March 2023

VBB on Belgian Business Law

Issue Highlights

"Van Bael & Bellis' Belgian competition law practice [...] is a well-established force in high-stakes, reputationally-sensitive antitrust investigations."

Legal 500, 2019

Topics covered in this issue

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COMMERCIAL LAW

Default Commercial Interest Rate Increases for First Time Since 2016

On 17 March 2023, the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) published the bi-annual default interest rate for commercial transactions which will amount to 10.5% during the first semester of 2023. This marks a strong increase over the rate of 8.0% which had been applicable since the second semester of 2016.

Pursuant to the Law of 2 August 2002 on combating late payment in commercial transactions (*Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties / Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales*), the default commercial interest rate for commercial transactions applies to compensatory payments in commercial transactions (*handelstransacties / transactions commerciales*), *i.e.*, transactions between companies or between companies and public authorities, but may be deviated from by contract.

Draft Book 6 on "Tort Law" of New Civil Code Submitted to Federal Chamber of Representatives

On 8 March 2023, the Private Member's Bill inserting Book 6 on "Tort Law" in the New Civil Code (*Wetsvoorstel houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek / Proposition de loi portant le livre 6 "La responsabilité extracontractuelle" du Code civil* – the ***Draft Book on Tort Law***) was submitted to the federal Chamber of Representatives to become part of the new Civil Code. The Draft Book on Tort Law is the result of several years of work by a commission of university professors and aims to modernise and codify the provisions on tort law of the old Civil Code. The old Civil Code covers tort law in only six provisions. As a result, this area of law was shaped mostly by the courts.

While the Draft Book on Tort Law in large part codifies the existing case law, such as the requirement of damage to be legitimate and the elaboration of the three elements of extracontractual liability (fault, damage and causal link between the two), it will also effect significant changes as follows:

Free Choice of Harmed Party between Contractual and Extracontractual Liability

While the current regime imposes strict conditions on the victim of a contractual breach who tries to rely on tort law to obtain damages, the Draft Book on Tort Law offers the harmed party the choice between the contractual and extracontractual liability regimes. This choice can have important implications as the reparable damage differs under both sets of rules. When opting for a specific regime, the harmed party will have to satisfy the specific conditions of application of the chosen regime.

Auxiliary Agents (uitvoeringsagenten / agents d'exécution) No Longer Benefit from Quasi-immunity

Under current rules, auxiliary agents, *i.e.*, persons entrusted with the performance of all or part of the contractual obligations of the contract parties, benefit from quasi-immunity in performing the obligations entrusted to them, which means that, as a rule, they cannot be held liable under tort law by the contracting party of their principal. The Draft Book on Tort Law puts an end to this situation, as a result of which auxiliary agents will be liable under tort law towards the contracting party of their principal.

Possibility to Request Preventive Measures

Until now Belgian tort law was reactive, in that it only offered the possibility of requesting damages after the emergence of damage. Similarly to the Book on obligations which now recognises the anticipatory breach of an agreement (*See*, this Newsletter, Volume 2022, No. 4), the Draft Book on Tort Law allows potential victims of a violation of the tort rules to seek a court injunction to avoid harm.

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Mitigation of Equivalence Theory

The equivalence theory establishes the conditions under which a fault is considered to be the cause of damage and provides that there is a causal link as soon as the damage would not have occurred in the absence of the fault. As all causes of the damage are considered to be equivalent under this theory, its application has sometimes led to situations in which even a remote fault gives rise to tort liability.

The Draft Book on Tort Law aims to change this approach by mitigating the equivalence theory in situations in which it would be unreasonable to hold a person liable for a tort. In particular, the foreseeability of the damage will be considered to be a relevant assessment criterion.

Miscellaneous Changes

Other interesting aspects of the reform include (i) the duty to take out insurance for actions of individuals for whom one is responsible; (ii) the inclusion of the rules on liability for defective goods in the new Civil Code; and (iii) the right to be compensated for costs incurred in avoiding the aggravation of damage.

Most provisions of the Draft Book on Tort Law are not mandatory.

By way of background, significant parts of the new Civil Code are already in force. That applies to Book 1 on General Provisions, Title 3 of Book 2 on Patrimonial Relationships within Couples, Book 3 on Goods and Property Law, Book 4 on Successions, Donations and Wills, Book 5 on Obligations and Book 8 on Evidence (*See*, this Newsletter, Volume 2022, No. 4).

COMPETITION LAW

Brussels Enterprise Court Finds Abuse of Economic Dependence on Part of Software Provider after Consulting Belgian Competition Authority

The French-language Enterprise Court of Brussels (*Tribunal de l'entreprise francophone de Bruxelles* – the ***Court***) held that Tunstall SA, Tunstall Group Holdings Ltd and Tunstall Group Ltd (***Tunstall***) abused the position of economic dependence held by competitor Victrix Socsan SL (***Victrix***) and customer Télé-Secours ASBL (***Télé-Secours***). This judgment was adopted after the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) had provided its opinion as an *amicus curiae*.

Although the judgment was adopted last year, on 26 July 2022, the BCA only published it (together with its *amicus curiae* opinion) on 20 March 2023. It offers interesting insights in the recent notion of abuse of economic dependence which was introduced into Belgian law in 2020. It also suggests possible discrepancies between the application of the notion of abuse of economic dependence by the courts and the interpretation given to this concept by the BCA.

Tunstall provides reception units and telecare software (called "platform") to organisations running call centres. It owns a patent on a protocol that allows reception units to communicate with the platform. One of the call centres using Tunstall's equipment and software, Télé-Secours, provides teleassistance to elderly or vulnerable people wishing to continue to live autonomously at home. Télé-Secours decided to start using the platform of one of Tunstall's competitors, Victrix. However, Tunstall refused to grant Victrix a licence in the patent protecting its communication protocol, which prevented Victrix from connecting its platform to the reception units used by Télé-Secours' clients.

Télé-Secours and Victrix claimed before the Court that Tunstall had infringed (i) Article IV.2 of the Belgian Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* – ***CEL***) and Article 102 of the Treaty on the Functioning of the European Union (***TFEU***), which both prohibit undertakings in a dominant position from abusing that dominance, and/or (ii) Article IV.2/1 CEL, which prohibits abuses of economic dependence. As the BCA has competence to investigate and prosecute both types of infringements, the Court requested it to offer its views as an *amicus curiae*, pursuant to Article IV.88 CEL. Interestingly, however, in its final judgment the Court did not fully follow the BCA's interpretation of the law.

(i) Alleged Abuse of Dominance (Article IV.2 CEL and Article 102 TFEU)

In its opinion, the BCA had told the Court that a refusal by a dominant firm to grant a licence to use a communications protocol may be abusive if specific conditions are satisfied. These relate to the indispensability of Tunstall's protocol, the elimination of competition, the prevention of the development of a new product and the absence of an objective justification for Tunstall's behaviour. However, this issue became moot when the Court found that Tunstall did not have a dominant position on the relevant market, which is a prerequisite for a finding of abuse of dominance. The Court observed that Tunstall had only one technology among others in a market defined as the European market for communications protocols. Based on the criteria proposed by the BCA, such as market shares and barriers to enter the market, the Court held that it had not been established that Tunstall holds a dominant position on this market.

(ii) Alleged Abuse of Economic Dependence (Article IV.2/1 CEL)

The Court observed that three conditions must be fulfilled for a company to be considered to abuse the situation of economic dependence of another company:

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- the existence of a situation of economic dependence of the latter vis-à-vis the former;
- an abuse by the former of this situation of economic dependence; and
- an effect on competition in the Belgian market or a substantial part of it.

First, the Court held that Télé-Secours is economically dependent on Tunstall because (i) it depends on Tunstall's patented technology; and (ii) it would be impossible for Télé-Secours to find another supplier able to provide it with a platform that offers equivalent services within a reasonable delay, at a reasonable cost and under reasonable terms and conditions. The Court observed that the only existing alternative was a licensee of Tunstall that uses the same patented technology, and that no customer of Tunstall was able to use another software than Tunstall's without its new provider holding a licence for Tunstall's technology.

The Court also found that Victrix was economically dependent on Tunstall. In its opinion, the BCA had pointed out that economic dependence normally requires a contract between the economically dependent company and the firm on which it depends, which was not the case between Tunstall and Victrix. However, the Court noted that the existence of a contract is not a legal requirement. In practice, the relevant software market in Belgium is exclusively composed of Tunstall and its licensees, which means that Victrix cannot operate in Belgium without obtaining a licence from Tunstall. The Court noted that, while Tunstall granted licences to its Belgian competitors, it had denied a license to Victrix without a valid reason, which amounts to imposing abnormal conditions.

Second, the Court held that Tunstall had abused the economic dependence of both Télé-Secours and Victrix. For its part, the BCA had considered that the behaviour at stake – Tunstall's refusal to offer a licence for its patented technology – concerns Victrix, not Télé-Secours, and that Télé-Secours was only indirectly affected, which, in the BCA's view, was not sufficient to prompt the application of the notion of abuse of economic dominance. The Court disagreed again with the BCA. It observed that there is no statutory definition of abuse. The Court also found that Télé-Secours was held captive by Tunstall, which abused its economic dependence, as evidenced by Télé-Secours' claim that the prices charged by Tunstall were 50% higher than those of Victrix. The Court reached the same conclusion as regards Victrix, noting that (i) Tunstall's refusal to grant a license to Victrix was based on a false pretense of patent infringement; and (ii) all of Victrix's competitors had obtained a licence. Tunstall's refusal was therefore considered to be unjustified, discriminatory and abusive.

Third, the Court remarked that the condition of competition being affected in a substantial part of the Belgian market is generally considered to be ambiguous in a context where the CEL intends to protect SMEs rather than competition itself. The Court held that this condition requires a showing that the abusive behaviour does not only affect the dependent company but can have broader anticompetitive effects, be it in the market of the dependent company or in the market of the abusive company. On that basis, the Court noted the significance of Télé-Secours (which has a market share of 25%) and observed that Tunstall's abusive behaviour allows it to increase its market share. This caused the third condition to be satisfied.

The Court therefore held that Tunstall had abused the position of economic dependence of Victrix and Télé-Secours and ordered Tunstall to grant these parties a non-exclusive licence, at a price equal to the average price paid by the other licensees of Tunstall's technology, failing which Tunstall would have to pay a daily penalty of EUR 10,000.

The judgment of the Court and the BCA's *amicus curiae* opinion are available on the BCA's website.

COMPETITION LAW

Carrefour Loses New Battle in Effort to Have Belgian Competition Authority's Authorisation of Mestdagh Acquisition Overturned

On 15 March 2023, retailer Carrefour Belgium SA lost another battle in its war against Intermarché over the decision of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) of 9 November 2022 to authorise the acquisition of Mestdagh SA by ITM Alimentaire Belgium SA (the ***Challenged Decision***).

In a previous interlocutory judgment, the Markets Court of the Brussels Court of Appeal (*Marktenhof / Cour des marchés* – the ***Markets Court***) had denied Carrefour's request for suspension of the Challenged Decision (*See*, this Newsletter, Volume 2022, No. 12).

This time, the Markets Court denied Carrefour's request to be given access to specific confidential and non-confidential documents of the procedural file. The Markets Court observed that, pursuant to Article IV.65(2) of the Belgian Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* – ***CEL***), third parties do not have access to the procedural file during the administrative procedure before the BCA. However, the Markets Court pointed out that the access rules during the appeal procedure are different, pursuant to Article IV.90(7) CEL and general rules of EU law.

The Markets Court held that two conditions must be satisfied for a document of the procedural file to be disclosed to a third party to the case, such as Carrefour:

1. the principle of equality of arms, the effective right to appeal the administrative decision, the right to a fair trial and the appropriate exercise by the Markets Court of its full jurisdictional power require such access to be granted in the framework of an appeal against the administrative decision; and

2. at least one serious plea justifies at first sight (*prima facie*) the annulment of the contested decision.

The Markets Court added that, even if these two conditions are satisfied, it is still not obliged to grant access to the requested documents, as the Markets Court must balance the benefits for the applicant associated with obtaining access against the disadvantages for the public interest. The Markets Court can also deny a request to protect confidential documents and data.

In this case, the Markets Court held that Carrefour failed to show that the requested documents were necessary to seek the annulment of the Challenged Decision. The Markets Court observed that, in its trial briefs, Carrefour itself had explained that it had the relevant data to establish that the BCA had made errors in the Challenged Decision. The Markets Court made it clear that it is not up to Carrefour to repeat the investigation carried out by the BCA by requesting all documents that it deems necessary for this purpose but to prove that the BCA's decision is illegal or flawed by a manifest error of assessment. Since Carrefour had confirmed having the data necessary to prove such an error, it had failed to establish that the requested documents were necessary to support its pleas. The Markets Court therefore denied Carrefour's request.

The next step of this procedure should be the adoption by the Markets Court of a judgment ruling on the merits of Carrefour's application for annulment of the Challenged Decision.

COMPETITION LAW

Belgian Competition Authority Opens Abuse of Dominance Proceedings Against Acquisition Not Caught by Merger Control Rules

On 22 March 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) announced that it would review the acquisition of Edpnet by telecommunications operator Proximus under the rules prohibiting abusive conduct by dominant companies (Article 102 TFEU and Article IV.2 of the Belgian Code of Economic Law). Edpnet supplies broadband communications services and found itself in judicial reorganisation proceedings because of financial difficulties. The Enterprise Court of Ghent, Dendermonde section (*Ondernemingsrechtbank Gent – afdeling Dendermonde*), had sanctioned the sale of the activities of Edpnet to Proximus, but this has not prevented the BCA from opening its investigation.

The BCA explained in its press release that its move against this acquisition based on the rules on abuse of dominance is inspired by the judgment handed down by the Court of Justice of the European Union (***CJEU***) on 16 March 2023 in Case C-449/21, *Towercast SASU v. Autorité de la concurrence and others*. In this judgment the CJEU held that a national competition authority can investigate *ex post*, under Article 102 TFEU, a concentration that does not reach the turnover thresholds for *ex ante* review under the European Union or national merger control regimes, in light of the structure of competition on a market which is national in scope.

The BCA had previously been reluctant to apply the "abuse of dominance" rules to below-threshold acquisitions. A few years ago, the BCA refused to grant interim measures to suspend the acquisition of a small brewery, Brouwerij Bosteels, by AB InBev. Competitor Alken-Maes, owned by Heineken, had argued that the below-threshold acquisition was in breach of Article IV.2, Code of Economic Law because it amounted to an abuse of dominant position on the part of AB InBev. The BCA disagreed and rejected Alken-Maes' complaint.

On appeal, the Markets Court of the Brussels Court of Appeal confirmed the BCA decision and held that an acquisition which creates a concentration which falls outside the scope of the merger control rules does not "as such" amount to an abuse of a dominant position absent "*accompanying but decisive conduct*" (case 2016/MR/2, judgment of 28 June 2017). The Court went on to say that such conduct must qualify as *prima facie* abusive, rather than capable of being abusive, and must, significantly, be distinguishable from the actual effect resulting from the concentration. In response to the objections raised by Alken-Maes, the Court specified that this is not a test which is more stringent than the test habitually used for determining an infringement of Article IV.2, Code of Economic Law and Article 102, TFEU. Lastly, the Court also made it clear that the BCA had some room for manoeuvring in that it is allowed to make policy choices that fall outside the scrutiny of the Court.

The CJEU's judgment in the *Towercast* case appears to have elicited a change of policy at the BCA level. This shift adds a level of uncertainty for transactions that involve small companies with a significant position on narrowly defined markets. It creates a further angle of attack against below-threshold mergers following the 2022 judgment in the *Illumina / Grail* case in which the CJEU held that the European Commission has jurisdiction to examine Illumina's acquisition of Grail, even though the acquisition falls below both the EU and national turnover thresholds for merger control review.

It will be interesting to see whether, as regards Proximus / Edpnet, the BCA will take a more militant approach, or whether, as the press release's reference to "*serious indications of substantial obstacles to competition*" might suggest, the BCA has identified facts that point to the "*accompanying but decisive conduct*" referred to by the Markets Court in the *Bosteels* case.

The press release published by the BCA is available on its website.

COMPETITION LAW

Belgian Competition Authority Publishes Informal Guidance Regarding Code of Conduct of Belgian Food Chain

On 27 March 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) published an informal opinion issued on 21 February 2023 following a request made by the Agro Food Chain Consultation (*Ketenoverleg / Concertation de la chaîne* – the ***Chain Consultation***).

In its request, the Chain Consultation informed the BCA of its intention to include a provision in its code of conduct regarding hardship (*imprevisieleer / théorie de l'imprévision*). Pursuant to this provision, members of the Chain Consultation would commit to recognising hardship, as provided for in Article 5.74 of the new Belgian Civil Code, and would agree not to contractually exclude, or modulate that obligation. The Chain Consultation asked the BCA whether such a commitment would infringe the competition rules to the extent that it restricts the contractual freedom of the companies adhering to the code of conduct.

The BCA observed that not every limitation placed on the contractual freedom of parties amounts to a restriction of competition. The insertion of the commitment that contracting parties will undertake not to contractually exclude hardship does not, as such, infringe competition law. However, companies and trade associations that are part of the Chain Consultation must ensure that this commitment is implemented in a manner that complies with the competition rules. For example, agreeing to increase prices in the event of hardship would be illegal, as companies must independently determine their commercial policy on the market.

The BCA's informal opinion is available on its website.

Belgian Competition Authority Clears Sustainability Initiative on Living Wages in Banana Sector

On 30 March 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) approved an initiative of IDH Sustainable Trade and several retailers to bolster pay in the banana sector to the living wage level. The initiative forms part of IDH's broader Roadmap on Living Wages. It targets fresh bananas sold on the Belgian market and supplied by companies with at least five employees.

The BCA explained in a press release that the following parameters played a role in its decision to clear the initiative: the transparency for the participants in the standard selection process; the participation in the project on a voluntary basis; the participants' freedom to set stricter standards than those agreed upon; the absence of the possibility to exchange commercially sensitive information between competing retailers; the effective and non-discriminatory access to the requirements and conditions of the standard; the absence of a significant price increase or reduction in choice; and the continuing monitoring of the implementation of the sustainability standard. The BCA stressed that it had made sure that retailers would not exchange commercially sensitive information and would maintain their pricing autonomy.

For its part, IDH confirmed that no recommendation would be issued on how to pass on any cost variations throughout the supply chain and that no mandatory or recommended minimum price would be communicated to the various supply chain players. IDH also committed to monitoring the implementation of the project and reporting substantial developments to the BCA.

The press release published by the BCA is available on its website.

CORPORATE LAW

Chamber of Representatives Finally Takes into Consideration Bill Implementing European Mobility Directive

Belgium missed the deadline of 31 January 2023 for implementing the European Mobility Directive into Belgian law (*See*, this Newsletter, Volume 2023, No. 1), but a Bill has finally been submitted to the Chamber of Representatives on 15 March 2023 (*Wetsontwerp tot wijziging van het Wetboek van vennootschappen en verenigingen, van de Wet van 16 juli 2004 houdende het Wetboek van international privaatrecht en van het Gerechtelijk Wetboek, onder meer ingevolge de omzetting van Richtlijn (EU) 2019/2121 van het Europees Parlement en de Raad van 27 november 2019 tot wijziging van Richtlijn (EU) 2017/1132 met betrekking tot grensoverschrijdende omzettingen, fusies en splitsingen/ Projet de loi modifiant le Code des sociétés et des associations, la loi du 16 juillet 2004 portant le Code de droit international privé et le Code judiciaire, notamment à la suite de la transposition de la directive (UE) 2019/2121 du Parlement européen et du Conseil du 27 novembre 2019 modifiant la directive (UE) 2017/1132 en ce qui concerne les transformations, fusions et scissions transfrontalières* (here and here)).

The Bill will now be discussed and voted upon by the Chamber of Representatives and will enter into force 10 days after its publication in the Belgian Official Journal. However, for technical reasons, specific provisions will enter into force on 30 June 2023 or on a date to be established by Royal Decree. The Bill also provides that the law will apply to cross-border proposals that are deposited at the clerk's office of the Enterprise Court ten days after the publication of the law in the Belgian Official Journal.

DATA PROTECTION

Federal Parliament Creates Belgian Health(care) Data Agency

The federal Chamber of Representatives adopted on 9 March 2023 the Law instituting and organising the Health(care) Data Agency (the ***Law***) (*Wet van 14 maart 2023 houdende oprichting en organisatie van het Gezondheids(zorg)data agentschap/Loi du 14 mars 2023 relative à l'institution et à l'organisation de l'Agence des données de (soins de) santé*) (the ***HDA***). The HDA is a new autonomous administrative agency within the Federal Public Service Public Health. The main purpose of the HDA is to facilitate the access to health data and health related data (***Health Data***) in a simplified and reliable manner and facilitate the re-use of such data.

The HDA, as a single point of contact, will assist data users in finding the right data holder and complying with the obligations to access the Health Data which they seek.

The Law makes clear that:

- the HDA itself will not process Health Data;
- the HDA will not have the authority to decide whether or not a data user can access Health Data;
- calling upon the services of the HDA is not mandatory, which means that data users can also choose to contact data holders directly;
- it does not provide a valid legal basis for the processing of personal data as required under the General Data Protection Regulation (the ***GDPR***). This means that the data user and the data holder must still rely on a separate valid legal basis for the processing in accordance with Articles 6 and 9 of the GDPR.

Specific concepts are defined very broadly in the Law as follows:

- "Re-use" refers to any use of data by natural or legal persons for commercial or non-commercial purposes other than the original purpose for which the data are processed (This definition is similar to that provided for the same concept in the EU Data Governance Act adopted on 30 May 2022);
- "Data user" means a natural or legal person who has lawful access to specific personal or non-personal data and is authorised to use that data for commercial or non-commercial purposes;
- "Data holder" means any legal person or data subject who, in accordance with applicable law, has the right to grant access to or share personal and non-personal data under his/her control.

The Law reflects several suggestions which the Belgian Data Protection Authority (the ***DPA***) made in relation to the Draft Bill. For example, the denomination of the HDA was changed from "Authority" to "Agency", to avoid confusion with the role of the DPA. Similarly, the Law now makes it clear that the HDA is not a supervisory authority within the meaning of Article 51 of the GDPR and will not affect the powers of the DPA.

There is still uncertainty regarding the conditions under which the re-use of Health Data would be considered as lawful both under the EU Data Governance Act and the GDPR. The GDPR contains strict conditions for further processing (Article 5.1.b of the GDPR), including the processing for another purpose (Article 6.4 of the GDPR) of personal data, which the Law does not address. Furthermore, it remains unclear which role the HDA will play in the new landscape of data-related EU Regulations, especially in combination with the Data Governance Act and the upcoming European Health Data Space.

The Law can be found here in Dutch and in French.

DATA PROTECTION

Advocate General of Court of Justice of European Union Equates Automated Assessment of Person's Ability to Service Loan with Profiling

On 16 March 2023, Advocate General Pikamäe (the ***AG***) delivered his opinion in case C-634/21, *SCHUFA Holding and Others (Scoring)*, in which he considers the automated establishment of a probability concerning the ability of persons to service a loan to amount to "profiling" under the General Data Protection Regulation (the ***GDPR***).

SCHUFA Holding AG (***SCHUFA***) provides services to a credit institution for calculating "scores" aimed at estimating the likelihood of an applicant defaulting on a loan. These scores serve as the basis for refusing or granting credit. The applicant in question, a natural person, requested SCHUFA to erase the entry that concerned her and to grant her access to this data. SCHUFA refused the request and only provided the applicant with her score claiming that its methods of credit calculation are a trade secret.

The Administrative Court of Wiesbaden, Germany (the ***Referring Court***) asked the Court of Justice of the European Union (the ***CJEU***) whether Article 22(1) of the GDPR is to be interpreted as meaning that the automated establishment by a credit institution of a probability value concerning the data subject's ability to benefit from a loan constitutes an automated decision producing legal effects concerning that person or significantly affecting her in a similar way.

The AG considered that the scoring activity constitutes "profiling" as defined in Article 4(4) of the GDPR. This is because the procedure uses personal data to evaluate aspects of natural persons to analyse or predict elements regarding their economic situation, reliability and likely behaviour in relation to the loan. The AG noted that any refusal of an application may have legal effects for the data subject, who may no longer benefit from a contractual relationship with the credit institution. Furthermore, this calculation may impact a data subject's financial position, amounting to an economic effect sufficiently "similar" to that of a legal one, as stipulated in Recital 71 of the GDPR.

The AG went on to consider this activity to amount to "automated profiling" because the credit institution draws strongly on the score to establish a contractual relationship with the data subject. He noted that, while human intervention is possible and the institution could, of its own accord, decide to grant a loan to an applicant despite a negative credit scoring, the calculations made by SCHUFA tend to determine the credit institution's actions. The AG added that as SCHUFA establishes the score, the data subject must reasonably be allowed to exercise her rights under Article 22(1) of the GDPR directly towards SCHUFA. According to the AG, the same holds true for the other rights granted to the data subject by the GDPR, such as the right to rectification (Article 16 of the GDPR) and the right to erasure (Article 17 of the GDPR).

Finally, in relation to the applicant's request for information on the algorithmic calculation of the scoring under Article 15(1) of the GDPR, the AG referred to recital 63 of the GDPR and considered that the defence of protecting intellectual property (***IP***) rights cannot justify a refusal to provide information to the data subject. Nonetheless, the AG also maintained that a "certain degree of confidentiality" must be ensured. According to the AG the real objective of Article 15(1)(h) of the GDPR is to guarantee that the data subject obtains information in an accessible way and in accordance with her needs. That objective does not necessarily mandate a disclosure of SCHUFA's algorithm. Rather, information about the processing of personal data should be provided by the controller in an aggregate format to explain the underlying logic of the decision. Such aggregate data could include a description of the factors considered and their importance at the aggregate level.

The Referring Court also asked the CJEU whether Articles 6(1) and 22 of the GDPR must be interpreted as precluding national legislation from profiling beyond the restrictions already provided for in Article 22(1) of the GDPR. The AG concluded that they do not, as long

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as national law complies with the conditions laid out in Article 6 of the GDPR and offers an adequate legal basis, which the referring court must verify.

If followed by the CJEU, the AG's formalistic approach would mean that controllers will have to carefully assess the extent to which they choose to rely on automated decision-making. This holds true for their internal processing operations, their contractual obligations towards third parties, and for the possible real-life effects of automated decisions on data subjects. Moreover, the AG's interpretation could broaden the extent to which controllers must disclose their processing operations to the data subject.

The AG's opinion can be found here in Dutch and in French.

Markets Court Annuls Data Protection Authority's Decision Condemning Media Company for Unlawful Use of Cookies

In January 2019, the Direction Committee of the Belgian Data Protection Authority (the ***DPA***) requested the Inspection Service of the DPA to investigate the ten most visited / popular Belgian media regarding the use of cookies on their websites. The investigation targeted also websites operated by Rossel Media Group (***Rossel***). On the basis of the Inspection Service's findings, the Litigation Chamber of the DPA imposed a fine of EUR 50,000 on Rossel for several infringements of the data protection rules on the use of cookies (*See*, this Newsletter, Volume 2022, No. 6 and this Newsletter, Volume 2022, No. 11).

Rossel appealed the DPA's decision to the Markets Court. It argued that the Direction Committee had failed to justify its decision to refer the matter to the Inspection Service.

The Markets Court first noted that, under the Law of 29 July 1991 on the formal justification of administrative acts, any such act must be justified and state the legal and factual considerations it relies on. The reasons must not only exist and be valid but must also be reflected in the administrative act itself. Additionally, the reasons must be "satisfactory" which implies that the reasoning must be based on actual facts and therefore allows an understanding of the aim pursued by the administrative authority.

The Markets Court then observed that Article 63,1° of the Law of 3 December 2017 establishing the DPA provides that the decisions of the Direction Committee to refer a case to the Inspection Service must ascertain the existence of "serious indications" of a practice likely to give rise to a breach of the fundamental principle of personal data protection.

In the case at hand, the Markets Court considered that the relevant administrative act was the Direction Committee's decision of 16 January 2019 which had referred the case to the Inspection Service. That act did not contain any formal justification or serious indications as defined above. The Markets Court added that subsequent acts of the authority must not cover the lack of formal justification in the original act. The Markets Court therefore annulled the DPA's decision and ordered it to pay Rossel EUR 1,800 as procedural indemnity.

The Markets Court's judgment can be found here.

INTELLECTUAL PROPERTY

Court of Justice of European Union and General Court Clarify Design Protection Requirements

The Court of Justice of the European Union (***CJEU***) and the General Court (***GC***) each delivered a judgment in which the criteria for design protection are clarified in line with existing case law.

(i) Papierfabriek Doetinchem BV v Sprick GmbH Bielefelder Papier- und Wellpappenwerk & Co. (C-684/21) – Features of Appearance of Product Dictated Solely by Product's Technical Function

On 22 March 2023, the CJEU handed down a preliminary judgment in case C-684/21, clarifying the application of the requirement under Article 8(1) of EU Regulation No. 6/2002 (the ***Design Regulation***) that Community designs must not subsist in features of appearance solely dictated by technical function (*See*, this Newsletter, Volume 2021, No. 4).

The case stems from a German dispute between two paper dispenser companies. The plaintiff, Sprick GmbH (***Sprick***), holds various Community designs and a patent related to the same product. It initiated infringement proceedings against the defendant, Papierfabriek Doetinchem BV (***Papierfabriek Doetinchem***), which in turn filed a counterclaim seeking cancellation of the Community designs on the basis of their features being dictated solely by technical function and, consequently, ineligible for design protection.

On appeal, the *Oberlandesgericht* Düsseldorf agreed with Papierfabriek Doetinchem and declared the design of Sprick invalid. However, the *Bundesgerichtshof* disagreed and decided to refer the case back to *Oberlandesgericht* Düsseldorf, which in turn decided to refer two questions to the CJEU.

In its the first question, the referring court asked whether the technical function assessment must be made having regard to the objective circumstances dictating the choice of features of appearance, the existence of alternative designs which fulfil the same technical function, or the fact that the proprietor of the design at issue also holds design rights for numerous alternative designs.

The CJEU held that the technical function assessment must be made having regard to all of the objective circumstances relevant to each case. It noted that the fact that the proprietor of the design in question also holds design rights for numerous alternative designs is not decisive as it would otherwise be possible to circumvent the application of Article 8(1) of the Design Regulation by obtaining design protection for all technical alternatives and thereby preventing competitors from offering a product incorporating specific functional features or limit the possible technical solutions. This is consistent with the CJEU's judgment of 8 March 2018 in *DOCERAM* (C-395/16).

In its second question, the referring court asked whether the assessment should be made considering the possibility of a multicolour appearance if the colour design is not apparent from the registration.

The CJEU found that elements which are not apparent from the registration of the design concerned cannot be considered in the assessment as to whether the appearance of a product is dictated solely by its technical function. The CJEU's reasoning was twofold. First, competent authorities must know with clarity and precision the nature of the constituent elements of a design in order to be able to discharge their obligations in relation to the prior examination of applications for registration and to the publication and maintenance of an appropriate and precise register of designs. Second, competitors must be able to acquaint themselves with registrations or applications for registration made by their current or potential competitors and must thus be capable of obtaining relevant information about the rights of third parties.

INTELLECTUAL PROPERTY

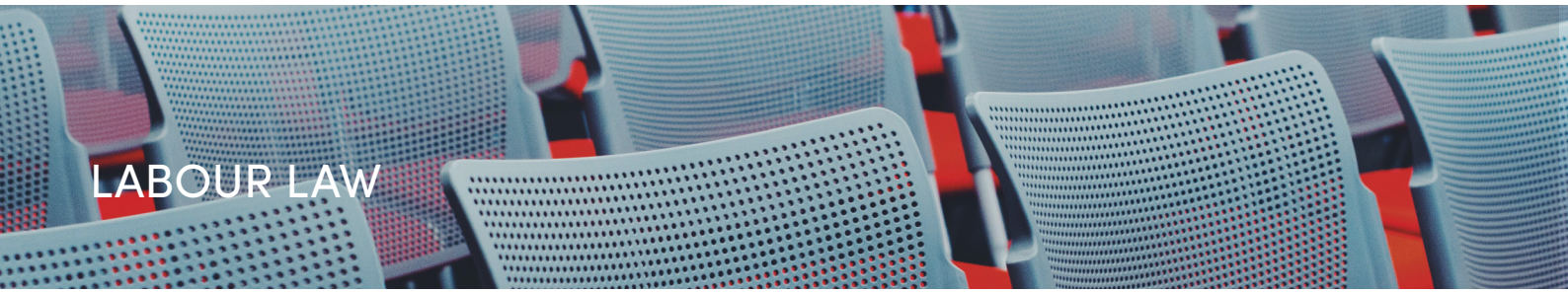
(ii) B&Bartoni spol. s r.o. v EUIPO (T-617/21) –Component Part of Complex Product

On 22 March 2023, the GC handed down its much-awaited judgment in Case T-617/21, holding that consumables are not to be considered component parts of complex products under Article 4(2) of the Design Regulation and, as such, are eligible for design protection.

The judgment of the GC confirms the appeal decision of the European Intellectual Property Office Board of Appeal (***BoA***) against a decision of the European Intellectual Property Office's Invalidity Division (the ***Invalidity Division***) in relation to an invalidity application brought against a Community design which depicts an electrode for a plasma-cutting torch. The invalidity applicant, B&Bartoni spol. s r.o. (***B&Bartoni***), argued that the electrode is a component part of a complex product and invisible during normal use of the torch, contrary to what is required by Article 4(2) of the Design Regulation. The Invalidity Division agreed with B&Bartoni but the BoA upheld the appeal against the Invalidity Division's decision, holding that the main criterion for distinguishing a consumable from a component part is whether the underlying product would be considered complete without it. Applied to this case, the BoA considered that if a torch lacks an electrode, it would not be considered broken, indicating that the electrode could not be regarded as a component part of a complex product within the meaning of Article 4(2) of the Design Regulation but as a consumable which does not need to fulfil the visibility requirement. As a result, the BoA found the contested design valid. However, B&Bartoni appealed the decision to the GC.

For its part, the GC held, first, that Article 4(2) of the Design Regulation should be interpreted narrowly as it is a restrictive exception to the system of protection laid down in Article 4(1) of the Design Regulation. Second, the GC noted that the BoA did not err in law or fact in finding that the following circumstances should be taken into account to indicate that the electrode cannot be considered as a component part of the torch: (i) the consumable nature of the electrode, taking into account the lifespan and the lack of a firm and durable connection; (ii) the fact that the torch is regarded as complete and sold without the electrode; (iii) the absence of disassembly and re-assembly of the torch when the electrode is replaced; and (iv) the interchangeability of the electrode with non-identical products.

It remains to be seen whether the judgment will be appealed to the CJEU. It would seem unlikely that the CJEU would annul the GC's judgment as it appears to be aligned with existing CJEU case law (*see*, cases C-397/16 and C-435/16) and to reflect more accurately the characteristics of consumables.



LABOUR LAW

Vacation Rules Updated in Accordance with European Regulatory Framework

A Royal Decree of 8 February 2023 contains several measures to ensure that employees are always entitled to at least four weeks of paid vacation, in accordance with applicable European requirements (*Koninklijk Besluit van 8 februari 2023 tot wijziging van de artikelen 3, 35, 46, 60, 64, 66 en 68 en de invoering van een artikel 67bis in het Koninklijk Besluit van 30 maart 1967 tot bepaling van de algemene uitvoeringsmodaliteiten van de wetten betreffende de jaarlijkse vakantie van de werknemers / Arrêté royal portant modification des articles 3, 35, 46, 60, 64, 66 et 68 et insérant un article 67bis dans l'arrêté royal du 30 mars 1967 déterminant les modalités générales d'exécution des lois relatives aux vacances annuelles des travailleurs salariés* – the ***Royal Decree***).

Vacation Carry-Over

Employees working in Belgium accrue legal vacation days in function of days worked as an employee in the previous year (*e.g.* legal vacation days for 2024 are accrued by working in 2023). Moreover, carrying over of legal vacation days to the next year was in general prohibited. This meant that any vacation days not taken were lost.

On 1 January 2024, employees will be entitled to carry over non-taken legal vacation days until two years following the end of the related vacation year (*e.g.* any holidays of 2024 can be carried over until 31 December 2026). This regime will apply to employees who were unable to take all their legal vacation days for one of the following reasons:

- accident or sick leave (including industrial accident and/or occupational disease);
- maternity or paternity leave;
- prophylactic leave;
- birth leave and adoption leave; and
- Foster care and foster parental leave.

Absences During Legal Vacation Days

If an employee currently takes legal vacation days and one of the above events occurs during the vacation, the days concerned are considered to be vacation days. This implies that if an employee falls ill during annual vacation, the days of illness cannot be converted into sick leave.

On 1 January 2024, this rule will change. Days of suspension of work on one of the above-mentioned grounds will no longer be considered as vacation days. However, the employee should inform the employer immediately if a specific event of work suspension occurs and he or she should also request the employer for permission to take up the impacted vacation days later.

LITIGATION

Law on Taking of Evidence and Service of Documents in Civil or Commercial Matters Enters into Force

On 24 March 2023, the Law implementing and complementing Regulation (EU) 2020/1783 of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (the ***Evidence Regulation***) and Regulation (EU) 2020/1784 of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (the ***Service of Documents Regulation***) (the ***Law***) was published in the Belgian Official Journal and entered into force the same day (*See*, this Newsletter, Volume 2023, No. 2). The full text of the Law is available in Dutch here and in French here.

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