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Legal 500 2019

November 2021

VBB on Belgian Business Law

Highlights

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Topics covered in this issue

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COMPETITION LAW

Economic Policy Note Gives Considerable Attention to Competition Law

On 29 October 2021, the Minister for Economic Affairs Pierre-Yves Dermagne (the ***Minister***) submitted to the federal Chamber of Representatives his policy note (*beleidsnota / note de politique générale*) on economic affairs (the ***Policy Note***).

The Policy Note covers a number of topics such as the impact of the European Green Deal and the digitisation of society, but also gives special attention to competition issues.

First, the Minister will monitor competition law developments at the European level. This concerns the European Commission's approach to digital markets and, more specifically, merger control in digital markets. The Minister will also closely follow the reform of the European rules governing vertical restraints (for an analysis of the Commission Proposal, *see* VBB Insights). The Minister "*makes sure that the ongoing review not only takes into account the expansion of e-commerce and online platforms, but also causes the relationships between large and small companies to become fairer*".

Second, the Minister wants to tackle territorial supply constraints, described as territorial restrictions imposed by a supplier that preclude a buyer from procuring products in the country of its choice and may give rise to important price differences between Member States. According to the Minister, "*the Benelux is committed to raising awareness among businesses and with the European Commission, in order to better understand territorial supply constraints, to inform businesses about the possibilities of dealing with them and to examine regulatory opportunities to end them*".

Third, a new competition bill will soon be submitted to federal Parliament. This bill will implement Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (the ***ECN+ Directive***). The bill should tackle various procedural shortcomings, increase the powers of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - ***BCA***) and introduce additional funding for the BCA. The BCA will receive funds from levies due on the notification of concentrations. This will increase the budget of the BCA by EUR 1.4 million (*See*, this Newsletter, Volume 2021, No. 10).

The full Policy Note can be found here.

Federal Parliament Adopts Bill Transposing Directive 2019/633 on Unfair Trading Practices in the Agricultural and Food Supply Chain

On 18 November 2021, the Chamber of Representatives of the Federal Parliament approved a bill (the ***Bill***) that implements Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (the ***UTP Directive***).

The Bill was submitted to Parliament by the federal Council of Ministers (*Ministerraad / Conseil des Ministres*) on 7 September 2021 (*See*, this Newsletter, Volume 2021, No. 9) and seeks to implement the UTP Directive into Book IV of the Code of Economic Law (***CEL***).

The UTP Directive aims to protect farmers, farmer organisations and small and medium sized suppliers of agricultural and food products against unfair trading practices by powerful buyers by allowing the former to lodge complaints against the latter for unfair trading practices and by requiring each EU Member State to designate a national enforcement authority to handle such complaints.

The Bill applies to sales when the supplier, the buyer, or both, are established in Belgium.

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 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 prohibited unless they were 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 competition law rules), will handle complaints and will have the power to impose administrative fines.

The deadline for implementing the UTP Directive was 1 May 2021. This led the European Commission to open infringement proceedings against Belgium for failure to transpose the UTP Directive (*See*, this Newsletter, Volume 2021, No 7).

The Bill enters into force on Christmas day and existing agreements have to be brought into line with the Law by 15 December 2022.

Brussels Court of Appeal Annuls Fine Imposed on Caudalie by Belgian Competition Authority for Misuse of Powers and Lack of Respect due to Written Observations

On 1 December 2021, the Markets Court (*Marktenhof / Cour des marchés*) of the Court of Appeal of Brussels (*Hof van Beroep te Brussel / Cour d'appel de Bruxelles*) annulled the decision of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - ***BCA***) of 6 May 2021 which had fined Caudalie for competition law infringements and, at the same time, had imposed binding commitments on Caudalie (the ***Contested Decision***).

During the infringement procedure before the BCA, Caudalie had attempted to accommodate the BCA's competition concerns by making a conditional offer to make communications to its selective distributors that would reaffirm and clarify the application of the competition rules to their relationship. In return, Caudalie expected the case against it to be dropped. Caudalie did not hear back from the BCA on this subject. However, in the Contested Decision, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the BCA accepted Caudalie's proposed commitments and made them binding while also imposing on Caudalie a fine of EUR 859,310 on account of resale price maintenance and restrictions of online sales.

Caudalie appealed the BCA's decision to the Markets Court. It also requested that the Markets Court suspend the BCA's decision to the extent that it had made the commitments binding, pending a judgment on the merits of its appeal. On 30 June 2021, the Markets Court granted this request for suspension (*See*, this Newsletter, Volume 2021, No. 7).

In its analysis of the merits of the appeal, the Market Courts first noted that Article IV.52(1)(2) of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* - ***CEL***) allows the Competition College to establish the existence of a competition law infringement and order its cessation "*in accordance with the terms which the Competition College prescribes*", without limitation on the form or shape of these terms. As a result, the Competition College could have taken inspiration from the commitments offered by Caudalie in fashioning an infringement decision.

However, the Markets Court found that the Competition College had failed to do that. It did not "*prescribe*" the terms of an order to stop the infringement but rather "*accepted and made binding*" the commitments that had been offered by Caudalie based on Article IV.52(1)(7) CEL, not Article IV.52(1)(2) CEL.

The Markets Court considered that the use of the word "*commitments*" in the operative part of the Contested Decision "*cannot be regarded as a "clerical error" on the part of the BCA*". On the contrary, by accepting and making binding the commitments, "*the Contested Decision does not prescribe "terms" within the meaning of Article IV.52(1)(2) CEL but makes use of the possibility provided for in Article IV.52(1)(7) CEL, which implies as a legal consequence the finding that "there are no longer any grounds for action by the Competition Authority*"".

The Markets Court also found that the Competition College "*had violated the respect due to the written observations*" to the extent that Caudalie had offered the commitments with the specific purpose of obtaining a finding that there are no longer grounds for action against it. The Markets Court considered that "*the respect due to an act is violated when it is given a meaning and scope that is not in keeping with what its authors intended to express in it,*

by adding elements that are not there or by ignoring elements included in it". The Markets Court also made clear that the commitments offered by Caudalie based on Article IV.52(1(7) CEL cannot be automatically imposed in a different legal framework which implies the finding of an infringement and the imposition of a fine.

The illegality committed by the BCA creates an intrinsic contradiction in the Contested Decision. The Markets Court found that "*accepting the proposed undertakings on the erroneous legal basis of Article IV.52(1)(2) CEL, when the sole purpose of those undertakings was to put an end to the BCA's action, is contradictory and incompatible with the fact that an infringement has been found and that this infringement is sanctioned by a fine set in the light of the "accepted undertakings*"".

The Markets Court therefore annulled the Contested Decision in its entirety.

DATA PROTECTION

European Data Protection Board Explains Concept of International Transfers under General Data Protection Regulation and Discusses Interplay with Territorial Application of Privacy Rules to Organisations outside EU/EEA

On 19 November 2021, the European Data Protection Board (the ***EDPB***) published for public consultation Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of General Data Protection Regulation 2016/679 (***GDPR***) (the ***Guidelines***). The Guidelines are intended to clarify which international transfers of data fall within the scope of Chapter V of the GDPR and therefore require safeguards or other measures to ensure protection of the personal data that are being transferred. In addition, the EDPB calls on the European Commission to adopt a new set of Standard Contractual Clauses for cases where the importer established in a third country is already subject to the GDPR on the basis of the application of the GDPR to non-EU based organisations under Article 3(2) of the GDPR.

First, the Guidelines set out when a processing constitutes a "transfer of personal data to a third country or to an international organisation" (a ***Transfer***) which triggers the application of the provisions of Chapter V of the GDPR. The Guidelines provide three cumulative criteria that, when satisfied, cause a processing activity to qualify as a Transfer. Thus, data must be sent or made available: (i) by a controller or a processor (*i.e.*, an exporter), which, regarding the given processing, is subject to the GDPR pursuant to Article 3 (*i.e.*, the territorial application of the GDPR); (ii) to a different controller, joint controller or processor (*i.e.*, an importer); (iii) which is in a third country, regardless of whether or not this importer is subject to the GDPR in respect of the given processing. The Guidelines further describe each criterion, providing practical examples.

Moreover, the Guidelines stress that Chapter V of the GDPR also applies to transfers or disclosures of personal data carried out by controllers or processors which are not established in the European Union (***EU***) but are subject to the GDPR pursuant to Article 3(2) because they: (a) offer goods or services to data subjects in the EU; or (b) monitor the behaviour of data subjects in the EU.

By contrast, if the three cumulative criteria identified by the Guidelines are not present, there is no Transfer and Chapter V of the GDPR does not apply. For instance, the Guidelines explain that a situation in which a controller in a third country collects data directly from data subjects in the EU does not constitute a Transfer. However, in such a case, the EDPB makes it clear that the controller or processor which is subject to the GDPR under Article 3 is still accountable for all processing that it controls, regardless of where such processing takes places, and that the risks of data processing in third countries must still be managed in order to comply with the GDPR.

Second, the Guidelines outline that if all the above criteria are met, the processing will be considered to be a Transfer and the exporter must comply with the conditions laid down in Chapter V of the GDPR. This means that the controller or processor must use the instruments that aim to protect personal data after they have been transferred to a third country or to an international organisation. These instruments include:

- the existence of an adequate level of protection in the third country or international organisation, pursuant to Article 45 of the GDPR or, in the absence of such adequate level of protection,
- the implementation by the exporter of appropriate safeguards, pursuant to Article 46 of the GDPR (*i.e.*, standard contractual clauses, binding corporate rules, codes of conduct, certification mechanisms, ad hoc contractual clauses, international or administrative agreements); or
- derogations under Article 49 of the GDPR.

In that regard, the Guidelines explain that these safeguards must be customised based on each situation. When controllers and processors develop relevant transfer tools,

such as Standard Contractual Clauses, they must take account of Article 3(2) so as not to duplicate the GDPR obligations, but rather address what is missing and fill the gaps. For example, such tools must address the measures to be taken in case of a conflict of laws between third country legislation and the GDPR.

In line with this approach, the EDPB encourages the development of a transfer tool for those cases where the importer is subject to the GDPR for a given processing pursuant to Article 3(2).

The Guidelines can be consulted here and are subject to public consultation until the end of January 2022.

European Data Protection Board Voices Concerns regarding EU's Digital Services Package and Data Strategy

On 18 November 2021, the European Data Protection Board (***EDPB***) adopted a statement on the EU's Digital Services Package and Data Strategy which encompasses a raft of legislative proposals, including the Digital Services Act (***DSA***), the Digital Markets Act (***DMA***), the Data Governance Act, the Regulation on a European approach for Artificial Intelligence and the soon to be presented Data Act. The proposals' ambition is to (i) ease the further use and sharing of personal data between public and private parties; (ii) bolster the use of specific technologies, such as big data and artificial intelligence; and (iii) regulate online platforms and gatekeepers.

The EDPB expresses concerns about the increased risks of inconsistencies, the general lack of protection mechanisms and the fragmented supervision. According to the EDPB, these issues could negatively impact the fundamental rights and freedoms of individuals and lead to significant legal uncertainty that is liable to undermine both the existing and future legal framework.

First, the EDPB expresses concern that the new proposals do not clearly state that they leave the current legal framework unaffected and may create ambiguity as to the applicability of the data protection framework. For instance, the instruments do not clearly indicate which provisions apply to personal data, non-personal data or both.

Moreover, the legal basis for processing personal data is often not clear from the text of the proposals. For instance, the Data Governance Act appears to authorise re-use of personal data by public sector bodies without providing an adequate legal basis. In addition, the Artificial Intelligence Regulation authorises the use of special categories of data for bias monitoring, detection and correction, but is unclear about the legal basis permitting such use.

In addition to its concerns over consistency, the EDPB explains that the proposed instruments do not offer adequate protection. In particular, the EDPB repeats its recommendation that the Regulation on a European approach for artificial intelligence should include a ban on any use of artificial intelligence for automated recognition of human features in publicly accessible spaces.

The EDPB also recommends that the Regulation on a European approach for artificial intelligence should prohibit the use of artificial intelligence systems that categorise individuals based on biometrics (such as facial recognition) according to ethnicity, gender, political or sexual orientation, or other prohibited grounds of discrimination. According to the EDPB, the same Regulation should also ban any other artificial intelligence systems whose scientific validity is not proven or that conflict with individuals' fundamental rights and freedoms.

Concerning the DSA, the EDPB notes that it should regulate online targeted advertising more precisely and push for a less intrusive form of advertising that does not require any tracking of user interaction with content. The EDPB thus endorses a phasing-out of targeted advertising that leads to a ban of targeted advertising based on pervasive monitoring. In addition, the EDPB recommends a general prohibition of the profiling of children.

Furthermore, the EDPB encourages awareness of the risks of parallel supervision structures and strongly recommends that each proposal provide an explicit legal basis for practical cooperation and exchange of information between the competent supervisory authority and data protection authorities.

The statement on the Digital Services Package and Data Strategy is available here.

European Commission Opinion Questions Independence Belgian Data Protection Authority

On 12 November 2021, the European Commission (the ***Commission***) sent a reasoned opinion to Belgium regarding the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – ***DPA***) holding that members of the DPA should be free from external influence or incompatible occupation.

The Commission initiated infringement proceedings against Belgium on 9 June 2021 questioning the independence of the DPA (*See*, this Newsletter, Volume 2021, No. 6). Pursuant to Article 52 of General Data Protection Regulation (EU) 2016/679 (***GDPR***), supervisory authorities should act with complete independence in performing their tasks and exercising their powers under the GDPR. They should remain free from any external direct or indirect influence which is liable to affect their decisions. Since some of the DPA's members either report to a management committee depending on the Belgian government, have taken part in governmental projects on Covid-19 contact tracing, or are members of the Information Security Committee, the Commission sent a letter of formal notice on 9 June 2021 initiating the infringement proceedings. Belgium had two months to take corrective measures.

According to the Commission, Belgium did not address the issues raised in the letter of formal notice in its response and no concrete steps were taken to ensure independence of the DPA (the members concerned remained in their posts). Therefore, the Commission took the infringement proceedings a step further by sending a reasoned opinion to Belgium on 12 November 2021. Belgium has again two months to reply and take relevant action. If it fails to do so, the Commission may bring an action before the Court of Justice of the European Union.

Secretary of State for Digitisation Publishes Policy Note on Digitisation and Privacy

On 29 October 2021, Mathieu Michel, Secretary of State for digitisation, administrative simplification, data protection and control of buildings (*Staatssecretaris voor Digitalisering, belast met Administratieve Vereenvoudiging, Privacy en de Regie der gebouwen/Secrétaire d'État à la Digitalisation, chargé de la Simplification administrative, de la Protection de la vie privée et de la Régie des bâtiments* - the ***Secretary of State***) published his policy note on digitisation and privacy (the ***Policy Note***).

The Policy Note reiterates the federal government's commitment to digital innovation and states that it is the government's goal to become a "Smart Nation for Smart Citizens". To that end, it will rely on new technologies such as artificial intelligence (***AI***), blockchain and quantum computers. For example, AI should help tackle the major challenges of the 21st century in areas such as healthcare and environment. Each citizen will receive a unique digital identity that will allow easier and swifter communication with governmental authorities. The security level linked to this digital identity must be equivalent to the use of the physical electronic identity card.

The Policy Note also explains that the use of new technologies such as AI comes with major challenges, not least in terms of data protection. An important aspect of the envisaged digitisation is the trust that citizens must place in the digital transition, as well as how the government deals with the "raw material" of digitisation, namely personal data. In this regard, the Policy Note points out that a strong and future-proof data protection regulatory framework is required. The Data Protection Law of 30 July 2018 (*Wet betreffende de bescherming van natuurlijke personen met betrekking tot de verwerking van persoonsgegevens/Loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel* - the ***Data Protection Law***), was evaluated in this light. This assessment showed that the current regulatory framework should be supplemented to strengthen the protection of personal data and to align the Data Protection Law more closely with the need to allow increased data flows in a digitised world. The federal government will come up with a legislative initiative in this regard.

The Policy Note furthermore points to the need to strengthen the independence and functioning of supervisory authorities (*See*, the infringement proceedings initiated by the European Commission against Belgium for lack of independence of its Data Protection Authority, this Newsletter, at p. 7). Other data protection enhancing measures that the Policy Note puts forward are:

- giving citizens access to their personal data by means of a digital platform. To this end, a register will be set up giving an overview of the personal data that are held by the federal government and the use that is made of them;

- defining a global data management policy as a key to a successful digital transformation;

- committing to "digital safety". A higher level of digitisation requires cyber-secure devices, servers and interconnected networks.

The Policy Note can be consulted here and is available in Dutch and in French.

INTELLECTUAL PROPERTY

Court of Justice of European Union Confirms Ferrari Design Protection

On 28 October 2021, the Court of Justice of the European Union (***CJEU***) held that product parts can be protected by an unregistered Community design (***UCD***) if their appearance is clearly identifiable. The CJEU explained that Article 11(2) of Regulation 6/2002/EC (***Design Regulation***) must be interpreted as meaning that individual parts of a prod¬uct may be protected as an UCD even if only the full product was made available to the public. The CJEU sided with the Advocate General (***AG***) Saugmandsgaard whose opinion was discussed in this Newsletter (*See*, this Newsletter, Volume 2021, no. 7).

Facts and Procedure

On 2 December 2014, the famous Italian car manufacturer Ferrari SpA (***Ferrari***) presented the new Fer¬rari FXX K to the public in a press release including two photographs showing the vehicle.

The Ferrari FXX K features a distinctive 'V' shaped design on the bonnet. Mansory Design & Holding GmbH (***Mansory Design***) manufactures and sells 'tuning kits' to transform the appearance of a Ferrari 488 GTB to make it resemble the Ferrari FXX K. Ferrari claimed that these tuning kits infringed its unregistered Community design rights (***UCDR***). Both the Regional Court of Düsseldorf and the Highest Regional Court of Düsseldorf rejected Ferrari's claims. The German Courts considered that Ferrari did not show the minimum requirements of autonomy and consistency of form. Ferrari appealed to the German Federal Court which referred a request for a preliminary ruling to the CJEU.

CJEU Reasoning

The CJEU observed that an UCD comes into being when the design is first made available to the public within the EU. Based on Article 11(2)(a) of the Design Regulation, UCDs are made available to the public if they are "*published, exhibited, used in trade or otherwise disclosed in such a way that in the normal course of business, these events could reasonable have become known to the circles specialised in the sector concerned, operating within the EU.*" The CJEU relied on the opinion of AG Saugmandsgaard who pointed out that the appearance of a part of the product must be clearly identifiable when the UCD is made available. However, there is no obligation for designers to make available each part of the product separately to benefit from the UCD protection. This would go against the objectives of simplicity and rapidity intended for UCDs.

For design parts to have individual character within the meaning of Article 6 of the Design Regulation, they must constitute a visible section of the product, capable of definition by their particular lines, contours, colours, shapes and texture. Consequently, the appearance of a product part can produce an overall impression on the informed users without being lost in the product as a whole.

The CJEU's judgment can be found here.

Court of Appeal of The Hague Shifts Burden of Proof in Trade Mark Exhaustion Case

On 19 October 2021, the Court of Appeal of The Hague (the ***Court***) held that if a party relying on the notion of trade mark exhaustion shows a real risk of market partitioning to exist, it is then for the beneficiary of a trade mark licence to establish that the products were initially placed outside the European Economic Area (***EEA***) by it or with its consent and can therefore not be imported into the EEA.

Facts and Procedure

Silk Cosmetics V.O.F. (***Silk Cosmetics***) is a perfume and cosmetics wholesaler. It holds an exclusive licence for two trade marks (i) 'Mancera' and (ii) 'Montale' owned by World Branding Mark S.A. (***WBM***). Silk Cosmetics entered into an exclusive distribution agreement to sell WMB's perfumes in the Benelux.

From 2017 to 2019, Notino Benelux B.V. (***Notino***) sold WBM's perfumes online to customers in Belgium and the Netherlands. After purchasing the perfumes on Notino's website, Silk Cosmetics initiated proceedings on WBM's behalf for infringement of the Mancera and Montale trade marks.

The District Court of The Hague held that, as a licensee, Silk Cosmetics could not bring actions for trade mark infringement and dismissed the case. Silk Cosmetics brought an appeal against this judgment before the Court.

Court Reasoning

The Court noted that if a party argues that the trade marks in the goods have been exhausted, it must demonstrate that the goods were put on the market in the EEA with the consent of the trade mark owner or its licensee. However, based on a judgment of the Court of Justice of the European Union (***CJEU***) in case C-244/00 *Van Doren / Lifestyle*, the Court added that if that party can show that the burden of proof resting on its shoulders was liable to create a risk of market partitioning, that burden of proof was reversed and it was then for the trade mark owner to establish that the goods had originally been put on the market outside the EEA.

The Court held that Notino had successfully established that there was a real risk of market partitioning due to the exclusive distribution agreement. Indeed, Notino argued that under the licence agreement, Silk Cosmetics was not allowed to sell the perfumes outside the Benelux territory. Notino added that several exclusive distribution agreements with a prohibition on active sales were in use in different Member States and claimed that this illegally partitioned the European market. As a result, the Court shifted the burden of proof and required Silk Cosmetics to demonstrate that the perfumes had been originally marketed outside the EEA and had not entered the EEA with its consent. As Silk was unable to adduce this proof, the Court assumed that the trade marks had become exhausted and that, accordingly, the goods were freely travelling within the EEA.

The Court's judgment can be found here.

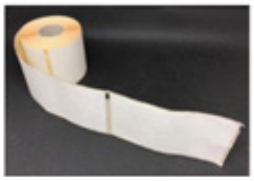
General Court Confirms that Features Indicating Origin Are Insufficient to Establish Individual Character of Contested Design

On 10 November 2021, the General Court of the European Union (***GC***) confirmed in case T-443/20 *Sanford v. European Union Intellectual Property Office* (***EUIPO***) a decision of the EUIPO's Board of Appeal (***BoA***) invalidating a Community design registration. The BoA had held that the newly registered design lacked individual character as it did not produce an overall different impression on the informed user within the meaning of Article 6(1) of Regulation 6/2002/EC (***Design Regulation***). The GC confirmed that the features indicating the design's origin are irrelevant to establish the individual character of the contested design.

Facts and Procedure

On 20 February 2004, Sanford LP (***Sanford***) filed an application for the registration of a Community design for the label roll pictured below in Class 19.08 "*Other Printed Matter*" of the Locarno Agreement of 8 October 1968 Establishing an International Classification for Industrial Designs (***Locarno Agreement***).


On 24 February 2016, Avery Zweckform GMbH (***Avery***) filed an application for a declaration of invalidity of the contested design pursuant to Article 52 of the Design Regulation. Avery claimed that the design lacked individual character.




The EUIPO's Cancellation Division rejected the application for declaration of invalidity on grounds that Avery did not establish that the appearance features of the contested design were dictated by its technical function within the meaning of Article 8 of the Design Regulation. Avery appealed that decision to the BoA, which reversed this decision and held that the contested design lacked individual character.

GC Reasoning

The GC held that the words ('Dymo' and 'Avery') and figurative elements (the triangle next to the word 'Avery') and the special font used on both designs refer to the origin of the product. These elements do not have a decorative function that gives their appearance within the meaning of Article 3 of the Design Regulation. They are consequently irrelevant to compare the overall impressions to establish the individual character of the contested design.

Furthermore, the GC recognised that the differences in the number of types, shape and arrangement of the black printed marks on both rolls were not insignificant. However, it held that such differences were insufficient to produce a different overall impression in the mind of the informed user. The GC also considered that these differences have a technical rather than aesthetic function as they depend on the configuration of the printer for which the designs are required to function. The informed user therefore would not pay particular attention to these differences. The GC thus confirmed that the registration was invalid due to lack of individual character of the contested design.

The Court's judgment can be found here.

LABOUR LAW

Covid-19: Overview of Recent Measures That Impact Employment

Teleworking Reimposed

Pursuant to the Royal Decree of 19 November 2021 (*Koninklijk Besluit houdende wijziging van het Koninklijk Besluit van 28 oktober 2021 teneinde de gevolgen voor de volksgezondheid van de afgekondigde epidemische noodsituatie betreffende de coronavirus COVID-19-pandemie te voorkomen of te beperken / Arrêté royal modifiant l'arrêté royal du 28 octobre 2021 en vue de prévenir ou de limiter les conséquences pour la santé publique de la situation d'urgence épidémique déclarée concernant la pandémie de coronavirus COVID-19*), several measures were implemented to limit the further spreading of the Covid-19 virus. These measures started to apply on 22 November 2021.

Teleworking again became the rule during at least four days per week for all jobs for which this is possible and provided this regime allows for the continuity of the business.

Compliance with compulsory telework is monitored on the basis of (i) a monthly declaration which employers must file through the online portal of the social security authorities (accessible here), and (ii) a certificate which employers should provide to the employees who cannot perform telework and which certifies their requisite presence in the workplace.

Justified Absence from Work for Covid-19 Test

As an additional measure to combat Covid-19, the federal government created a Self-Assessment Testing Tool (the SATT), which allows citizens with mild Covid-19 symptoms to fill out an online self-assessment questionnaire to verify whether a PCR test is recommended.

The National Labour Council adopted Collective Labour Agreement No. 160 regarding the introduction of justified absence from work for a Covid-19 test on the basis of the SATT (*Collectieve arbeidsovereenkomst houdende invoering van een gerechtvaardigde afwezigheid van het werk voor een Covid-19-test op basis van de Self Assessment Testing Tool / Convention collective du travail introduisant une absence justifiée du travail pour un test de dépistage du covid-19 sur la base du self assessment testing tool – **CLA No. 160***). CLA No. 160 entered into force on 19 November 2021 and applies until 28 February 2022.

The scope of CLA No. 160 is limited to employees who are advised to take a Covid-19 test following the SATT. It therefore does not apply to other categories of employees, such as employees with severe symptoms or employees who must be tested after a high-risk contact.

Employees who should take a Covid-19 test based on the SATT receive an absence certificate, which they must immediately provide to their employer. Based on this absence certificate, the employees are allowed to be absent from work for a period of up to 36 hours. They are entitled to a guaranteed salary during this period payable by the employer.

In order to avoid abuse, employees are only allowed to submit an absence certificate generated through the SATT for a maximum of three times. In addition, employees who can perform telework should do so until they receive their test result.

PUBLIC PROCUREMENT

Council of Ministers Implements Policy Note on Public Procurement

On 19 and 26 November 2021, the Council of Ministers adopted a draft proposed Law and a draft Royal Decree giving effect to some of the measures which Prime Minister De Croo had announced in his policy note (*beleidsnota / note de politique générale*) on public procurement of 28 October 2021 (*See*, this Newsletter, Volume 2021, No. 10). Furthermore, and still in furtherance of the objectives of the policy note, the Council of Ministers agreed on an action plan to facilitate the access of small and medium-sized enterprises (***SMEs***) to public procurement contracts.

The draft proposed Law which the Council of Ministers adopted on 19 October 2021 amends the Law of 17 June 2016 on public procurement (*Wet van 17 juni 2016 inzake overheidsopdrachten / Loi du 17 juin 2016 relative aux marchés publics*) and the Law of 17 June 2016 on concession contracts (*Wet van 17 juni 2016 betreffende de concessieovereenkomsten / Loi du 17 juin 2016 relative aux contrats de concession*). It seeks to clarify how tenderers who find themselves in an optional exclusion ground can demonstrate their reliability despite the existence of this exclusion ground.

Furthermore, the draft proposed Law restores the text of Article 43 of the now abolished Law of 15 June 2006 regarding public contracts and certain contracts for works, supplies and services (*Wet van 15 juni 2006 inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten / Loi du 15 juin 2006 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services*). Pursuant to this provision, claims of contractors resulting from the performance of a public contract cannot be subject to attachment, opposition, transfer or pledge in favour of creditors of the contractor until the date of delivery of the works, supplies or services. By restoring this provision, the draft proposed Law aims to prevent the untimely interruption of public contracts by third-party creditors of the contractor.

On 26 November 2021, the Council of Ministers adopted a draft Royal Decree which (i) brings into force the obligation for contractors to send their invoices in electronic format to contracting authorities; and (ii) determines a threshold below which contractors will be exempt from the obligation to send electronic invoices. The obligation to send invoices in electronic format was introduced by a Law of 7 April 2019 (*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*). However, the date of entry into force of this obligation was still to be determined by Royal Decree (*See*, this Newsletter, Volume 2021, No. 10).

Both the draft Law Proposal and the draft Royal Decree have been submitted to the Council of State for review.

Separately, the Council of Ministers agreed on 19 November 2021 on an action plan to facilitate the access of SMEs to public procurement contracts. The action plan hopes to achieve this goal by (i) increasing transparency; (ii) offering more flexibility; (iii) improving knowledge of the applicable rules and good practices; and (iv) increasing trust between SMEs and contracting authorities.

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