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Legal 500 2019

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# VBB on Belgian Business Law

## Highlights



**"Van Bael & Bellis excels in M&A work, and often provides domestic Belgian law advice on cross-border transactions."**

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### Topics covered in this issue





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# COMMERCIAL AND CONSUMER LAW

***Federal Government Explains Policy on Economic Affairs and Consumer Protection to Federal Parliament***

On 29 October 2021 and 3 November 2021, Minister for Economic Affairs Pierre-Yves Dermagne and Secretary of State for Budget and Consumer Protection Eva de Bleeker submitted their policy notes (*beleidsnota's / notes de politique générale*) on economic affairs (the ***Policy Note on Economic Affairs***) and on consumer protection (the ***Policy Note on Consumer Protection***) to the federal Chamber of Representatives. The Policy Note on Economic Affairs and the Policy Note on Consumer Protection (together, the ***Policy Notes***) outline the different objectives which the federal Government (the ***Government***) will be pursuing in the areas of commercial law and consumer protection in 2022. The following initiatives are worth highlighting.

First, the Economic Inspection Services (*Economische Inspectie / Inspection économique*) have been instructed to carry out a number of pre-defined investigations over the whole Belgian territory pertaining to possible unfair practices towards consumers and businesses. In the years 2020 and 2021, a large part of their resources were devoted to monitoring compliance with so-called "corona measures" (*e.g.*, compliance with rules of hygiene by shops and close-contact professions), the emergence of corona-related unfair practices (*e.g.*, the sale of excessively expensive or unsafe hygiene products) and the correct implementation of support systems (*e.g.*, the voucher system in the travelling and events sectors). If still necessary in 2022, these verifications will continue. Additionally, the Economic Inspection Services are to strengthen their actions against mass fraud phenomena (*e.g.*, fake debt recovery agencies and pyramid schemes). At the same time, the unit of the Economic Inspection Services which focuses on B2B unfair commercial practices will in 2022 focus on the implementation of (i) Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services; and (ii) Directive (EU) 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. Finally, since the end of 2020, the Economic Inspection Services have the power to offer perpetrators of a range of economic offences the possibility to pay an administrative fine, in addition to their existing powers of proposing a settlement or transferring the file to the public prosecutor to start criminal proceedings. The Government plans to implement administrative fines in 2022 as it considers that fines increase the effectiveness and dissuasive effect of relevant regulations.

Second, the Government will develop a central digital platform for consumers called *ConsumerConnect*. This project will build on the experience of the existing "Point of Contact" (*Meldpunt / Point de Contact*), an online platform launched in 2016 and operated by the Economic Inspection Services where consumers and businesses alike had the possibility to submit questions and/or complaints regarding misleading and/or fraudulent practices (available here in the Dutch language version and here the French language version). *ConsumerConnect* will offer consumers – including those with limited digital literacy – a central platform on which they can find all relevant information and submit questions, reports or complaints. The Point of Contact will take part in the development of *ConsumerConnect* by providing improved services to consumers, while pursuing its own objectives.

Third, given the exponential growth of e-commerce, the Government will focus on different aspects of online consumer protection. It will elaborate and issue recommendations to social media influencers to increase transparency on the paid nature of a given communication. The Government will also act against affiliate marketing, a practice pursuant to which advertisers reward affiliate partners for sales or prospects generated by their publication. In particular, the Government is concerned about large amounts of consumer data being collected and sold to marketing companies and call centres. In this regard, the Government is contemplating different legal solutions, including the establishment of a chain of liability with regard to the collection and management of personal data. Additionally, the Government aims to raise awareness and increase inspections

with respect to so-called "dropshipping". Under this business model, the operator of an online store sells products that it does not stock. As a result, it is unable to verify the conformity and quality of the products which it sells and often encounters difficulties with deliveries. Finally, the Government will facilitate companies' access to the "Do Not Call Me" list, which contains the telephone numbers of subscribers who do not wish to be targeted by direct marketing. It will also make the prior consultation of the Robinson list (*Robinsonlijst / liste Robinson*) mandatory for all companies which intend to send personalised marketing mail. To this end, the Government is currently preparing legislative modifications to Book VI of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*). Along the same lines, the Government will carry out a widespread campaign against phishing, a practice which consists in sending fake messages to obtain the recipient's login, credit card details, PIN codes, passwords and other personal data.

Fourth, the Government will act against greenwashing, a form of misleading advertising whereby companies present their products and services as more ecologically sustainable than they are in reality. In this context, a practical guide has been prepared in cooperation with the Ministry for Economic Affairs to help firms avoid greenwashing in their advertisements and marketing campaigns. To complement these prevention measures, Secretary of State Eva de Bleeker will have the Economic Inspection Services carry out targeted inspections.

Fifth, the Government seeks to transform the Belgian economy in accordance with a Federal Plan for Sustainable Development (*Federaal Plan voor Duurzame Ontwikkeling / Plan fédéral de Développement durable*). The Government will thus seek to promote the circular economy through different incentives and tools against programmed obsolescence. For example, the Government recently approved a Bill transposing Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts of the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC. If adopted, this Bill will modify the provisions of the (old) Civil Code on sales to consumers and extend the effective duration of the legal warranty period. Importantly, consumers would no longer bear the burden of proving that they are not responsible for the malfunctioning of the goods they have purchased in order to benefit from the legal warranty. Instead, the burden of proof would fall exclusively on the seller and the manufacturer. In addition, the Government will examine whether the duration of the legal warranty period may significantly contribute to prolonging the life cycle of a product. Moreover, the Government will carry out a campaign called "*Belgium Builds Back Circular*", which consists, on the one hand, of the funding of eco-design projects and the substitution of harmful chemicals and, on the other hand, of raising awareness of circularity amongst small and medium-sized enterprises.

Sixth, the Government will transpose two EU Directives in the field of consumer protection into Belgian law. It must implement before 28 November 2021 Directive (EU) 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement and modernisation of Union consumer protection rules – informally known as the ***Omnibus Directive*** – and provide for its entry into force six months later (*i.e.*, by 28 May 2022). The Omnibus Directive brings changes to four existing pieces of consumer protection legislation pertaining to unfair commercial practices, consumer rights, unfair contract terms and prices. In addition, the Government must transpose Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC by 25 December 2022 and provide for its entry into force six months later (*i.e.*, by 25 June 2023). In this context, the Government has ordered an in-depth impact study on relevant legal provisions.

Seventh, the Government intends to be closely involved in the negotiations that will lead to the adoption of the proposed EU Digital Services Act (the ***DSA***) which was published by the European Commission (the ***Commission***) in December 2020. The DSA will modernise the legislative framework governing e-commerce and regulate illegal online content.

Eighth, the Government will promote the use of qualified trust services (*e.g.*, electronic signatures, time stamps, seals and electronic registered delivery services) by ensuring that each federal administration relies on such services. It will also encourage regional governments to follow this approach. As part of this transformation, the Government intends to follow closely the negotiations regarding the proposed Regulation amending Regulation (EU) 910/2014 as regards establishing a framework for European Digital

Identity published by the Commission on 3 June 2021. If adopted, the proposed Regulation would establish a European eID which could compete with low-quality identifiers offered by large digital platforms.

Ninth, the Government acknowledges that artificial intelligence (***AI***) represents both major opportunities and challenges. Therefore, it is currently preparing a federal strategy which should strengthen and complement the corresponding strategies of the regional governments and of the EU. The European Commission has already published a proposed Regulation laying down harmonised rules on artificial intelligence and amending certain union legislative acts (the ***AI Act***). The proposed AI Act seeks to promote innovation and investment in AI technologies, while ensuring that AI systems are safe, transparent and ethical. Again, the Government intends to stay closely involved in discussions on the proposed AI Act within the Council of the EU. In addition, the Government will coordinate a study seeking to identify Belgium's main legal and economic stakes in the proposed AI Act, proposing practical solutions and preparing an action plan to transpose this future AI Act into Belgian law.

Lastly, as part of a strategy to boost the economy following the COVID-19 pandemic, the Government will develop and publish an annual competitivity table (*Boordtabel van het concurrentievermogen van de Belgische economie / Tableau de bord de la compétitivité de l'économie belge*), which should improve its understanding of several parameters of importance for the competitive position of Belgium. The Government will request the Pricing Observatory (*Prijzenobservatorium / Observatoire des prix*) to carry out an in-depth analysis of inflation data and other parameters of price, specifically in the agri-food sector as well as other regulated sectors (*e.g.*, bailiffs).

# COMPETITION LAW

***Brussels Court of First Instance Asks Court of Justice of European Union Whether UEFA Homegrown Player Rule Is Compatible with Competition Rules***

On 15 October 2021, the French-language Brussels Court of First Instance (*Franstalige Rechtbank van Eerste Aanleg te Brussel / Tribunal de première instance francophone de Bruxelles* – the ***Court***) referred two questions for a preliminary ruling to the Court of Justice of the European Union (the ***CJEU***). The Court seeks to receive clarification as to whether the rules of the Union of European Football Associations (***UEFA***) imposing quotas of players trained locally comply with the EU law principle of free movement of workers and with the competition rules.

In 2005, UEFA adopted rules pursuant to which clubs that are members of UEFA are obliged to have a maximum of 25 players, including eight locally trained players. Players are considered to have been trained locally if they were trained by their club or clubs from the same country during a period of at least three years between the ages of 15 and 21 (the ***UEFA Homegrown Player Rules***). The UEFA Homegrown Player Rules were approved by UEFA members in 2005 and implemented by national football associations, including the Royal Belgian Football Association (***RBFA***).

In 2020, Belgian-Israeli football player Lior Refaelov, and the Royal Antwerp Football Club that hired him in 2018 (the ***Claimants***), brought an action before the Belgian Court of Arbitration for Sport (*Belgisch Arbitragehof voor de Sport / Cour Belge d'Arbitrage pour le Sport* - ***BCAS***) claiming that the UEFA Homegrown Player Rules and the RBFA implementing rules infringed the free movement of workers enshrined in Article 45 of the Treaty on the Functioning of the European Union (the ***TFEU***) and Article 101 of the TFEU which prohibits anticompetitive agreements. However, the BCAS dismissed the action as partly inadmissible and partly without merit.

The Claimants then turned to the Court to seek the annulment of the arbitral decision of the BCAS. They argued that the UEFA Homegrown Player Rules, and the RBFA implementing rules, infringed Article 101 of the TFEU and Article 45 of the TFEU, since they (i) reduced the chances of players not trained locally to be hired by Belgian clubs and to be selected for football matches; and (ii) restricted the freedom of Belgian clubs to recruit players.

In its judgment of 15 October 2021, the Court considered that, if established, a violation of Articles 45 and 101 of the TFEU would amount to a violation of the Belgian public order, which would lead to the annulment of the arbitral decision. Since the case turns on the interpretation of European Treaty rules, the Court asked the CJEU to clarify (i) whether Article 101 of the TFEU must be interpreted as precluding the Homegrown Player Rules adopted by the UEFA and approved by the national members associations in 2005; and (ii) whether the RBFA rules implementing the Homegrown Player Rules are contrary to Article 101 of the TFEU and Article 45 of the TFEU.

The procedure before the Court is now suspended pending the preliminary ruling of the CJEU, which the Court will have to apply to the facts of the case in its judgment on the merits.

***Belgian Competition Authority Receives Significant Budget Boost and Seeks to Hire Dutch-speaking Investigators***

In October 2021, the Minister of Economic Affairs, Pierre-Yves Dermagne, announced that the annual budget of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***), which currently amounts to EUR 7.5 million, would be increased by EUR 1.4 million.

This raise had been decided in two stages. In May 2021, the federal Government had agreed that the BCA would receive additional funding of EUR 800,000. According to the Minister of Economic Affairs, this funding would be borne by firms that notify mergers to the BCA. Notifying companies will be required to pay EUR 17,450 for mergers reviewed under the simplified procedure and EUR 52,350 for mergers subjected to the normal merger control procedure. In a second stage, in October 2021, the Belgian Government

decided to grant the BCA an additional EUR 600,000 from the Belgian State budget.

According to the president of the BCA, Jacques Steenbergen, these additional resources will allow the BCA to dedicate a team for merger review. This will allow other staff members to focus on the investigation and prosecution of anticompetitive practices.

Possibly in connection with the above, the BCA announced on 11 October 2011 its intention to hire Dutch-speaking investigators.

***Federal Government Appoints Damien Gerard as New Chief Prosecutor in Competition Matters***

Following weeks of uncertainty, the federal government appointed on 25 October 2021 Damien Gerard as Chief Prosecutor in Competition Matters (*auditeur-generaal/ auditeur général*) to succeed Véronique Thirion. The appointment will become effective on 1 December 2021 and applies for a period of 6 years. Mr. Gerard was Deputy Head of Unit at the Directorate General for Competition of the European Commission and is an adjunct professor of EU Competition Law at the University of Louvain (UC Louvain) and the College of Europe (Bruges).

# CORPORATE LAW

***Court of Justice of European Union Establishes Conditions under which Subsidiary Can Be Held Liable for Infringement of Competition Rules by Parent Company***

On 6 October 2021, the Court of Justice of the European Union (the ***CJEU***) delivered its judgment in the long-awaited Sumal case (Case C-882/19, *Sumal*) (*See*, Van Bael & Bellis Competition Newsletter, Volume 2021, No. 10). It clarified the notion of "undertaking" under principles of EU competition law. The judgment establishes the possibility for the victim of a competition law infringement to bring an action against the subsidiary of the perpetrator, subject to specific conditions.

*Background*

In July 2016, the European Commission (the ***Commission***) fined truck manufacturers, including the German company Daimler AG, on account of a violation of Article 101 TFEU. Following the Commission's decision, the Spanish company Sumal brought an action for damages against Mercedes Benz Trucks España (***Mercedes Benz***), a subsidiary of Daimler AG. The Spanish Court of First Instance dismissed Sumal's action holding that the Commission had found Daimler AG, Sumal's parent company, to violate Article 101 of the TFEU. Following this dismissal, the Spanish Court of Appeal was presented with the question whether a subsidiary can be held liable for the anti-competitive behaviour of its parent company. Since there was no case law on this, the Court of Appeal decided to suspend the proceedings and refer the question to the CJEU for a preliminary ruling.

*CJEU Ruling*

The *Sumal* judgment is based on the CJEU's reasoning in *Skanska*. In that case (Case C-724/17, *Skanska*), the CJEU had partly defined the notion of "undertaking". The CJEU found that a parent company could be held liable to compensate for harm caused by its subsidiary. It found that the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU is, as such, not an issue that can be left to national tort law and is rather directly governed by EU law. The CJEU reasoned that the effectiveness of EU competition law enforcement would be jeopardised if undertakings were able to escape liability through restructurings, sales or other legal or organisational changes. As a result, it concluded that the concept of "undertaking" in EU law designates an economic unit even if that economic unit consists of several natural or legal persons.

In *Sumal*, the subsidiary was asked to compensate for harm caused by its parent and the CJEU thus had to define further the notions of "undertaking" and "economic unit". Adopting a functional approach to the question, the CJEU established a system of descending transfer of liability, subject to conditions. More specifically, the claimant must:

- establish the relevant economic, organisational and legal links between the parent company and its subsidiary. This includes consideration of whether the subsidiary essentially complies with the instructions issued by its parent; and

- establish the existence of a specific link between the economic activity of the subsidiary and the subject-matter of the infringement for which the parent company has been held responsible. On the facts of *Sumal*, the claimant had to show that the anti-competitive agreement entered into by the parent company affected the same products as those sold by the defendant (i.e., the subsidiary).

The CJEU finally held that the company against which an action is brought has all of the rights of defence available to it to prove that these two conditions are not satisfied. Interestingly, *Sumal* establishes that it is possible for a group to contain several economic units, and thus several undertakings, depending on the economic activity at hand. It remains to be seen whether this means that it is possible to bring actions against sister companies of the entity which is found to have infringed competition law, if all of these entities form part of the same economic unit. At the same time, it should not be possible to hold a subsidiary liable for infringements committed in the context of economic activities which are wholly unconnected to its own.

*Comment*

The CJEU's judgment reflects the particularly expansive approach adopted in respect of liability of entities for the conduct of companies that belong to the same economic unit or undertaking (and regardless of whether such liability results from control or the agency theory). The determination of the liable entity remains a matter of EU law, even though this position often contrasts with concepts of separate legal personality and limited liability of companies under national law.

Nonetheless, it remains to be seen whether this will prompt the Commission to include more subsidiaries, or maybe even sister companies, within the scope of its future fining decisions relating to conduct committed by companies belonging to the same economic unit.

In this context, the CJEU's judgment is a timely reminder that all companies should take careful steps to mitigate the antitrust risk of their affiliates (for example by conducting rigorous due diligence processes to detect potential competition law infringements and by ensuring that transactional agreements contain robust indemnity language).

# DATA PROTECTION

***European Data Protection Board Publishes Opinion on Draft Adequacy Decision for South Korea***

On 27 September 2021, the European Data Protection Board (***EDPB***) issued a favourable opinion on the European Commission's draft adequacy decision for the Republic of Korea. The opinion is an important step towards a formal adequacy decision. Once the formal decision has been adopted, personal data can flow freely from the European Economic Area (***EEA***) to South Korea. This means that further safeguards or authorisations such as binding corporate rules or contractual clauses will no longer be required (*See*, this Newsletter, Volume 2021, No. 4).

The EDPB's opinion concludes that the key aspects of South Korea's data protection framework are essentially equivalent to the European data protection framework. The EDPB's opinion focused on the general features of General Data Protection Regulation 2016/679 (***GDPR***) and the South Korean laws providing access by public authorities to personal data transferred from the EEA for law enforcement and national security purposes. As part of the adequacy negotiations, South Korea has committed to: (a) implementing additional safeguards to protect European citizens' personal data (*e.g.*, by introducing the concept of "pseudonymised information" and the "purpose limitation" principle); and (b) entrusting a single authority with centralised supervisory tasks, while previously data protection breaches and issues were handled by multiple agencies.

At the same time, the EDPB identified specific areas that require further assessment and clarification. For instance, the South Korean data protection framework only provides for a right to withdraw consent in particular circumstances. The EDPB invites the European Commission to analyse in more detail the impact of this limited withdrawal right on South Korean data protection. Differently from EU law, South Korea also allows for onward transfers from a South Korea-based controller to a third country-based recipient, provided that the data subject consents. The EDPB invites the European Commission to ensure that data subjects are appropriately informed about the third country to which their data will be transferred before consent is obtained.

The EDPB also noted that the disclosure of personal data by telecommunications providers to national security authorities could have an impact on data subjects' rights. The EDPB recommends that the European Commission clarify that the interception of telecommunications data in bulk is not permitted in the light of the recent case law of the European Court of Human Rights. The EDPB also requests the European Commission to explain the requirements to file a complaint with the South Korean data protection authority to ensure that data subjects are provided with effective remedies and a right of redress.

Once the EDPB's concerns have been addressed, the next step in the adoption of the adequacy decision for South Korea will be to obtain approval from a committee formed of representatives of the EU Member States.

***European Data Protection Board Issues Guidelines on Restrictions of Data Subject Rights***

On 13 October 2021, the European Data Protection Board (***EDPB***) adopted the final version of its Guidelines 10/2020 on restrictions pursuant to Article 23 of General Data Protection Regulation 2016/679 (***GDPR***; hereinafter referred to as the ***Guidelines***). The Guidelines were adopted following a public consultation, which was concluded in February 2021.

Article 23 of the GDPR allows EEA Member States to impose restrictions on data subject rights provided that these restrictions do not affect the essence of fundamental rights and freedoms of individuals and are necessary and proportionate measures in a democratic society to safeguard, for instance, national security, defence, or public security. The data subject rights and protection principles are listed in Article 5 (the data processing principles), Articles 12-22 (including, but not limited to, the right of access, information, to object and erasure) and Article 34 of the GDPR (communication of a data breach to individuals). Moreover, Article 34 of the GDPR sets out the requirements under which EEA Member States can restrict these rights, by legislative

measures, to protect the rights and freedoms of others; for example, in relation to safeguarding national and public security, enforcement of civil law claims, and protection of judicial independence.

To explain whether restrictions may affect the essence of fundamental rights, the Guidelines provide a thorough analysis of the criteria for the imposition of restrictions by the EEA Member States or the EU legislator. The Guidelines thereby refer to the EU Charter of Fundamental Rights and the GDPR. In general, the relevant restrictions must be contained in a clear and precise legislative measure, and their potential application must be foreseeable for those who depend on them. The applicable national law should be sufficiently clear to provide individuals with an adequate indication of the circumstances and conditions under which data controllers are authorised to impose the restrictions. Remarkably, there is no definition of "restrictions" in the GDPR. By contrast, the Guidelines define "restrictions" as any limitation of the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34 of the GDPR, as well as the corresponding processing principles of Article 5.

The Guidelines acknowledge that the restrictions on the data subject's rights concern the various rights granted under the GDPR: the right to transparent information, rights of access, rectification, erasure, restriction of processing, data portability, the right to object to certain processing operations, and the right not to be subject to automated individual decision making as well as the notification obligation when personal data are rectified, erased or restricted. Any other data subject right, such as the right to lodge a complaint with the supervisory authority, or other controllers' obligations, cannot be restricted.

Controller obligations include the obligation to document the application of restrictions to concrete cases by keeping a record of their application. The record should include the reasons for the restrictions, the legal basis for such restrictions, their timing, and the outcome of the necessity and proportionality test. Also, the data controller should lift the restrictions as soon as the circumstances that justify them no longer prevail.

Restrictions should be seen as an exception to the general rule allowing the exercise of rights and imposing the obligations enshrined in the GDPR. Therefore, the Guidelines explain that restrictions should be interpreted narrowly and applied only to specific cases and subject to specific requirements. Furthermore, the Guidelines indicate that legislative measures containing restrictions must, where relevant, set out the information essential under Article 23 of the GDPR (including the scope of the restrictions and safeguards to prevent abuse) and pass a necessity and proportionality test. The test should be conducted before the legislator decides to provide for a restriction.

The Guidelines can be consulted here.

***Supreme Court Annuls Markets Court Judgment on Processing of Personal Data of eID Card***

On 7 October 2021, the Supreme Court (the ***Supreme Court***) annulled a judgment of the Markets Court of the Brussels Court of Appeal (the ***Markets Court***) regarding the processing of personal data on the Belgian eID card by a retailer for purposes of creating customer loyalty cards.

*Background*

In 2019, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) investigated a complaint raised by a customer (the ***Complainant***) following her refusal to provide a retailer (the ***Defendant***) her eID card (*See,* this Newsletter, Volume 2019, No. 10). The Defendant requested the eID card for the creation of a customer loyalty card in order to grant its customers discounts. In a decision of 17 December 2019, the DPA fined the Defendant 10,000 EUR for unlawfully processing the personal data on the Belgian eID card. The Defendant processed the name, surname, address, birth date and gender of its customers and linked this to the barcode of their eID card, which also contains their national register number. According to the DPA, the processing operation did not comply with the principle of minimal data processing. Moreover, the DPA found that, in the absence of free consent of the data subject, there was no legal basis for the processing of personal data as required by Article 6 of the GDPR.

The Defendant appealed this decision to the Markets Court, which ruled in favour of the Defendant. The Markets Court considered that the Complainant had refused to provide her eID card. As a result, it held that no effective processing of her data had taken place, and the Complainant therefore did not demonstrate an actual infringement in relation to her personal data.

*Supreme Court Reasoning*

First, the Supreme Court clarified that a data subject always has the right to lodge a complaint with the DPA against a processing activity which he/she believes infringes his/her rights under General Data Protection Regulation 2016/679 (the ***GDPR***), in particular based on the principles of minimal data processing and lawfulness and if the processing activity concerns receiving a benefit or a service. This is also the case if the data subject's personal data were not processed. In the case at hand, the Complainant was refused a benefit or service because she had not consented to the (allegedly infringing) processing.

Second, with regard to the free nature of the consent given by the Complainant, the Supreme Court found that the possibility of losing a benefit or service must be considered when assessing the "free" nature. The loss of a benefit or service in the event of refusal of consent may cause the possibility of a genuine free consent to be non-existent. In the case at hand, the Complainant was not offered any alternative to the creation of a loyalty card in order to benefit from the discount. The Supreme Court therefore held that the Markets Court had been wrong to rule that there had not been any disadvantage for the data subject.

The Supreme Court's judgment is available here.

# INTELLECTUAL PROPERTY

***Brussels Commercial Court Confirms Copyright Protection Afforded Rolex in its Products and Photographs***

On 7 July 2021, the Dutch-language Brussels Commercial Court (*Ondernemingsrechtbank/Tribunal de l'entreprise*) (the ***Court***) held in favour of Rolex S.A. and Rolex Benelux NV (***Rolex***) against Time Line Watches BV (***Time Line***) in cease-and-desist proceedings for trade mark and copyright infringement. The Court held that encrusting diamonds on watches protected by copyright amounts to an adaptation which requires the consent of the copyright holder.

*Facts and Procedure*

Rolex is a Swiss manufacturer of luxury watches. It owns the Benelux trade mark "Rolex" for the classes of goods 9 (including watches) and 14 (including timepieces and their parts). In 2020, Rolex noticed that Time Line, an independent jeweller, was selling Rolex watches online without Rolex's permission. Time Line was adapting the watches by incrusting precious gem onto the watches, a process called "icing". The case was first brought in front of the Antwerp Enterprise Court but was dismissed for lack of jurisdiction. It was then referred to the Brussels Enterprise Court.

*Court Reasoning*

In the case before the Court, Rolex claimed that the online sale and marketing by Time Line infringed its trade marks and copyright. Regarding the alleged copyright infringements, the Court agreed and referred to Article XI.165 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) based on which "*the author of a literary or artistic work alone has the right to reproduce it or have it reproduced in any way or form, directly or indirectly, temporarily or permanently, in whole or in part. This right includes the exclusive right to grant permission to adapt the work*". Time Line had not received Rolex's permission to adapt Rolex' work by icing the watches. Consequently, Time Line's use of Rolex's authentic creations constitutes an unauthorized adaptation of the work.

Furthermore, Time Line used pictures made by Rolex on its website and, when that use was challenged, argued that these were not protected by copyright because they lacked originality.


The Court disagreed and explained that a photograph can be protected by copyright if the author has expressed a free and creative choice. This can result from the staging of the product, the choice of the photographed product/person or the lighting. The Court held that the photographs of Rolex displayed creative choices in that the product had been photographed in full front and that special photographing techniques and software had been used to manipulate the image and obtain a 3D feeling. The Court concluded that Time Line's use of these photographs infringed Rolex's copyright.

Regarding the trade mark aspects of the action, the Court held that Time Line's actions were unfair because it advertised photographs that included the contested sign and displayed on social media a counterfeited glove bearing that sign. Since that glove was not put on the market by Rolex, Time Line could not invoke the trade mark exhaustion rule. The Court upheld the trade mark infringements as well and ordered Time Line to stop the infringement and imposed periodic penalty payments of EUR 10,000 per infringement.

***Court of Justice of European Union Rules on Legitimacy of Decompiling Computer Programmes***

On 6 October 2021, the Court of Justice of the European Union (***CJEU***) held in Case C-13/20 *Top System SA v. Belgian State* that the lawful acquirer of software can decompile a computer programme to correct its errors under Article 5(1) of Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes (the ***Software Directive***). The CJEU sided with Advocate General (***AG***) Szpunar whose opinion was discussed in this Newsletter (*See*, this Newsletter, Volume 2021, n°3).

*Facts and Procedure*

The dispute arose between Selor, the selection and recruitment office of the Belgian federal government, and Top System, a software company. Selor had decompiled Top System's software to address a malfunction. The decompiling of a programme is a process of reverse engineering involving the conversion of an executable programme code into readable form. Top System objected to the decompiling and brought an action for copyright infringement which ended up before the Court of Appeal of Brussels (*Hof van Beroep te Brussel / Cour d'appel de Bruxelles*). That court referred a request for a preliminary ruling to the Court of Justice of the European Union.

*CJEU Reasoning*

The CJEU held that although under Article 4 of the Software Directive the author of the programme has exclusive rights of reproduction of a computer programme, Article 5 of the Software Directive provides that the acquirer can carry out acts that are within the owner's monopoly without its authorisation, provided that these are necessary for the use of the programme, including correcting its errors.

The CJEU explained that Article 5 of the Software Directive has a different purpose than Article 6 of the Software Directive, which allows the decompiling of the software by an authorised user when it is indispensable for its interoperability. To rely on Article 5 of the Software Directive, the users' acts, including the correction of errors, must be necessary for them to be able to use the programme for its intended purpose. The CJEU explained that the term 'errors' should be understood as a defect in the programme that causes its malfunctioning. The correction will in most cases involve a modification of the programme's code. The implementation of that correction will thus require access to the source code or the quasi-source code of the programme. However, such a correction will not be deemed 'necessary' if the source code is lawfully accessible to the purchaser.

Finally, the Court noted that, based on recital 18 of the Software Directive, parties cannot contractually exclude the correction of errors affecting the operation of the programme. By contrast, parties can define the procedure to follow for the decompiling of the programme.

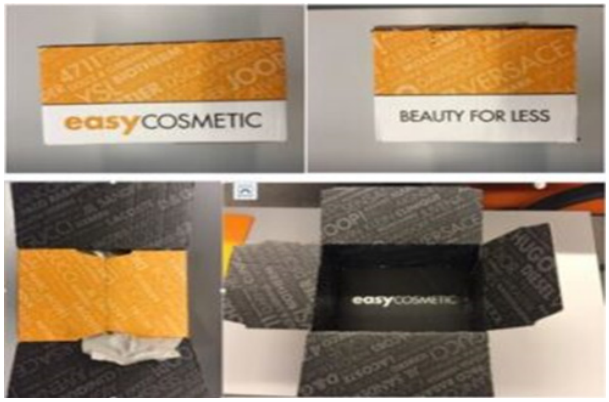
The CJEU's judgment can be found here.

***Court of Appeal of The Hague Rules on Trade Mark Exhaustion for Multi-Branded Packaging***

On 17 August 2021, the Court of Appeal of The Hague (the ***Court***) laid down the conditions under which multi-branded packaging can be allowed over the objections of the owner of the trade marks in the product. The Court held that multi-branded labelling on the packaging does not necessarily impair the reputation of the trade mark holder.

*Facts and Procedure*

Coty Beauty Germany GMBH (***Coty***) is a German company selling perfume, cosmetics, and skin care products. Coty has exclusive licences on numerous trade marks including 'Jil Sander' and 'Davidoff'. Easycosmetic Benelux BV (***Easycosmetic***) is a Dutch company selling cosmetics of more than 250 different brands. Easycosmetic's shipping boxes contain more than 80 brands, including trade marks that are registered by Coty.




Coty brought an action before the District Court of The Hague (***District Court***), claiming that Easycosmetic's packaging infringed some of its trade marks. The District Court sided with Coty and held that the packaging created the false impression of an economic link between the two firms. Easycosmetic appealed this decision.

*Court Reasoning*

The Court explained that pursuant to Article 15(2) of Regulation 2017/1001 on the European Union Trade Mark (***Regulation 2017/1001***), the trade mark owner can prohibit sales if there are legitimate reasons to object to the further commercialisation of the goods. Based on the judgment of the Court of Justice of the European Union (***CJEU***) in Case

C-337/95 *Dior/Evora*, such legitimate reason will be found to exist when the indication of origin function of the trade mark is affected. This is the case if the specific use of the trade mark damages the trade mark holder's reputation or creates an impression of economic link between the trade mark owner and the reseller.

The Court reversed the District Court's ruling and held that these conditions had not been met in this case. It noted that the slogans "BEAUTY FOR LESS" and the sign "EASYCOSMETIC" were separated from the group of brands of Coty printed on the shipping box and therefore stand out as they are written in a different style, font and colour. Moreover, the signs were not depicted with the specific style of any of Coty's brands but with Easycosmetic's corporate identity. Based on the numerous brands mentioned and the fact that the slogan implied that Easycosmetic offers lower prices, the Court held that the relevant public will not have the impression that there is an economic link between Easycosmetic and the various trade mark owners.

# LITIGATION

***Court of Justice of European Union Confirms CILFIT Criteria and Clarifies Case Law on Preliminary References***

On 6 October 2021, the Grand Chamber of the Court of Justice of the European Union (the ***CJEU***) delivered a judgment clarifying the obligation of national courts to refer questions on the interpretation of EU law to the CJEU (Case C-561/19, *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*).

In the case at hand, the referring court asked whether a national court against whose decisions there is no remedy must refer a question on the interpretation of EU law to the CJEU when that question is raised at an advanced stage of the proceedings, after the case has been set down for judgment for the first time or when a request for a preliminary ruling has already been made to the CJEU in the same case.

In its judgment of 6 October 2021, the CJEU first referred to its *CILFIT* judgment according to which national courts of last instance are only relieved from their obligation to make a reference for a preliminary ruling when (i) the question raised is irrelevant; (ii) the question has already been interpreted by the CJEU; or when (iii) the correct application of EU law is so obvious as to leave no reasonable doubt (the ***CILFIT criteria***).

Second, the CJEU confirmed that if national courts of last instance decide not to refer a question to the CJEU, they must specify the reasons for that decision and these must be based on one of the three CILFIT criteria. Accordingly, the CJEU found that a national court cannot be relieved of the obligation to refer a question to the CJEU merely because it has already made a reference to the CJEU for a preliminary ruling in the same proceedings.

Third, the CJEU reaffirmed that it is for national courts to assess whether and at what stage of the national procedure it would be relevant and appropriate to make a preliminary reference. However, a national court against whose decisions there is no remedy may refrain from referring a preliminary question to the CJEU on grounds of inadmissibility applicable under their national procedural rules, provided that such rules comply with the EU law principles of equivalence and effectiveness.

Lastly, the CJEU held that the "absence of reasonable doubt" (*i.e.*, the third *CILFIT* criterion) must be assessed based on the characteristic features of EU law, the particular difficulties to which the interpretation of EU law gives rise and the risk of divergences in judgments within the EU. In particular, the CJEU indicated that, before concluding that there is no reasonable doubt as to the correct application of EU law, national courts must be convinced that the matter would be equally obvious to the courts of other Member States and to the CJEU.

The judgment can be found here.

# PUBLIC PROCUREMENT

***Prime Minister Presents Policy Note on Public Procurement***

On 28 October 2021, Prime Minister De Croo submitted his annual policy note (*beleidsnota / note de politique générale* – the ***Policy Note***) to the federal Chamber of Representatives. In the Policy Note, the Prime Minister outlines the main objectives which the federal Government (the ***Government***) will be pursuing in the areas for which he bears responsibility. These areas include the regulatory framework governing public procurement, alongside topics as diverse as cybersecurity, internal audits, and the policy of providing seats for international organisations (*zetelbeleid / politique de siège*).

The Policy Note discusses four initiatives that will impact the Belgian regulatory framework governing public procurement.

First, the Government will take steps to continue promoting the use of electronic invoicing in the framework of public procurement. Some steps in this regard have already been taken by the Law of 7 April 2019 amending the Law of 17 June 2016 on public procurement and other laws (*Wet van 7 april 2019 tot wijziging van de Wet van 17 juni 2016 inzake overheidsopdrachten, de Wet van 17 juni 2016 betreffende de concessieovereenkomsten, de Wet van 13 augustus 2011 inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten op defensie- en veiligheidsgebied en tot wijziging van de Wet van 4 mei 2016 inzake het hergebruik van overheidsinformatie / Loi du 7 avril 2019 modifiant la Loi du 17 juin 2016 relative aux marchés publics, la Loi du 17 juin 2016 relative aux contrats de concession, la Loi du 13 août 2011 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services dans les domaines de la défense et de la sécurité et modifiant la Loi du 4 mai 2016 relative à la réutilisation des informations du secteur public* – the ***Law of 7 April 2019***). With effect from 1 April 2019, the Law of 7 April 2019 imposed an obligation on contracting authorities to accept and process electronic invoices received from economic operators. Furthermore, the Law of 7 April 2019 introduced provisions, of which the date of entry into force was still to be determined by Royal Decree, requiring economic operators to send their invoices in electronic format to contracting authorities. The Government intends to adopt this Royal Decree, which will provide for a phased entry into force of the requirement to send electronic invoices, starting with contracts whose value exceeds the European thresholds. The Royal Decree will also determine a threshold below which economic operators will be exempt from the obligation to send electronic invoices.

Second, the ongoing review of the regulatory framework governing public procurement will be continued (*See also*, the Prime Minister's policy note of 2020, p. 16). One of the subjects under review is that of how access of small and medium-sized enterprises (***SMEs***) to public procurement contracts can be improved. To be able to monitor SME participation better, the requirement to publish a contract award notice will, according to the Policy Note, "to some extent" (*in zekere mate / dans une certaine mesure*) be generalised to cover also contracts whose value remains below the European thresholds. Ethical, environmental and social clauses will also receive greater attention. Furthermore, increased transparency and increased effectiveness should lead to a reduction in the number of appeals.

Third, and related to the previous action, the Government will revise the regulatory framework governing public procurement in light of two recent judgments of the Court of Justice of the European Union (***CJEU***). Having regard to the CJEU's judgment of 14 January 2021 in case C-387/19 (*RTS Infra and Aannemingsbedrijf Norré-Behaegel*) (*See*, this Newsletter, Volume 2021, No. 1), revisions will be made to clarify how and when tenderers who find themselves in an optional exclusion ground can demonstrate their reliability despite the existence of this exclusion ground. In addition, clarifications will be introduced regarding the obligation to indicate the maximum quantity and/or value of the purchases to be made under a framework agreement in view of the CJEU's judgment of 17 June 2021 in Case C-23/20 (*Simonsen & Weel*).

Finally, the Government intends to establish a Committee on the Management of Public Procurement (*Comité inzake het bestuur van de overheidsopdrachten / Comité de la gouvernance des marches publics*). The task of this new Committee will be to assist the Federal Public Service Chancellery of the Prime Minister, Directorate General Coordination and Legal Affairs (Public Procurement Service) in preparing the three yearly monitoring reports that should be submitted to the European Commission.

***EU Public Procurement Thresholds Are Updated***

On 11 November 2021, the *Official Journal of the EU* published financial thresholds for the application of the EU public procurement Directives in the years 2022-23.

The new thresholds, which will apply from 1 January 2022, are as follows (VAT excluded):

- Directive 2014/24/EU of 26 February 2014 on public procurement ("classical sectors"):

| Type of contract | Current threshold (EUR) | New threshold (EUR) |
|---|---|---|
| Supplies and services - Central government authorities | 139,000 | 140,000 |
| Supplies and services - Sub-central contracting authorities | 214,000 | 215,000 |
| Works | 5,350,000 | 5,382,000 |
| Light touch regime (social and other services listed in Annex XIV) | 750,000 | 750,000 |

- Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors:

| Type of contract | Current threshold (EUR) | New threshold (EUR) |
|---|---|---|
| Supplies and services | 428,000 | 431,000 |
| Work | 5,350,000 | 5,382,000 |

- Directive 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security:

| Type of contract | Current threshold (EUR) | New threshold (EUR) |
|---|---|---|
| Supplies and services | 428,000 | 431,000 |
| Work | 5,350,000 | 5,382,000 |

- Directive 2014/23/EU of 26 February 2014 on the award of concession contracts:

| Type of contract | Current threshold (EUR | New threshold (EUR) |
|---|---|---|
| Concession contracts | 5,350,000 | 5,382,000 |

Contracts whose estimated value reaches or exceeds these thresholds must be announced both in the Belgian Public Tender Bulletin (*Bulletin der Aanbestedingen / Bulletin des Adjudications;* available here) and in the Supplement to the Official Journal of the EU (available here). The slight increase in thresholds implies that, as from 1 January 2022, less public procurement procedures will be subject to the EU public procurement rules.

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