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Highlights

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CONSUMER LAW

Advocate General Bobek Considers Extent of Consumer Jurisdictional Privilege in Relation to Personal and Assigned Claims for Breach of Data Rights

On 14 November 2017, Advocate General Bobek (the "AG") gave his opinion (the "Opinion") in Case C-498/16 *Maximilian Schrems v. Facebook Ireland Limited*. In his Opinion, which the Court of Justice of the European Union ("ECJ") is not obliged to follow, the AG proposes a clarification of the consumer jurisdictional privilege.

Maximilian Schrems is a well-known Austrian activist in the field of technology and electronic privacy. Previously, Mr. Schrems had successfully challenged the transfer of data from the EU to the US through the Safe Harbour regime (See, *this Newsletter*, Volume 2015, No. 9, p. 10 and No. 10, p. 8).

In the present case, Mr. Schrems sued Facebook Ireland, the European subsidiary of Facebook Inc., for alleged violations of his data protection rights, as well as those of seven other Facebook users. Mr. Schrems initiated proceedings in the Austrian courts, relying on the consumer jurisdictional privilege provided for in Article 16(1) of the now repealed Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation"). This provision allows consumers (*i.e.*, non-commercial parties) to sue the other party to a contract in the courts of the EU Member State in which the consumer is domiciled. Article 18(1) of the currently applicable Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels Ibis Regulation") contains similar terms.

Facebook challenged the jurisdiction of the Austrian court which asked the ECJ for help in applying the European rules of jurisdiction. Facebook argued that Mr. Schrems was not a consumer, given the public nature of his activities on the site. Facebook added that any consumer jurisdictional privilege which Mr. Schrems enjoys cannot extend to the claims assigned to him by other Facebook users.

Mr. Schrems maintained two presences on Facebook. The first, an "account", was for personal use. The second, a "page", was public and used for promoting his books, lectures, media appearances and fundraising activities.

According to the AG, the status of consumer arises, as a general rule, from the nature and aim of the contract at the time it was concluded. Once acquired, consumer status will normally persist. A subsequent change in use may, exceptionally, transform the user's status, but the mere fact of possessing particular knowledge, expertise or public renown due to previous litigation is insufficient to effect such a change in status. The AG therefore suggested that Mr. Schrems' use of a public Facebook page and his activities in publishing, lecturing and fundraising, for the purposes of litigation and enforcing claims, do not result in the loss of his consumer status in relation to claims arising from his use of a personal Facebook account.

By contrast, the AG maintained that the assigned claims do not enjoy the same consumer jurisdictional privilege. The AG noted that the jurisdictional rules are intended to apply to "*the concrete and specific parties to the contract*". Thus, a vehicle for collective redress which specifically seeks to gather litigants and assign their claims to one claimant is incompatible with the consumer jurisdictional privilege. The AG observed that to hold otherwise could lead to abuses of the privilege and widespread forum-shopping. He allowed for the fact that such disadvantages may be outweighed by gains in effective judicial consumer protection and a reduction of the need for concurrent proceedings. This would, however, require a well-designed regulatory framework, the creation of which would be beyond the ECJ's competence.

Thus, the AG proposed that Mr. Schrems should maintain his consumer jurisdictional privilege only partially. The privilege would therefore not extend to the claims that had been assigned. The ECJ will give judgment in the coming months.

DATA PROTECTION

EU and South Korea Discuss Adequacy

On 20 November 2017, European Commissioner Věra Jourová met with Lee Hyo-seong, Chairman of the Korea Communications Commission, and Jeong Hyun-cheol, Vice President of the Korea Internet & Security Agency, to exchange views on ways to strengthen the cooperation between the EU and South Korea on data protection and data flow issues.

The EU and South Korea are working towards an agreement that would facilitate mutual data flows. In the European Union, this would lead to the European Commission (the "Commission") adopting an "adequacy" decision vis-à-vis Korea. This would imply that the Commission determines that South Korea ensures an "adequate level of protection" for personal data by reason of its domestic law or the international commitments it has entered into. The parties hope to reach such an adequacy finding in the course of 2018.

If a third country is granted an adequacy decision, personal data flows from all European Union Member States and the three EEA member countries (Iceland, Liechtenstein and Norway) to that third country may occur without any further safeguards.

The Commission has so far recognised Andorra, Argentina, Canada (commercial organisations), Faeroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, Uruguay and US companies registered with the EU US Privacy Shield as providing adequate protection.

A press release about the meeting can be found [here](#).

Advocate General Bobek Considers Extent of Consumer Jurisdictional Privilege in Relation to Personal and Assigned Claims for Breach of Data Rights

See, this Newsletter, Consumer law.

INTELLECTUAL PROPERTY

Bill Implementing Unitary Patent and European Unified Patent Court

On 6 November 2017, the Belgian government submitted a bill to the federal Chamber of Representatives amending various provisions concerning patents in relation to the implementation of the unitary patent and the unitary patent court (*Wetsontwerp houdende wijziging van diverse bepalingen betreffende de uitvindingsoctrooien in verband met de implementering van het eenheidsoctrooi en het eenge-maakt octrooigerecht/Projet de loi modifiant diverses dispositions en matière de brevets en relation avec la mise en oeuvre du brevet unitaire et de la juridiction unifiée du brevet*) (the "Bill"). The aim of the Bill is to align Belgian legislation with the Agreement on a Unified Patent Court (the "UPC Agreement").

The main changes brought about by the Bill relate to the rights of patent holders under the UPC Agreement, including the exceptions to these rights. Without these changes, a Belgian judge would have to assess patent claims differently depending on the classification of the patent as a Belgian patent (including a national patent based on a "classical" EU patent application) or as a European patent with unitary effect. The proposed modifications harmonise both types of rights.

The exceptions to the exclusive rights conferred by a patent are contained in the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique*). The Bill proposes to exclude the following acts from the scope of patent protection:

- the use of biological material for the purpose of breeding or discovering and developing other plant varieties;
- the acts and the use of the obtained information as allowed under Articles XI.299 and XI.300, in particular, the provisions on decompilation and interoperability; and,
- the so-called "Bolar" exemptions (which permits the use of patented products without the content of the patent holder in experiments for the purpose of obtaining regulatory approval for medicines). Article

XI.34(1)(d) will explicitly refer to the Law of 25 March 1964 concerning Medicines, which already provides for this exception in Belgian law.

Furthermore, a new Article XI.83/1 of the Code of Economic Law will provide for the possibility for a patent holder whose request for unitary effect has been refused to continue enjoying protection under a European patent without unitary effect which, once granted, becomes a bundle of national patents.

As regards jurisdiction, Article XI.337, §1 of the Code of Economic Law attributes to the Commercial Court of Brussels (*Rechtbank van Koophandel/Tribunal de commerce*) the exclusive competence with regard to any actions concerning patents and supplementary protection certificates ("SPCs"). The Bill amends Article XI.337, §1 of the Code of Economic Law in order to clarify that the UPC is, nevertheless, the competent court for claims listed in Article 32(1) of the UPC Agreement. The Bill fails, however, to take into account the existence of two Commercial Courts in Brussels, namely the Dutch-speaking Commercial Court and the French-speaking Commercial Court.

Finally, the Bill introduces amendments to the Law of 21 April 2007 concerning various provisions relating to the procedure for the submission of European patent applications and the consequences of these applications and of the European patents in Belgium (*Wet van 21 april 2007 houdende diverse bepalingen betreffende de procedure inzake indiening van Europese octrooiaanvragen en de gevolgen van deze aanvragen en van de Europese octrooien in België/Loi du 21 avril 2007 portant diverses dispositions relatives à la procédure de dépôt des demandes de brevet européen et aux effets de ces demandes et des brevets européens en Belgique*). The amendments create terminological clarity and incorporate references to the European patent with unitary effect.

The Bill provides for the entry into force of a range of its provisions when the UPC Agreement itself will enter into force. By contrast, other provisions will enter into force ten days following the publication of the new law in the Belgian Official Journal.

As regards the entry into force of the Unitary Patent, the EU regulations establishing the Unitary Patent system (No 1257/2012 and No 1260/2012) entered into force on 20 January 2013, but they will only apply as from the date of entry into force of the UPC Agreement. This is expected in the course of 2018 if the ratification process is able to overcome the obstacles created by Brexit in the United Kingdom and a constitutional challenge in Germany. These issues could still delay or even derail the entry into force of the UPC Agreement.

Supreme Court Holds That Unsold Goods Have Not Yet Been "Put on the Market" Under Trade Mark Law

On 2 November 2017, the Supreme Court (*Hof van Cassatie/Cour de Cassation*) handed down a judgment in which it applied the interpretation of the Court of Justice of the European Union ("ECJ") of the wording "*goods which have been put on the market in the European Economic Area*" within the meaning of Article 15(1) of Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark.

Referring to the judgment of the ECJ in the *Peak Holding* case (C-16/03), the Supreme Court held that the leasing of goods under the retention of ownership does not exhaust the rights of the trade mark proprietor even though the lease contract provides for the possibility to invoice the goods that are not returned. The Supreme Court held, in accordance with the interpretation of the ECJ, that exhaustion of trade mark rights can only occur if the goods are effectively sold in the EEA. This means that the right to market the goods must be transferred to a third party. According to the Supreme Court, the possibility to invoice the goods if the end user does not return them cannot be likened to putting the goods on the market since this does not enable the right holder to realise the economic value of the trade mark.

Board of Appeal of European Union Intellectual Property Office Grants Trade Mark Protection to Portrait Photograph

On 16 November 2017, the Board of Appeal of the European Union Intellectual Property Office (the "EUIPO Board of Appeal") reversed the EUIPO examiner's refusal to register a portrait photograph of the Dutch model Maartje Verhoef as an European Union Trade Mark ("EUTM") for a large number of products and services.



According to the EUIPO examiner, a portrait photograph of a woman (i) has no inherently distinctive character since it does not differ from other portrait photographs of other women; and (ii) has a descriptive character in so far as that picture merely describes the category of consumers for which the goods are intended (*i.e.*, women) and in so far as the picture represents the model or the fashion designer. In relation to other goods and services, the examiner held that the sign lacks any distinctive character and does not allow for the distinction of the goods and services of the applicant from those of another commercial origin.

Upon appeal by Ms. Verhoef, the EUIPO Board of Appeal overturned the examiner's decision holding that the photograph clearly depicted one particular woman and that the relevant public would not perceive that photograph as a direct link to the target audience (*i.e.*, women) since there are also female fashion designers that design collections for men, and *vice versa*. Furthermore, the EUIPO Board of Appeal rejected the reasoning of the examiner that the portrait merely represents the person providing the services in question and thus found the portrait photograph to have sufficient distinctive character to qualify for trade mark protection. In other words, according to the EUIPO Board of Appeal, the photograph can be perceived as an indication of the commercial origin of these goods and/or services since a portrait photograph is a unique representation of a person. Consequently, such a photograph inherently has the capacity to fulfil the essential function of a trade mark, which is to distinguish the products for which registration is sought from those of another commercial origin.

Court of Justice of European Union Clarifies Genuine Use Requirement for Trade Marks

On 11 October 2017, the Court of Justice of the European Union ("ECJ") handed down a judgment in a case concerning the genuine use requirement for trade marks. The ECJ held that the use of a figurative element of a mixed trade mark may suffice to demonstrate a "genuine use" of the trade mark.

The facts of the case relate to the registration of the figurative sign "CACTUS OF PEACE – CACTUS DE LA PAZ" by a company called Del Rio Rodriguez.

CACTUS OF PEACE

CACTUS DE LA PAZ

On 12 March 2010, Cactus SA ("Cactus") filed a notice of opposition on the basis of the earlier EU word mark CACTUS and an earlier figurative mark consisting of a stylised cactus and the word element "CACTUS".



In its judgment, the ECJ dismissed the appeal of the European Union Intellectual Property Office ("EUIPO") against the judgment of the General Court of 15 July 2015 in *Cactus v OHIM* (T-24/13). According to EUIPO, the General Court based its findings (i) on an erroneous interpretation of the *IP Translator* (C-307/10, 19 June 2012) and *Praktiker Bau* (C-418/02, 7 July 2005) judgments; and (ii) on an incorrect interpretation of the "genuine use" requirement within the meaning of Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark ("CTMR").

In its appeal before the ECJ, the EUIPO argued that it follows from *IP Translator* that the scope of general indications of a class heading of the Nice Agreement is limited to all the goods or services in the alphabetical list of a particular class. It further contended that it follows from the *Praktiker Bau* case that although retail trade in goods constitutes a service in Class 35 of the Nice Agreement, the applicant must nevertheless be required to specify

the types of goods to which the retail relates. Although the *IP Translator* and *Praktiker Bau* judgments were both given after the registration of the trade marks of Cactus, the EUIPO contended that these judgments limit the scope of protection of the Cactus trade marks due to the retro-active effect of the case law of the ECJ.

The ECJ did not accept the EUIPO's arguments. It referred to its *Brandconcern* judgment (C-557/14 P) of 16 February 2017, in which it held that the *IP Translator* judgment does not concern trade marks that were already registered at the date of that judgment's delivery. Further, the ECJ pointed out that in *Praktiker Bau* it had held that the specification requirement only relates to applications for registration as EU trade marks and does not concern the protection of trade marks already registered at the date of the judgment. Accordingly, the earlier word and figure marks "Cactus" can cover all the goods and services within Class 35 and Cactus is not required to specify the types of goods to which the retail trade relates.

During the proceedings, the defendant claimed that Cactus could not rely on its mixed figurative and word mark since it had not been used. Indeed, Cactus had failed to provide evidence of "genuine use" of the mixed trade mark containing figurative and word elements. Nevertheless, the ECJ held that the use of the figurative part of the trade mark could suffice to demonstrate "genuine use". Referring to its judgment in the *Specsavers* case (C-252/12), the ECJ held that the use of a trade mark in a form which differs from the form in which it was registered is regarded as "genuine use" within the meaning of Article 15(1) CTMR provided that the distinctive character of the mark in the form in which it was registered is not altered. In the case at hand, the ECJ held that the condition of "genuine use" is satisfied even if only the figurative element of a composite mark is used, as long as the distinctive character of that mark, as registered, is not altered. The ECJ concluded that the absence of the word element "Cactus" in the abbreviated version of the earlier figurative mark was not sufficiently important in the perception of that mark as a whole as to alter its distinctive character.

Furthermore, EUIPO argued that the General Court had erred in law since it deduced the equivalence of the sign used in an abbreviated form (the stylised cactus alone) and of the registered sign (stylised cactus + word element "Cactus") solely from the semantic equivalence of their

word and figurative components, without carrying out an overall assessment. However, the ECJ held that the General Court rightly conducted a global assessment of the equivalence of the sign in an abbreviated form and of the registered sign. Furthermore, the General Court was under no obligation to verify the extent to which the part omitted (*i.e.*, the word element "Cactus") had a distinctive character and was important in the perception of the sign as a whole.

European Commission Communication on Enforcement of IPRs and on Standard Essential Patents

The European Commission presented on 29 November 2017 an intricate set of policy documents designed to increase the level of protection afforded by intellectual property rights ("IPRs") in the European Union. The Commission's initiatives focus on (i) the fight against counterfeiting and piracy; (ii) the enforcement of IPRs; and (iii) Standard Essential Patents ("SEPs"). All of these initiatives are discussed in a Communication entitled "A balanced IP enforcement system responding to today's societal challenges" (COM (2017) 707 final) (the "IPR Communication") while some aspects of the Commission's policy package are explained in greater detail in additional, distinct documents.

Fight against Counterfeiting and Piracy

The main measures under this heading can be summarised as follows:

- The Commission will step up its "follow the money" efforts and deprive large scale IPR infringers of the revenues associated with their counterfeiting and piracy activities.
- Emulating the example of the 2011 Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet, the Commission will support further industry initiatives to combat IPR infringements. It is currently working on similar MoU's for the online advertising and payment services industries.
- The Commission will increase cooperation with third countries; offer more targeted assistance to national customs authorities; and enhance administrative cooperation in the anti-counterfeiting fight.

Enforcement of IPRs

The Commission also published a Communication offering "Guidance on specific aspects of Directive 2004/48/EC on the enforcement of IPRs" (COM (2017) 708 final) (the "Enforcement Guidance"). The Enforcement Guidance is accompanied by a Staff Working Document that evaluates Directive 2004/48/EC ("IPRED")(SWD (2017) 431 final).

The Enforcement Guidance seeks to assist judicial authorities and other parties involved in enforcing IPRs in interpreting and applying IPRED. It focuses on a range of aspects of IPRED, including its scope; the entitlement to apply for relief, including injunctions and corrective measures; the presumption of authorship and ownership; the rules on obtaining and preserving evidence; the right of information; damages; and legal costs.

The Staff Working Document evaluates IPRED while relying on external studies, various stakeholder consultations and desk research. Significantly, it lists a range of weighty issues that currently fall outside the scope of IPRED but may have to be addressed in any revision of that Directive. The Staff Working Document cites, for example, the lack of harmonisation of substantive IPR rules which hampers cross-border enforcement; the disparities between national criminal sanctions; and the tensions with rules that form part of the E-commerce regulatory framework.

SEPs

The most anticipated Commission document was the Communication "setting out the EU approach to Standard Essential Patents" (COM (2017) 712 final) (the "SEP Communication"). The SEP Communication promised to be controversial pitting right holders against IPR users. However, in the end, the Commission chose not to take a position on the most contentious issues while establishing key principles with regard to SEPs. The Commission thus pursued a double objective: (i) stimulating the development and inclusion of high-end technologies in standards, by guaranteeing right holders a fair and adequate return for their contributions; and (ii) ensuring a wide and friction-free dissemination of the resulting standardised technologies.

The key points of the SEP Communication are as follows:

- The Commission advocates increased transparency of the system of declaration of technology (in practice mostly patent applications that may still evolve before and if they become patents) and a more user-friendly accessibility to databases of standard developing organisations.
- The Commission is in favour of a higher degree of scrutiny on essentiality claims, with scrutiny being performed by an independent party. The Commission adds that this would have to be balanced against the cost.
- The Commission would still seem to allow for flexibility in how fair, reasonable and non-discriminatory ("FRAND") rates are established. IPR valuation should focus on the value of the patented technology as such, rather than the value derived from the fact that the technology has become part of a standard. Neither should value be affected by the market success of the product unrelated to the patented technology. Furthermore, individual SEPs should not be considered in isolation, but assessed against the overall added value of the technology.
- Non-discrimination between "similarly situated" licensees is fundamental.
- Patent pools within the scope of EU competition law should be encouraged. This is conducive to the development of the Internet of Things and will help SMEs.
- Avoiding taking a position on a hotly debated issue, the Commission does not mandate "use-based" licensing, but at the same time does not rule it out. It advocates a case-by-case approach dependent on sector and business models. The Commission encourages "sectoral discussions with a view to establishing common licensing practices".
- Patent Assertion Entities are subject to the same rules as other SEP holders. Still, the Commission adds a word of caution when discussing injunctive relief for these entities: "The application of the proportionality principle by courts provides yet another safeguard. The Commission will closely monitor the ongoing impact of these market players on the SEP licensing market in Europe, in particular once the EU unitary patent is operational."
- Proportionality remains critical when it comes to injunctive relief generally. The Commission indicates that the "relative relevance of the disputed technology for the application in question and the potential spill-over effects of an injunction on third parties" should be taken into account and refers to Article 3(2) of the IPRED.

The IPR Communication can be found [here](#), the link to the Enforcement Guidance can be accessed [here](#) and, finally, the SEP Communication is available [here](#).

VCAST Cloud Storage Not Only Question of Private Copying But First and Foremost of Making Available Protected Works

On 29 November 2017, the Court of Justice of the European Union ("ECJ") handed down a judgment on a request for a preliminary ruling from the Italian Court of First Instance regarding the compatibility of Article 5, §2, b) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of specific aspects of copyright and related rights in the information society (the "InfoSoc Directive"). At issue was a national provision prohibiting the offering of cloud-computing services that enable the remote recording of private copies of copyright protected works without the consent of the right holder. The ECJ's ruling is broadly consistent with the opinion of the General Advocate General (*See, this Newsletter, Volume 2017, No. 9, page 16*).

VCAST's service allows users to record terrestrial programmes of Italian television broadcasters, using online cloud storage. The questions referred to the ECJ sought to learn whether the cloud-based storage offered by VCAST could be regarded as a private copy under EU law. In response, the ECJ pointed out that this issue does not only relate to a possible exemption of the reproduction right, but that the national court would first have to consider the issue under the making available right. Indeed, the ECJ considered that the service provided by VCAST has a dual functionality consisting in ensuring both the reproduction and the making available of protected works. To the extent that the service offered by VCAST consists in the making available of protected works, it falls within the notion of communication to the public. In that respect, the ECJ recalled that, according to the InfoSoc Directive, any communication to the public, including the making available of a protected work or subject-matter, requires the right holder's consent, given that the right of commu-

nication of works to the public should be understood, in a broad sense, as covering any transmission or retransmission of a work to the public by wired or wireless means, including broadcasting.

The ECJ held that the original transmission made by the broadcasting organisation, on the one hand, and that made by VCAST, on the other, are made under specific technical conditions, using a different means of transmission for the protected works. In addition, each firm targets different persons which therefore should be regarded as making up a distinct public.

In view of these circumstances, the ECJ concluded that the retransmission made by VCAST constitutes a communication to a different public from that of the original transmission and must therefore secure the consent of the copyright owner or holder of related rights. As a result, such a remote recording service cannot fall within the private copying exception.

European Commission Launches Public Consultation on Supplementary Protection Certificates and Patent Research Exemptions

On 12 October 2017, the European Commission launched a public consultation to assess existing legislation and consider potential updates to the EU rules governing supplementary protection certificates ("SPCs") and patent research exemptions.

SPCs are regulated by Regulations (EC) No 469/2009 and No 1610/96 on SPCs covering pharmaceutical and plant protection products respectively. SPCs consist in an extension of up to 5 years to the term of a patent right and apply to innovative pharmaceutical and plant protection products authorised by regulatory authorities. The additional exclusivity period compensates for the lengthy testing and clinical trials required for these products to obtain marketing approval during which time the patent owner is not allowed to market its invention.

As regards patent research exemptions, the so-called "Bolar" patent exemption is particularly on focus. This exemption aims to accelerate the market entry of generic medicines by allowing early preparatory development of generics to obtain pre-market regulatory approval, even when the SPC of the reference medicine is still in force. At

European Union level, the pharmaceutical industry benefits from this exemption by virtue of Article 13(6) of Directive 2001/82/EC on the Community code relating to veterinary medicinal products and Article 10(6) of Directive 2001/83/EC on the Community code relating to medicinal products for human use.

The public consultation follows the adoption, in October 2015, of the Single Market strategy of the European Commission, the purpose of which is to improve the patent system in Europe.

All stakeholders are invited to contribute to the public consultation by responding to an [online questionnaire](#) by 4 January 2018.

Expired Patent Does not Stand in Way of Copyright Protection for Handbag

On 6 November 2017, the Commercial Court of Antwerp (*Rechtbank van Koophandel/Tribunal de Commerce*) (the "Court") held that BVBA PB Fashion ("PB Fashion") and BVBA Kamize ("Kamize") infringed Jean Cassegrain SAS's copyright in the handbag and shopping bag *le Pliage*. PB Fashion imported and distributed counterfeit bags as a wholesaler, while Kamize sold these bags as a retailer.

According to the Court, PB Fashion and Kamize did not substantiate their position that the design in question was not original. The fact that there is a U.S. patent dating back to 1925 that describes a foldable bag merely proves that this technique has been known for a long time. The Court added that this essentially technical element does not affect the copyright rules. The other elements of the design are completely different and accordingly the bag *le Pliage* should be granted copyright protection. The Court imposed a fine of EUR 25,000 on PB Fashion and a fine of EUR 1,000 on Kamize.

LITIGATION

Recovery of Unchallenged Claims Under Review by Supreme Court and Parliament

On 12 October 2017, the Supreme Court (*Hof van Cassatie/Cour de Cassation*) (the “Supreme Court”) held that a court cannot require a plaintiff to pay the costs associated with court proceedings for the sole reason that this plaintiff sought to recover an unchallenged debt through ordinary court proceedings instead of opting for the procedure pursuant to Article 1394/20 of the Judicial Code. This provision allows a creditor to recover his unchallenged claim, without the intervention of any court, by having his lawyer instruct a bailiff to proceed with the recovery.

In the case at hand, the Ghent Commercial Court had initially required a plaintiff to pay the costs associated with court proceedings on the grounds that he had not used the procedure provided for by Article 1394/20 of the Judicial Code. By contrast, the Supreme Court pointed out that the preparatory works of Article 1394/20 of the Judicial Code clearly establish that recourse to such a procedure is optional. As a result, a plaintiff cannot be punished for his failure to opt for this extra-judicial procedure.

Separately, Article 1394/20 of the Judicial Code is subject to review by Parliament. On 17 November 2017, a bill (the “Bill”) was submitted to Parliament with the aim to remove the current requirement providing for the mandatory intervention of a lawyer in the procedure (*Wetsvoorstel tot wijziging van het Gerechtelijk Wetboek teneinde de procedure tot invordering van onbetwiste geldschulden te vereenvoudigen/Proposition de loi modifiant le Code judiciaire en vue de simplifier la procédure de recouvrement de dette d'argent non contestées*). If the Bill is adopted, private claimants (as well as in-house counsel) will be able to instruct their bailiff directly to proceed with the recovery of unchallenged claims.

PUBLIC PROCUREMENT

Advocate General Proposes Clarification of Obligations when Related Companies Submit Individual Tenders

On 22 November 2017, Advocate General Campos Sánchez-Bordona (the "AG") gave his opinion in Case C-531/16 *Šiaulių regiono atliekų tvarkymo centras and Others* (the "Opinion"). The Opinion is not binding on the Court of Justice of the European Union ("ECJ") but may serve to guide its reasoning in its upcoming judgment.

The case concerns the issuing by a Lithuanian local authority of a public tender for waste-disposal services. A number of bidders took part, including two who were members of the same corporate group. One of the related tenderers ultimately won the tender and a losing bidder challenged the procedure. The Supreme Court of Lithuania sought guidance from the ECJ in interpreting EU law, including the now repealed Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the "Directive").

The questions referred to the ECJ essentially concerned the duties of both the bidders and the tender issuer in such a scenario. First, must related tenderers which submit separate tender offers disclose their relationship? Second, how should the contracting authority proceed once it becomes aware of the links between two tenderers?

It was common knowledge that the two companies at the heart of the dispute were part of the same corporate group. One of the companies included in its bid a declaration that it was acting independently of its sister company. As a result of the company's declaration, the local authority was aware that the two companies formed, in the words of the AG, an "economic unit".

Unless the call for tenders specifically requires related companies to disclose their relationship, there is no obligation in EU law to do so. While the Directive provides that related tenderers must not submit a "mere variant or alternative" of a competitor's tender, the AG does not hold this to mean that there is a general obligation to disclose the nature of their corporate relationship to the contracting authority.

There may, however, be circumstances in which disclosing this relationship would be necessary on the grounds of competition law. In principle, the prohibition of anti-competitive agreements and concerted practices does not apply to companies that constitute an economic unit. Thus, article 101 TFEU does not apply to the case of two related tenderers.

Nonetheless, the ECJ's case law has made it clear that a contracting authority has an "active role" in applying the principles of public procurement and must act as the "guarantor of genuine competition between tenderers". As part of this role, a contracting authority is normally required to ensure that the tenders submitted are indeed distinct one from the other. This process of verification may necessitate the requesting of additional information from tenderers. At the same time, the contracting authority may already have sufficient information to make a decision. This will be the case if related tenderers voluntarily disclose the nature of their relationship and undertake to act in complete independence of each other for the purposes of the tendering process.

As a result, the contracting authority is required to ensure a fair and competitive process even though the competition rules on cartels do not apply to the situation of related tenderers. While the contracting authority is not specifically required to ask for information from related tenderers, it must nonetheless ensure that such information is available to it (such as on the basis of submissions already received) if it considers there to be a risk to transparency and fair competition between tenderers arising from the participation of related entities. If not, the fairness of the procedure may be called into question by other participants in the tender.

Although the AG delivered his opinion on the basis of Directive 2004/18/EC, the opinion is of future relevance because Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC contains similar terms.

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