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COMPETITION LAW

Belgian Competition Authority Publishes Enforcement Priorities for 2019

The Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - "BCA") published on 1 March 2019 its list of enforcement priorities for 2019. The list is virtually copied from that of last year. The pharmaceutical sector is again one of the BCA's targets for action. The BCA specifies that this priority is shared with other European countries and will focus on all links within the value chain, including laboratories, distributors and the competitive dynamics between pharmacies.

Apart from the pharmaceutical sector, and similar to last year's enforcement priorities, the BCA will also target telecommunications, distribution, service providers, public procurement and logistics.

The BCA's enforcement priorities can be found here in Dutch and in French.

Parliament Adopts Law on Abuse of Economic Dependence

On 21 March 2019, the federal Chamber of Representatives adopted a draft bill modifying the Code of Economic Law to introduce as an actionable offence the abuse of a position involving economic dependence (*Wet houdende wijziging van het Wetboek van Economisch Recht met betrekking tot misbruiken van economische afhankelijkheid, onrechtmatige bedingen en oneerlijke marktpraktijken tussen ondernemingen / Loi modifiant le Code de droit économique en ce qui concerne les abus de dépendance économique, les clauses abusives et les pratiques du marché déloyales entre entreprises* – the "Law").

The Law seeks to establish an additional competition law infringement, namely the abuse of a position of economic dependence towards other businesses. The Law further introduces a prohibition of unbalanced contract terms and unfair, misleading and aggressive practices in a business to business relationship. For a discussion of the main novelties introduced by the Law, we refer to the February 2019 edition of this Newsletter (*See, this Newsletter, Volume 2019, No. 2, pp. 3-4*).

The Law should be published in the Belgian Official Journal in the course of April 2019. It will then enter into force gradually: the prohibition of unfair, misleading and aggressive practices will enter into force 4 months following publication, the prohibition of abuse of economic dependence 13 months following publication and the prohibition of unbalanced contract terms 19 months following publication.

Belgian Competition Authority Once Again Partially Lifts Kinepolis Merger Commitments

On 25 March 2019, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - "BCA") decided to lift partially specific merger commitments imposed on Kinepolis. It is the most recent development in a legal saga that has mesmerised the Belgian cinema sector for more than twenty years.

The case started in November 1997, when the former Belgian Competition Council (later replaced by the BCA) cleared the concentration between the Claeys and Bert cinema groups to establish the Kinepolis group. The decision was conditional on several commitments, imposed for an indefinite period of time, including the obligation on Kinepolis to obtain the prior approval from the BCA concerning any form of growth, including organic growth (the obligation thus caught any increase in the number of screens or seats operated by Kinepolis).

In 2010, following a four-year legal battle, Kinepolis succeeded in having the commitments partially lifted (*See, this Newsletter, Volume 2010, No. 4, pp. 3-4*). Subsequently, nearly twenty years after the initial decision to clear the concentration, Kinepolis tried on 31 March 2017 to have the remaining commitments removed. After analysing the necessity of the remaining commitments which were aimed to prevent a restriction of competition in the prevailing market structure at the time, the BCA decided on 31 May 2017 to lift the restriction on organic growth, subject to a two-year transition period, while leaving the other commitments in place. These were conditions preventing

Kinepolis from (i) growing through acquisition without prior approval from the BCA; (ii) obtaining exclusive or priority rights to distribute films; and (iii) concluding programming agreements with independent cinema owners (*See, this Newsletter, Volume 2017, No. 5, pp. 7-8*).

This decision was appealed by two competing cinema companies, Euroscoop and I-Magix. On 28 February 2018, the Brussels Court of Appeal (the "Court") found that the Competition College – the BCA's decision-making body – had insufficiently justified entirely lifting the commitment preventing Kinepolis from growing organically, while the College of Competition Prosecutors – the BCA's investigatory arm – had proposed to lift the commitment for small organic growth only. According to the Court, the Competition College had also insufficiently reasoned its decision to create a two-year transition period (*See, this Newsletter, Volume 2018, No. 3, pp. 4-5*).

Following the Court's annulment of the 31 May 2017 decision, the BCA reopened the case and adopted a new decision on 26 April 2018. This decision was again appealed by competing cinema company Euroscoop. In its judgment of 21 November 2018, the Court annulled the BCA's decision of 26 April 2018 on procedural grounds. The Court held that the BCA should have adhered to the full procedural framework of the Code of Economic Law to take a new decision instead of limiting itself to taking an amending decision as it had done on 26 April 2018 (*See, this Newsletter, Volume 2018, No. 12, pp. 5-6*).

On 28 January 2019, Kinepolis once again tried to have the remaining commitments removed. In its latest decision adopted on 25 March 2019, after an *ab initio* examination of Kinepolis' renewed request, the Competition College decided to lift partially the commitment preventing Kinepolis from growing organically to the extent it concerns the establishment of new cinema complexes. The Competition College held that a new Kinepolis cinema complex with maximum 7 movie theatre halls and 1,125 seats would have pro-competitive effects and a limited anti-competitive impact. In order to prevent any circumvention of the imposed limits concerning maximum seats and movie theatre halls, the BCA added that Kinepolis would be prevented from (i) establishing any new cinema complex within a 10 km range of its other cinema complexes; and (ii) expanding such new cinema complexes exceeding the above thresholds without the prior approval of the BCA.

Kinepolis issued a press release (available here) and expressed dissatisfaction with the latest partial lifting of the organic growth commitment, which is more limited than the BCA's 2018 decision that was annulled on procedural grounds. The legal saga might not be over yet as Kinepolis, and possibly other parties, are considering an appeal.

Draft Bill on Reform of Belgian Competition Law Adopted by Committee for Economic Affairs

On 26 March 2019 and again, following further amendments, on 4 April 2019, the Committee for Economic Affairs of the federal Chamber of Representatives adopted a draft bill (*Wetsvoorstel houdende wijzigingen aan boek I "Definities", boek XV "Rechtshandhaving" alsmede vervanging van boek IV "Bescherming van de mededinging" in het Wetboek van Economisch Recht / Proposition de loi portant modifications au livre Ier "Définitions", au livre XV "Application de la loi" ainsi que le remplacement du livre IV "Protection de la concurrence" dans le Code de droit économique* – the "Draft Bill") bringing about a wholesale change of the competition law provisions of the Code of Economic Law ("CEL").

The Draft Bill will not bring about major substantive or procedural changes to the current competition rules and will also maintain the prevailing institutional architecture. Still, a new text will replace in full Book IV of the CEL entitled "Protection of Competition". New definitions will also be added to Book I of the CEL. Finally, the Draft Bill will modify Book XV of the CEL which governs the enforcement of laws. For a discussion of the main novelties included in the Draft Bill, we refer to the November 2018 and February 2019 editions of this Newsletter (*See, this Newsletter, Volume 2018, No. 11, p. 3 and Volume 2019, No. 2, p. 4*).

The Draft Bill is now scheduled for final adoption by the Chamber of Representatives in plenary session on 24 April 2019, just before the Belgian Parliament will be dissolved in view of the European, federal and regional elections on 26 May 2019.

DATA PROTECTION

European Data Protection Board Clarifies Interplay between ePrivacy Directive and General Data Protection Regulation

On 12 March 2019, the European Data Protection Board ("EDPB") adopted an opinion clarifying the interplay between Directive 2002/58/EC (the "ePrivacy Directive") and the General Data Protection Regulation (the "GDPR") (the "Opinion"). At the request of the Belgian Data Protection Authority, EDPB provides guidance on whether (and to what extent):

- the competences, tasks and powers of data protection authorities under the GDPR are limited when the processing of personal data falls under the scope of both the GDPR and the ePrivacy Directive;
- data protection authorities should take into consideration the provisions of the ePrivacy Directive when exercising their competences, tasks and powers under the GDPR, while tackling possible infringements of national rules implementing the ePrivacy Directive;
- the cooperation and consistency mechanisms under the GDPR apply to processing that falls under the scope of both the GDPR and the ePrivacy Directive.

Interaction between GDPR and ePrivacy Directive

The objective of the GDPR is to protect fundamental rights and freedoms of natural persons with regard to the processing of personal data and the free movement of personal data within the EU. By contrast, the ePrivacy Directive seeks to safeguard the right to privacy and confidentiality in the electronic communications sector as well as the free movement of personal data and of electronic communications equipment and services in the EU. The EDPB thus notes that there are many types of processing activities that may fall within the scope of both legal instruments. In its opinion, the EDPB focuses on four sorts of interplay.

First, some provisions of the ePrivacy Directive "particularise" rules of the GDPR in regard to processing of personal data in the electronic communications sector. In these situations, the EDPB states that the ePrivacy Directive ("*lex specialis*") will prevail over the general provisions of the GDPR ("*lex generalis*").

Second, it is possible that provisions of the ePrivacy Directive complement the GDPR, *e.g.*, by extending the scope of the protected rights and legitimate interests.

Third, the opinion notes that Article 95 of the GDPR seeks to avoid that unnecessary administrative burdens are imposed on natural and legal persons in relation to processing of personal data, when these persons are subject to (similar) specific obligations set out in the ePrivacy Directive.

Fourth, any processing of personal data which falls outside the scope of the ePrivacy Directive will be governed by the GDPR.

Competences, Tasks and Powers of Data Protection Authorities

By definition, data protection authorities are charged with the enforcement of the GDPR. Their competence in this respect will not be limited if a particular subset of data processing operations also falls within the scope of the ePrivacy Directive.

However, the EDPB notes that the domestic rules transposing the ePrivacy Directive may only be enforced by the authority that is appointed as competent by the EU Member States. While it is possible that this is the national data protection authority, it may also be another body (*e.g.*, a national telecommunications authority). Consequently, if the processing of personal data falls under the scope of both the GDPR and the ePrivacy Directive, the designated authority will be competent for the enforcement of the specific rules envisaged by the ePrivacy Directive.

With respect to any processing operations that are not subject to these rules, responsibility is entrusted to the data protection authorities. At the same time, if the data

protection authority finds that a particular action constitutes an infringement of both the GDPR and the ePrivacy Directive, it may take this circumstance into account when applying the GDPR so that enforcement of both instruments remains consistent. Nonetheless, any decision must be justified on the basis of the GDPR, insofar as the data protection authority is entrusted with supervisory powers solely in relation to that instrument.

As regards the potential application of the cooperation and consistency mechanisms under the GDPR towards types of processing that fall under the scope of both the GDPR and the ePrivacy Directive, the EDPB notes that they do not apply to the enforcement of the national rules implementing the ePrivacy Directive. Since these mechanisms are related to the GDPR, they are only relevant to the extent that the processing of data is subject to the general provisions of the GDPR and not to the special rules of the ePrivacy Directive.

The above clarifications are essential in the light of the need to ensure consistent interpretation among EU data protection authorities of the boundaries of their competences, tasks and powers. In accordance with the requirements of the GDPR (Articles 61 and 62), they should also adhere to a coherent practice of mutual assistance and joint operations.

Finally, the EDPB notes that the Opinion is without prejudice to the outcome of the current negotiations on the future ePrivacy Regulation among the European institutions. If and when adopted, the new ePrivacy Regulation will replace the ePrivacy Directive and its national implementing laws.

Belgian Data Protection Impact Assessment List Amended Following European Data Protection Board Opinion

Following the opinion of the European Data Protection Board (the "EDPB"), the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit/L'Autorité de protection des données*) amended its draft list regarding the processing operations subject to the requirement of a data protection impact assessment ("DPIA") ("the DPIA List") (*See, this Newsletter, Volume 2018, No. 11, p. 11*).

The General Data Protection Regulation (the "GDPR") lays down several new obligations for data controllers, including the obligation to carry out a DPIA prior to specific data processing activities (Article 35, GDPR). The objective of DPIAs is to assess the risks associated with the rights and freedoms of natural persons that arise or threaten to arise in connection with the processing of personal data and to assess the possibilities for mitigating or managing these risks. Under the GDPR, national supervisory authorities can adopt a list of processing operations that always require a DPIA.

The DPIA List of the Belgian Data Protection Authority now includes a statement clarifying that the list is not exhaustive and that a DPIA will always be required if the conditions under Article 35(1), GDPR are satisfied. The DPIA List also notes its reliance on the Working Party 29 Guidelines WP248. Finally, it adds that the DPIA List is not set in stone and may be amended if it does not reach its intended purpose.

The DPIA list now contains the following processing activities for which a DPIA is required:

1. processing using biometric data when the intended goal is the unique identification of natural persons who are in a public space or in private spaces that are available to the public;

2. obtaining personal data from third parties to determine whether to refuse a service agreement with a data subject or terminate an existing one;

3. processing of health data with the aid of an active implantable medical device;

4. large-scale processing of data to evaluate personal aspects about the economic situation, health, personal preferences or interests, reliability or behavior, location or movements of natural persons;

5. systematic sharing between multiple data controllers of sensitive personal data or data of a very personal nature (such as data related to poverty, unemployment, youth support or social work, data related to domestic and private activities, and location data);

6. large-scale processing of data generated by devices with sensors that send data over the internet or another means (i.e., "internet of things" applications such as

smart TVs, smart household appliances, connected toys, smart cities, smart energy meters) for the purpose of analysing or predicting a natural persons' economic situation, health, personal preferences or interests, reliability or behavior, location or movements;

7. large-scale and/or systematic processing of telephone data, internet data or other communication data, metadata or location data of natural persons, or data that can lead to specific natural persons (e.g., wifi tracking or processing of travellers' location data in public transport) when such processing is not strictly necessary for the requested service; and

8. large-scale processing of personal data where the natural person's behavior is observed, collected, established or influenced in a systematic manner in reliance on automated means, including for advertising purposes.

INTELLECTUAL PROPERTY

European Parliament and Council of European Union Endorses Proposal for a New Copyright Directive

On respectively 26 March 2019 and 15 April 2019, the European Parliament and the Council of the European Union adopted the proposal of the European Commission for a Directive on Copyright in the Digital Single Market (the "Copyright Directive"). The Copyright Directive aims to modernise copyright rules and ensure that the longstanding rights and obligations of copyright law also apply to the internet while ensuring that the internet remains a space of freedom of expression. Once the text has entered into force (which will happen 20 days after its publication in the Official Journal of the European Union), EU Member States will need to transpose the new rules in their national legislation within 24 months.

The Copyright Directive has three main objectives:

- improve access to copyright protected content online and across borders;
- foster a better functioning copyright marketplace and stimulate the creation of high-quality content;
- create more opportunities to use copyright protected material for education, research and preservation of cultural heritage

Better Access for Citizens to Content Online and Across Borders

The Copyright Directive will create favourable conditions for cross-border distribution of television and radio programmes online. It will also make EU audio-visual works more accessible on video-on-demand ("VoD") platforms. Currently, less than half of EU films are available on a VoD platform and they are often only available in their country of origin. To improve this, the Copyright Directive sets out a negotiation mechanism that will ease the process of reaching contractual agreements and remove obstacles in relation to the licensing of the rights necessary to make audio-visual works available on VoD platforms.

Furthermore, the Copyright Directive provides for a new licensing mechanism for copyright protected works that cannot be found commercially anymore. Non-exclusive licences for non-commercial purposes entered into by collective management organisations and cultural heritage institutions for the purpose of digitalising and disseminating online and across borders the works held in their collections will be presumed to extend to right holders of the same category as those covered by the licence who are not represented by the collective management organisation. European citizens will thus benefit from wider access to out-of-commerce works forming part of the cultural heritage.

Rules Fostering Better Functioning Copyright Marketplace

The Copyright Directive will introduce more balance in the relations between, on the one hand, authors and performers and, on the other hand, their producers and publishers. New measures include the right for content creators to revoke their rights if their works are not being exploited, transparency obligations in relation to the exploitation of their works, and the right to an appropriate and proportionate remuneration for content creators. Authors and performers will be able to claim additional remuneration when the remuneration initially agreed upon is disproportionately low in comparison with the benefits derived by the distributor exploiting these rights.

The position of copyright holders with respect to the exploitation of their content on video-sharing platforms will also be strengthened. According to the new rules, platforms that store and provide access to large amounts of works will be obliged to obtain authorisation from right holders in order to perform acts covered by the copyright. In the absence of an agreement, the platforms will have to undertake specific steps to avoid liability for content uploaded to their site.

The Copyright Directive also seeks to support the press and quality journalism by strengthening the bargaining position of press publishers in the negotiation of the use of their content by online services providers. In particular, the Copyright Directive provides that journalists will receive an appropriate share of the revenues generated from the press publishers' right. Lastly, the online exploitation of publications and the enforcement of rights will also be strengthened.

Better Access to Protected Content for Purposes of Education, Research and Culture

The Copyright Directive envisages a mandatory copyright exception in relation to teaching activities. It covers digital cross-border uses of protected content for the purposes of teaching (including online) and applies to educational establishments and teachers.

An exception allowing for text and data mining will simplify the administrative burden of universities and research organisations to secure copyright clearance. These institutions will be able to analyse large sets of data for scientific purposes through the use of automated technologies.

Cultural heritage institutions, such as libraries and museums, will be able to use digital preservation techniques to make copies of the works that form part of their collections. This will allow the digitisation and preservation of the EU cultural heritage.

LITIGATION

Council of State Issues Opinion on Supreme Court's (In) Ability to Review Brussels International Business Court Judgments

On 28 February 2019, the Council of State (*Raad van State/Conseil d'État*) issued an opinion on the amendment to the bill for the creation of the Brussels International Business Court (the "BIBC") put forward by a member of parliament on 18 December 2018 (*See, this Newsletter, Volume 2018, No. 12, pp. 14-15*). The amendment in question provided that judgments of the BIBC would not be subject to review by the Supreme Court (*Hof van Cassatie/Cour de Cassation*).

The proposed change was justified primarily on the grounds that the future cases before the BIBC would require the judges in the BIBC to apply and interpret foreign laws. However, given that the Supreme Court is not in a position to interpret such foreign laws, the amendment sought to remove the possibility of review by the Supreme Court. It was also argued that such a review mechanism would be counterproductive, considering that the creation of the BIBC seeks to accelerate proceedings. Furthermore, it was pointed out that translation issues were likely to arise, since the working language of the BIBC would be English, while the working languages of the Supreme Court are Dutch and French.

Nevertheless, the Council of State rejected the proposed amendment.

First, the Council of State noted that BIBC judgments would not be subject to appeal before a Court of Appeal and that this impossibility to appeal judgments handed down by the BIBC was precisely justified on the grounds that such judgments would still be subject to review by the Supreme Court as a safeguard of last resort.

Second, the Council of State underlined that third parties which may not necessarily have contractually agreed to litigate before the BIBC may still be forced to appear before the BIBC. As a result, the Supreme Court's review constitutes an important safeguard vis-à-vis third parties.

Third, the Council of State insisted that exceptions to the Supreme Court's jurisdiction should remain exceptional. By contrast, the proposed amendment would subtract all decisions of the BIBC – which remains part of the Belgian judicial order – from the Supreme Court's jurisdiction.

Finally, the BIBC's competence to determine large-scale international business disputes does not, as such, exclude the applicability of Belgian substantive and/or procedural law. As a result of the amendment, the Supreme Court would be prevented from guaranteeing the uniform interpretation of Belgian law.

The Council of State thus rejected all possible grounds for the proposed amendment and concluded that it could envisage no other reason for exempting judgments of the BIBC from the Supreme Court's jurisdiction.

The Bill for the creation of the BIBC is scheduled for a vote in the plenary session of the Chamber of Representatives on 24 April 2019.

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