to stay the proceedings and question the CJEU on whether P&C Düsseldorf could be said to have paid for the editorial content, and whether its conduct would thus fall within the scope of paragraph 3(3), UWG and the Directive. Although P&C Düsseldorf had not provided specific monetary consideration for the publication, it provided, as mentioned, the images used free of charge and shared the costs of the advertised event with the publisher.

The CJEU found that such non-pecuniary arrangements between the publisher and P&C Düsseldorf could indeed constitute payment and fall under the ban on advertorials. The CJEU considered the purpose of the rule in question to guide its interpretation. In this case, the fact that the Directive seeks to ensure that consumers can rely on the neutrality of editorial content and to prevent "covert advertising" was decisive. In view of this objective, the specific form of financing is irrelevant. Furthermore, a requirement that payment be defined as a sum of money would allow circumvention of the rule and is inconsistent with the "reality of journalistic and advertising practice".

Although the CJEU did note that the ultimate assessment of whether there was indeed "payment" in the sense of the granting of a "material benefit" linked to the editorial content was to be made by the referring court, it specified that the granting of rights to images free of charge would fall under the provision. Amongst other things, the CJEU noted that, because the Directive did not specify a minimum amount of payment that would trigger the application of the provision, any amount or proportion of financing would do so.

Like paragraph 3(3), UWG, Article VI.100, 11° of the Belgian Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) prohibits the use of editorial content in media to promote a product, if the trader itself funded the promotion, without clearly indicating this in the content, or through images or sounds that are clearly identifiable from that content by consumers. As both the Belgian and German provisions are very close to the wording of the Directive, the CJEU judgment provides an interpretation directly applicable to the Belgian provision.

Interestingly, the judgment also confirms the ability of a competitor to bring an action against such behaviour. The CJEU clarified at the outset that, because the provision exists both in the interest of protecting consumers and competitors, and in view of the fact that the Directive does not preclude a competitor from challenging such a practice, the challenge brought by P&C Hamburg was admissible.

DATA PROTECTION

US Data Transfers: Belgian Council of State Confirms Encryption May Constitute Appropriate Supplementary Measure

In a judgment of 19 August 2021, the President of the Council of State (*Raad van State / Conseil d'État* – the ***President***) confirmed that the encryption or pseudonymisation of personal data could constitute an adequate supplementary measure for the transfer of data to the US under the General Data Protection Regulation (EU) 2016/679 (the ***GDPR***). The President held that such measures supplementing the use of Standard Contractual Clauses (***SCCs***) could provide adequate protection to transfer personal data to the US, even if the transfer concerns sensitive categories of data.

In the case at hand, the President of the Council of State was requested to suspend a decision of the Flemish Region granting a tender for establishing and operating a central mobility unit to ViaVan Technologies (***ViaVan***), the EU based entity of a US company. The unsuccessful tender participants BV Qarin and BV Rotterdamse Mobiliteit Centrale RMC (the ***Applicants***) appealed to the President of the Council of State to suspend the decision under the extreme urgency procedure, claiming that the decision to grant the tender to ViaVan would infringe the GDPR.

In particular, the Applicants argued that the Flemish Region should not have awarded the contract to ViaVan because its parent company is subject to the US FISA regulation and ViaVan would use the cloud platform Amazon Web Services (***AWS***) to store personal data. According to the Applicants, this would result in the transfer of personal data that infringe the GDPR rules on international transfers as interpreted by the Court of Justice of the European Union (***CJEU***).

The Council of State noted that since the judgment of the CJEU in *Facebook Ireland and Schrems* (C-311/18, ***Schrems II case***), controllers and processors relying on SCCs under Article 46 GDPR for the transfer of personal data outside the EU/EEA, must verify on a case-by-case basis whether the law of the third country ensures a level of protection for the personal data that is "essentially equivalent" to the protection existing under the GDPR (our client alert on the CJEU's judgment can be found here). In that case, the CJEU held that the US did not offer a level of protection equivalent to the EU. However, a transfer of personal data was still possible if supplementary measures were implemented. The parties involved must thus assess whether they can comply with their obligations under the SCCs without running afoul of applicable legislation and determine supplementary measures if required.

The European Data Protection Board (***EDPB***) published Recommendations 1/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data to help identify and implement these supplementary measures and provide examples of technical (encryption), organisational (internal policy allocating responsibilities) and additional contractual measures.

The Council of State considered the advice from the Flemish Supervisory Commission as well as two Recommendations from the EDPB: (i) Recommendations 1/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data, and (ii) Recommendations 02/2020 on the European Essential Guarantees for surveillance measures (our client alert on the Recommendations can be found here). On this basis, the Council of State considered that the encryption of personal data could constitute an adequate supplementary measure, especially since the controller will remain in complete control of the encryption keys. As a result, the President of the Council of State held that the Applicants failed to show that ViaVan would not create sufficient safeguards for the international transfer of personal data under the GDPR.

While the judgment is certainly a boost for US transfers of personal data, it is important to realise that the President did not carry out a detailed assessment of the permissibility of the transfer. The judgment merely confirms that – in accordance with the CJEU case law – transfers to the US that rely on SCC are still permitted and that the Applicants failed to demonstrate – on a *prima facie* basis – that the

transfers at hand would run counter to the GDPR. Which "supplementary measures" are adequate in specific situations must still be determined for each individual restricted international transfer.

Belgian Data Protection Authority Reprimands Food Retailer for Unauthorised Disclosure of Personal Data and Failure to Comply with Data Deletion Request

On 1 September 2021, the Litigation Chamber (*Geschillenkamer / Chambre Contentieuse* – the ***Litigation Chamber***) of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) ordered a food retailer to delete a customer's personal data from its marketing list following (i) the unauthorised disclosure of personal data to third parties, and (ii) the failure to comply with the customer's data deletion request.

Factual Background

In June 2021, a customer (the ***Complainant***) launched a complaint with the Litigation Chamber to obtain an order against a food retailer (the ***Defendant***) to stop sending newsletters. The Defendant had failed to follow up on its promise to do so in response to the Complainant's initial request to blind carbon copy (bcc) the recipients of the newsletter and subsequent requests to be removed from the mailing list. Already in June 2020, the Complainant had repeatedly reminded the Defendant that it continued to send emails to those subscribed to its weekly newsletter in which all recipients were visible as the recipient of a carbon copy (cc). The Complainant had expressly requested that they would feature as bcc recipients instead of cc.

Due to remote working circumstances, the Defendant claimed this not to be possible. In October 2020, the Complainant then requested the Defendant to be removed from the Defendant's mailing list altogether. Despite the Defendant's promise to take care of this, the Complainant received another newsletter a week later. Following another data deletion request and request to use bcc, the Complainant did not receive any newsletters for several months. After receiving yet another unwanted newsletter in June 2021, the Complainant decided to file an anonymous complaint with the DPA.

Decision

Based on the evidence and the facts in this case, the Litigation Chamber found that the Defendant had not adopted a consistent policy or proposed amendments to safeguard the privacy of recipients when sending electronic newsletters. Article 6.1(f) of General Data Protection Regulation 2016/679 (the ***GDPR***) allows the Defendant to send newsletters containing the Complainant's e-mail address in a way that is visible to all addressees but only if justified by a legitimate interest of the Defendant. In accordance with the case-law of the Court of Justice of the European Union (***CJEU***), three conditions must be satisfied for a legitimate interest to exist in this case: (i) a legitimate purpose; (ii) a necessity; and (iii) a balancing test. The Litigation Chamber decided that not all three conditions were met. With regard to the second condition ("necessity"), there is a simple technical means to reach the intended recipients of the e-mail in one single movement without the e-mail addresses of everyone being visible, namely by putting them in bcc instead of cc. The principle of data minimisation of Article 5.1(c) of the GDPR was thus not complied with. Additionally, the third condition, *i.e.,* the balancing test, was not satisfied either. The Complainant was not expected to accept that his data would be shared at all times with the other persons subscribed to the weekly newsletter.

Furthermore, the Litigation Chamber established a breach of Articles 24.1 and 2, as well as 25.1 and 25.2 of the GDPR. The data controller (*i.e.,* the Defendant) was not able to demonstrate which measures had been taken to protect the rights of data subjects and to ensure compliance with the principles of the GDPR. A mere statement of failure to send in bcc due to remote working circumstances, without any intention to bring the processing into compliance, is not sufficient.

In view of the limited consequences of this violation, the Litigation Chamber deemed it unnecessary to hear this case on its merits and only issued a warning to the Defendant after a *prima facie* assessment. The purpose of this decision is to inform and enable the Defendant to comply with the principles of the GDPR in the future.

Since it is clear from the facts and evidence that the Defendant failed to respond in a timely and appropriate manner to the Complainant's requests to exercise his rights

to object and his right to erasure, the Litigation Chamber also established a breach of Articles 12.3, 12.4, 21 and 17 of the GDPR. Apart from the instruction to remove the Complainant from the mailing list, no additional sanctions were imposed.

The DPA's decision is currently only available in Dutch (here).

Belgian Data Protection Authority Approves First National Code of Conduct for Notaries

On 15 September 2021, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* - ***DPA***) published its decision of approval of its first ever national code of conduct for the National Chamber of Notaries (the ***Code of Conduct***).

The Code of Conduct clarifies several provisions of General Data Protection Regulation 2016/679 (the ***GDPR***) by adapting them to the specific nature of the processing operations carried out by notaries. These include:

- the need to designate a data protection officer (DPO);
- the measures to be taken in order to guarantee the security of the processing of personal data;
- the measures to be taken by the notary with respect to his/her employees to make them aware of the protection of personal data and the precautions to be taken when processing personal data; and
- the right to information of the data subjects.

The National Chamber of Notaries will be responsible for monitoring compliance with these rules, without prejudice to the DPA's powers of inspection and sanctioning. In the Code of Conduct, there is no supervisory body provided for, as it involves the activities of notaries as holders of public office. However, the DPA points out that when a Code of Conduct concerns processing activities other than those relating to the public sector, an independent supervisory body must be designated.

Codes of conduct are an instrument provided for by the GDPR to enable the identification of good compliance practices at sector level and they benefit both data controllers and citizens. The DPA therefore strongly encourages the establishment of such codes but also recalls that adherence to a code of conduct approved by the DPA does not constitute proof of the conformity of the processing operations carried out by its members.

The DPA's press release is available in Dutch and in French. More information can be found in the DPA's decision, also available in Dutch and in French.

INTELLECTUAL PROPERTY

Court of Justice of European Union Confirms Protected Designation of Origin also Shields against Similar Services

On 9 September 2021, the Court of Justice of the European Union (the ***CJEU***) held that a protected designation of origin (***PDO***) for food and drinks can be relied on to prohibit the use of similar signs for related services.

The CJEU's decision comes in a case that was originally in dispute before the Spanish courts. The Comité Interprofessionel du Champagne (***CIVC***) had brought an action against GB, who owns various tapas bars in Catalonia. GB used the sign "CHAMPANILLO" as a trade mark for its tapas bars. CIVC argued that the CHAMPANILLO sign infringed the PDO "Champagne" and requested a Spanish court to prohibit the use of the CHAMPANILLO sign and logo.

When ruling on the dispute, the referring court sought the guidance of the CJEU on whether PDOs are protected only against practices relating to *products* that are identical or comparable to those designated by the PDO in question, or, instead, whether the PDO also offers protection against the use of the sign for a *service* that relates to the distribution of those products. More specifically, the referring court asked the CJEU to clarify whether the protection of a DPO against "*misuse, imitation or evocation*" under Article 103(2)(b) of Regulation 1308/2013 establishing a common organisation of the markets in agricultural products (***Regulation 1308/2013***), also applied to services – like tapas bars.

According to the CJEU, "evocation" of a PDO within the meaning of Article 103(2) Regulation 1308/2013 exists when in the mind of the consumer who is confronted with a disputed designation, the image is triggered of the product whose designation of origin is protected. The CJEU added that it is not required that the product covered by the PDO and the product or service covered by the sign at issue should be identical or similar. The protection against evocation also applies to the use of a sign in relation to services since the reputation of a product covered by a PDO can also be exploited through a service.

Leaving it to the referring court to apply Article 103(2) Regulation 1308/2013 to the case at hand, the CJEU suggested that the referring court should assess whether conceptual proximity exists between the registered name Champagne and the disputed sign CHAMPANILLO, and whether there is a sufficiently clear and direct link between both in the mind of an average European consumer. To identify this link, several aspects must be considered, such as the partial incorporation of the PDO, the phonetic and visual relationship between both signs and the fact that the products protected by the PDO are similar to the goods or services covered by the contested sign.

The judgment of the CJEU can be read here.

EU General Court Dismisses Sony's Challenge of EU Trade Mark Application for "GT RACING"

On 1 September 2021, the EU General Court (the ***Court***) dismissed the appeal brought by Sony Interactive Entertainment Europe Ltd (***Sony***) against a decision of the EUIPO Fourth Board of Appeal (the ***Board***) which had allowed the registration of "GT RACING" as an EU trade mark (***EUTM***) (Case T-463/20).

Factual Background

On 23 August 2017, Wai Leong Wong filed with the European Union Intellectual Property Office (***EUIPO***) an application for registration of an EUTM for the word sign "GT RACING" for goods within Class 18 of the Nice Agreement, namely "*leather; imitations of leather and goods made of these materials that are not included in other classes such as wallets, purses, suitcases and accessories*".

Referring to six earlier trade marks concerning, inter alia, goods in Classes 9 (computer and video games, audio and video recordings, phonograph records, cassettes, tapes, compact discs, video discs, magnetic data media),

16 (printed matter) and 28 (electronics handheld games), Sony filed a notice of opposition against the registration of "GT RACING" as an EUTM in respect of all goods. The Opposition Division and subsequently the Fourth Board of Appeal of EUIPO rejected Sony's opposition and dismissed its appeal that related to the distinctiveness and the reputation of the EUTM. Sony then further appealed to the Court.

Judgment

While Sony had initially based its opposition on six earlier trade marks, it based its defence before the Court only on the figurative EUTM below and on its earlier registered EUTM 'GT'.

The General Court dismissed the appeal against the word mark "GT RACING" in its entirety. To reach this conclusion, the Court identified the relevant public, compared the signs and goods, and assessed whether a possible link between the signs, dilution, tarnishing and/or free riding had to be considered.

First, the Court considered the goods at issue to be everyday consumer goods, as they were aimed at the general public.

Second, the Court noted that the mark "GT RACING" was a word mark, whereas the EUTM depicted above was a figurative EUTM. Interestingly, the Court found that the signs were visually different because the relevant public would not recognise the capital letters 'G' and 'T' in the abstract figurative EUTM unless they engaged in a "*highly imaginative cognitive process*" in order to perceive the signs as representing those letters.

Third, referring to the case *Caventa v OHIM, T-224/11*, the Court observed that all the relevant factors relating to the goods should be considered when assessing their similarity. These include their nature, intended purpose, method of use, whether the goods are in competition with each other, their distribution channels, and more. In the case at hand, the Court found that, given these factors, the goods were different.

Fourth and lastly, Sony had argued that the Board should have considered whether a possible link existed between the signs, and dilution, tarnishing and free riding regarding Sony's earlier trade mark, in line with Article 8(5) of Regulation (EU) 2017/1001 on the European Union trade mark (***EUTMR***). However, the Court held that the conditions for application of Article 8(5) EUTMR, such as the provision of proof of reputation, were not satisfied. Consequently, the Court dismissed Sony's appeal in its entirety.

The Court's judgment could restrict the scope of protection for figurative trade marks containing highly stylised words or alphabetic elements. The judgment can be found here.

LABOUR LAW

Temporary Unemployment Due to Covid-19 Extended Until 31 December 2021

On 24 September 2021, the federal government decided to extend the regime of temporary unemployment for reasons of *force majeure* due to Covid-19 until 31 December 2021.

The regime was implemented at the beginning of the Covid-19 pandemic on 13 March 2020 and significantly reduced the formalities for applying temporary unemployment to employees for reasons of *force majeure*. Considering the long-term repercussions of the Covid-19 pandemic, the simplified regime was extended several times (*See*, this Newsletter, Volume 2020, No. 10, p. 20).

Based on the additional extension, any employer who still suffers from the consequences of Covid-19 (*e.g.*, a reduction of profit, difficulties with suppliers, etc.) can apply for temporary unemployment on grounds of *force majeure* until 31 December 2021.

Prior to the (re)application of the regime, the employer should inform the employees in writing about (i) the period for which the regime will be applied; (ii) the specific days of unemployment; and (iii) the formalities which staff should comply with in order to receive unemployment benefits from the employment authorities.

The employer should also inform his payroll agency in order to take care of the necessary electronic filings.

During the period of temporary unemployment, the employees will be entitled to unemployment benefits amounting to 70% of the monthly salary which is currently capped at EUR 2,840.84 gross. In addition, they are entitled to a specific Covid-19 allowance of EUR 5.74 per day, which is also paid by the employment authorities.

In specific industries such as the metal industry, additional allowances are due by the employer on top of the regular unemployment benefits during the period of temporary unemployment.

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