May 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

In Landmark Judgment Supreme Court Confirms Arbitrability of Exclusive Distribution Agreements

On 7 April 2023, the Supreme Court held that the Belgian rules on the unilateral termination of exclusive distribution agreements of indefinite duration, as contained in Articles X.35 through X.40 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* – ***CEL***) (the ***Belgian Distribution Law***), are not "overriding mandatory provisions" within the meaning of Article 9(1) of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) (the ***Rome I Regulation***) (Supreme Court, 7 April 2023, C.21.0325.N, *Thibelo bv v. Stölzle-Oberglass GmbH*, available here).

This landmark ruling marks the end of an era because it will turn the Belgian Distribution Law into a dead letter in the world of international distribution. The Belgian Distribution Law dates back to the early 1960s, and is particularly advantageous for and protective of exclusive distributors whose agreement is terminated unilaterally by the supplier.

The judgment puts an end to a litigation strategy that has flourished for decades, namely that of Belgian distributors bringing proceedings against their former suppliers before the Belgian civil courts and claiming damages under the Belgian Distribution Law, despite their distribution agreement containing a foreign choice of law clause and/or an arbitration clause. This approach had been made possible by Article X.39 CEL (following a similar earlier statutory provision) which provides that "[t]*he distributor may, upon termination of a distribution agreement effective within the entire Belgian territory or a part thereof, in any event summon the supplier, either before the court of his own domicile, or before the court of the domicile or registered office of the supplier*" and that "[i]*n case the dispute is brought before a Belgian court, this court shall exclusively apply Belgian law*".

Facts

In the case at hand, a Belgian distributor had entered into an exclusive distribution agreement with an Austrian supplier. The agreement provided for the application of Austrian law and contained an arbitration clause designating Vienna as the seat of arbitration.

Following the supplier's unilateral termination of the distribution agreement, the distributor sought damages under the Belgian Distribution Law from its former supplier before the Enterprise Court of Turnhout, Belgium, pursuant to Article X.39 CEL. Challenging the jurisdiction of the Turnhout Enterprise Court, the supplier raised the exception of arbitration, but that was dismissed. The supplier then brought an appeal to the Antwerp Court of Appeal which, siding with the supplier, declared itself without jurisdiction in view of the agreement's arbitration clause. The distributor then appealed the matter to the Supreme Court. Applying the principles of the Supreme Court's past case law, the distributor argued that the agreement's arbitration clause was invalid in that (i) the arbitral tribunal would not apply Belgian law but Austrian law; and (ii) Austrian law does not offer an equivalent level of protection to the distributor as Belgian law.

Judgment of Supreme Court

Overruling its earlier case law, the Supreme Court held that, despite the language of Article X.39 CEL, a Belgian Court handling a dispute regarding the termination of an exclusive distribution agreement that is subject to the Rome I Regulation cannot set aside the foreign law chosen by the parties and apply the Belgian Distribution Law instead. Accordingly, Belgian Courts also cannot render the arbitrability of such a dispute subject to the condition that the arbitral tribunal should apply the Belgian Distribution Law or a foreign law offering an equivalent level of protection.

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The Supreme Court's finding is based on three considerations:

1. Since the entry into force on 1 September 2013 of the Law of 24 June 2013 "*amending the sixth part of the Judicial Code on arbitration*" (*Wet van 24 juni 2013 tot wijziging van het zesde deel van het Gerechtelijk Wetboek betreffende de arbitrage / Loi du 24 juin 2013 modifiant la sixième partie du Code judiciaire relative à l'arbitrage*), disputes regarding the termination of an exclusive distribution agreement are eligible for arbitration as they are of a pecuniary nature. Article 1676, §1 of the Judicial Code (*Gerechtelijk Wetboek / Code judiciaire*), as introduced by the Law of 24 June 2013, provides that "*any dispute of a pecuniary nature can be the subject of arbitration*".

2. The Belgian Distribution Law is not an "overriding mandatory provision" within the meaning of Article 9(1) of the Rome I Regulation because it mainly protects private interests rather than public interests.

   By way of exception to the general rule of Article 3(1) of the Rome I Regulation that "[a] *contract shall be governed by the law chosen by the parties*", Article 9(2) of the Rome I Regulation provides that "[n]*othing in* [the Rome I Regulation] *shall restrict the application of the overriding mandatory provisions of the law of the forum*". Pursuant to Article 9(1) of the Rome I Regulation, "overriding mandatory provisions" are "*provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation*".

   The Court of Justice of the European Union (***CJEU***) clarified in *Unamar* (CJEU, 17 October 2013, Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*, available here) that the term "overriding mandatory provisions" must be interpreted strictly and can only cover national provisions which "*the legislature adopted* […] *in order to protect an interest judged to be essential by the Member State concerned*". According to the Supreme Court, the Belgian Distribution Law does not satisfy that criterion as it mainly protects private interests, and not public interests judged essential by the Belgian State.

3. In view of the principle of primacy of EU law over national law, the fact that the Belgian Distribution Law is categorised under Belgian law as a rule of public order (*politiewet / loi de police*) cannot call into question the above assessment. If it did, the primacy of EU law would be undermined.

On this basis, the Supreme Court concluded that the contractually agreed arbitration clause should be given effect and, consequently, dismissed the distributor's appeal.

Assessment

The judgment significantly reduces the risk of foreign suppliers facing lawsuits before the Belgian civil courts following the unilateral termination of exclusive distribution agreements which contain a foreign choice of law clause and/or an arbitration clause. This development is most welcome because it increases legal certainty for foreign suppliers and for international business in general. The Supreme Court's judgment confirms and approves a pre-existing trend in the case law of lower courts to adopt a more business-friendly approach, and give effect to contractually agreed arbitration clauses and choice of law clauses (*see*, for instance, VBB on Belgian Business Law, Volume 2020, No. 6).

While a foreign choice of law clause would seem to suffice to avert the application of the Belgian Distribution Law, suppliers based outside of the EU are nonetheless advised to combine that clause with an arbitration clause to avoid litigation in Belgium. Conversely, distributors wishing to increase their protection upon the termination of their distributorship are advised to negotiate with their supplier a – mutually agreeable – contractual protection mechanism.

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Meat Products Merger Abandoned Following Objections of Belgian Competition Authority

On 2 June 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - ***BCA***) announced the closure of its phase II review of the proposed acquisition of Imperial Meat Products by What's Cooking? (formerly Ter Beke), following the latter's decision to abandon the transaction.

Both parties offer a variety of meat products that are sold mainly in supermarkets. The transaction was notified to the BCA on 4 May 2022. Two months later, on 4 July 2022, the Competition College (*Mededingingscollege / Collège de la Concurrence*) of the BCA announced its decision to open an in-depth ("phase II") investigation (*see*, this Newsletter, Volume 2022, No. 7). The BCA was concerned that the transaction would harm competition in several markets for dry sausages, salami, poultry, cooked ham and pâté. As the acquiror did not formally offer remedies to address these concerns, the Chief Prosecutor (*Auditeur-generaal / Auditeur général*) recommended to the Competition College on 8 May 2023 and on 1 June 2023 to block the transaction. What's Cooking abandoned its proposed acquisition shortly after.

In an unusually long press release, the BCA explained that it carried out a "very comprehensive assessment", which "lasted for several months" and included a "thorough market review with the participation of all large supermarket chains". According to the Chief Prosecutor, the merged entity would have become "the only market player with a significant presence across markets" and would have faced "limited competition" because "foreign products accounted for limited volumes overall and were positioned differently" than those of the parties to the concentration. The Chief Prosecutor added that "the loss of competition resulting from the transaction was unlikely to be compensated by other factors such as entry or expansion of competitors or buyer power".

Transactions are rarely prohibited in Belgium. The BCA's reasoning in this case will not be tested in court, as the parties abandoned their transaction before the adoption of a formal decision.

What's Cooking? also called off a parallel transaction in the Netherlands (the acquisition of Stegeman from the same seller) which had equally come under close scrutiny from the Dutch competition authority, *Autoriteit Consument & Markt*.

Belgian Competition Authority Gives Green Light for Acquisition by AG Insurance of Commercial Activities of Touring Club Royal de Belgique ASBL

On 22 May 2023, the Competition College (*Mededingingscollege / Collège de la Concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - ***BCA***) announced its decision to authorise the acquisition of the commercial activities of Touring Club Royal de Belgique ASBL (***Touring***) by AG Insurance, subject to conditions.

Touring is a non-profit organisation which uses several firms to provide vehicle roadside breakdown assistance, travel and legal assistance, auto glass repair and replacement services, travel insurance broker services, mandatory technical inspections of motor vehicles and driving licence examinations. AG Insurance offers life and non-life insurance services and supplementary pensions through a variety of channels to various customers, ranging from individuals to large corporations.

The transaction was notified to the BCA on 23 November 2022. The BCA identified a potential competition law issue because of possible data exchanges between AG Insurance and KBTC Holding, which is the Touring company that offers mandatory technical vehicle

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inspection services and driving licence examinations. The BCA was concerned that, post-transaction, AG Insurance would access commercially sensitive information from KBTC Holding on its testing and examination activities, which would confer an advantage on AG Insurance's automobile insurance and roadside assistance services. The BCA found that Touring (with KBTC) has significant market power in both the markets for mandatory vehicle inspection and in the markets for organising the mandatory driving licence examination, where it holds a monopoly in Antwerp and Limburg.

To assuage these concerns, AG Insurance offered commitments which were market tested, approved and made binding by the BCA. AG Insurance committed to ensure an operational and structural separation between the inspection and examination activities of KBTC and its affiliates, on the one hand, and the other commercial activities of AG Insurance Group, on the other hand:

- *Operational separation*: AG Insurance will not sell any of its other commercial services or use any of its other brand names and logos while running the examination and testing centres through KBTC. In addition, it will create "Chinese walls" (physical staff separation, IT-system separation and mandatory internal guidelines) and will report on these measures in its annual report and in a report to the BCA.

- *Structural separation*: AG Insurance will continue to hold the shares relating to the operation of the examination and testing centres through KBTC Holding, which will have at least two independent directors with a joint veto right on all decisions relating to the compliance of the independence requirements.

Both AG Insurance and the BCA may request the Competition College to cancel or modify these commitments at any time in the future. Failure to comply with these commitments may result in prosecution and in a fine.

COMPLIANCE

Further Implementation of Whistleblowers Directive in Public Sector

On 12 May 2023, the Council of Ministers approved a draft bill regulating various aspects of the reporting channels and the protection of whistleblowers in the federal public sector (the ***Draft Bill***).

On 15 December 2022, Belgium had already implemented Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law (the ***Whistleblowers Directive***) in the private sector by creating a set of common minimal rules for the protection of workers and self-employed persons reporting breaches of EU law in their professional activities (*See*, this Newsletter, Volume 2022, No. 10 and this Newsletter, Volume 2022, No. 12).

Similar legislation applies to the federal public sector. The Law of 8 December 2022 concerning the reporting channels and the protection of persons reporting integrity violations that take place in federal public authorities and in the integrated police (the ***Law***) implemented the Whistleblowers Directive into Belgian law for the federal public sector. The Law, which entered into force on 2 January 2023, applies to federal public authorities and allows federal public sector employees to report anonymously breaches of EU law.

The Draft Bill aims to implement additional aspects of the Law pertaining to (i) the procedural elements and supervision of internal reporting; (ii) the objectives and content of storage of information; and (iii) the terms for public consultation.

The Draft Bill was sent to the Council of State for advice.

CONSUMER LAW

Law on Consumer Debt Published in Belgian Official Journal

On 23 May 2023, the Belgian Official Journal published the Law, dated 4 May 2023, inserting a new Book XIX "Consumer debts" into the Code of Economic Law (***CEL***) (*Wet van 4 mei 2023 houdende invoeging van boek XIX "Schulden van de consument" in het Wetboek van Economisch Recht / Loi du 4 mai 2023 portant insertion du livre XIX "Dettes du consommateur" dans le Code de droit économique* – the ***Law***).

For more information on the Law, we refer to the April 2023 (*See*, this Newsletter, Volume 2023, No. 4) and October 2022 (*See*, this Newsletter, Volume 2022, No. 10) issues of this Newsletter.

Subject to limited exceptions, the Law will enter into force on 1 September 2023. As of 1 December 2023, the Law will also apply to the recovery of consumer debts resulting from agreements concluded prior to its entry into force, to the extent that the delay in payment or the amicable recovery occurs after its entry into force.

The Law is available here in Dutch and here in French.

General Product Safety Regulation Published in Official Journal of EU

On 23 May 2023, the Official Journal of the EU published Regulation (EU) 2023/988 of 10 May 2023 on general product safety (the ***GPSR***). The GPSR repeals and replaces Directive 2001/95/EC of 3 December 2001 on general product safety (the ***GPSD***) and is designed to improve the safety of non-food consumer products in the internal market.

For over two decades, the EU has relied on the GPSD to ensure that products placed on the market are safe. The GPSD required businesses to (i) only place products on the market which are safe; (ii) inform consumers on any risks associated with the products which they commercialise; and (iii) ensure that any dangerous products on the market can be traced. Furthermore, it required EU Member States to monitor the safety of products and enforce product safety legislation.

The new rules on product safety come in the form of a Regulation which will be directly applicable in all EU Member States and does not require national transposition. The GPSR introduces the following novelties:

- new obligations on e-commerce, such as requirements for providers of online offers and online marketplaces;
- a new accident reporting system pursuant to which manufacturers must notify the authorities of any accident caused by their product via the Safety Gate system (i.e., the EU rapid alert system for dangerous non-food products);
- new requirements for product recall notices and rules for recall remedies; and
- rules on e-labeling.

The penalties for infringements of the GPSR are left to the discretion of the EU Member States but they must be effective, proportionate and sufficiently dissuasive.

The GPSR will apply from 13 December 2024 (Article 52 GPSR). To ensure a smooth transition from the GPSD to the GPSR, Article 51 GPSR provides that products which are in conformity with the GPSD and which were placed on the market before 13 December 2024 can continue to be made available on the market after 13 December 2024.

The text of the GPSR is available here.

CORPORATE LAW

Law Implementing Mobility Directive Adopted

The Law of 25 May 2023, which amends each of the Belgian Companies and Associations Code (***BCAC***), the Law of 16 July 2004 containing the Code of Private International Law and the Judicial Code (the ***Law***), was published in the Belgian Official Journal on 6 June 2023 (*Wet van 25 mei 2023 tot wijziging van het Wetboek van vennootschappen en verenigingen, van de wet van 16 juli 2004 houdende het Wetboek van internationaal 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/ Loi du 25 mai 2023 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*).

The Law transposes Directive (EU) 2019/2121 of 27 November 2019 as regards cross-border conversions, mergers and divisions (the ***Mobility Directive***), which removed barriers to the freedom of establishment of EU limited liability companies, by facilitating cross-border conversions, mergers and demergers within the EU, while at the same time safeguarding the interests and rights of shareholders, creditors and employees.

Key provisions of the Law are as follows:

- The Law creates an exit right for shareholders (including those without voting rights) of a (de) merging or converting Belgian company, when (i) the same shareholders voted against the cross-border (de)merger or conversion; and (ii) the acquiring or converted company is not governed by Belgian law. The (de)merger or conversion proposal must contain a section on the consideration to be offered to exiting shareholders. Additionally, shareholders who voted against the proposed transaction have the right to challenge the proposed exchange ratio.

- The Law offers new possibilities for national mergers, divisions and conversions (such as the simplified "sister merger", "disproportionate" partial division) and establishes a smaller required majority (from 4/5 to 3/4) to decide on the national conversion.

- The Law expands the possibilities to satisfy publication requirements via a company's website (as a result of which only minimal information has to be submitted to the clerk's office for publication in the Belgian Official Journal). Additionally, the details of the notary public delivering the pre-reorganisation certificate, including the email address, must be mentioned under the pre-reorganisation proposal. This will allow creditors objecting to the conversion to inform the notary and specify the collateral which they offer.

- The Law creates consultation rights for employees regarding the impact of the conversion from an employment perspective.

Subject to a few exceptions, the Law enters into force on 16 June 2023. However, mergers, divisions and cross-border and national conversions whose proposal is filed with the clerk's office of the competent enterprise court by 16 June 2023 will continue to be governed by the old rules.

The Dutch version of the Law can be found here, and the French version here.

CORPORATE LAW

Law Governing Central Register of Disqualified Directors Published

The Law of 4 May 2023 regarding the Central Register of Disqualified Directors (*Wet van 4 mei 2023 betreffende het Centraal register van bestuursverboden/ Loi du 4 mai 2023 relative au Registre central des interdictions de gérer* - the ***Law***) was published in the Belgian Official Journal on 1 June 2023.

The Law partially transposes Directive (EU) 2019/1151 of 20 June 2019 as regards the use of digital tools and processes in company law, which creates a series of obligations regarding the exchange of information between EU Member States on director disqualifications in order to prevent and combat fraudulent behaviour. Each Member State is required to set up a central register in which prohibitions regarding director functions are stored.

Disqualified directors are individuals who are prohibited from taking on or maintaining a mandate as director in a broad sense and include company liquidators, members of an executive committee and other officers.

Subject to exceptions, the Law will enter into force on 1 August 2023, by which time the Register should be created.

The Dutch version of the Law can be found here and the French version here.

Bill implementing EU Restructuring Directive Approved

During its plenary session of 25 May 2023, the Chamber of Representatives approved the Bill transposing the EU Restructuring Directive into Belgian law. The Law implementing the EU Restructuring Directive will enter into force on 1 September 2023.

The primary objective of the new Law is to improve the preventive restructuring regimes for companies in financial difficulty so that efficacious restructuring measures can be put in place at an early stage to stave off insolvencies. The reform also amends the bankruptcy regime to facilitate the liquidation of businesses.

Additionally, the procedures governing restructuring, insolvency and debt write-off will become more efficient and will take up less time in future.

Finally, the new Law is part of a Europe-wide effort to bring about more harmonisation, which should increase transparency and legal predictability for such restructuring measures and encourage cross-border investment.

The text of the new Law can be found here.

DATA PROTECTION

Belgian Data Protection Authority Suspends Belgium-US Agreement on Transfer of Tax Information

On 23 April 2014 Belgium and the United States (***US***) concluded a bilateral treaty providing that financial information collected by Belgian financial institutions on clients possessing US nationality would be automatically transferred to US tax authorities by Belgian tax authorities. From a US perspective, the treaty implemented the Foreign Account Tax Compliance Act (***FACTA***).

On 24 May 2023, the Litigation Chamber of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) had to rule on the lawfulness of the processing of personal data under FACTA. An individual with dual Belgian/US nationality had filed a complaint before the DPA against the Belgian Federal Public Service Economy. The plaintiff had obtained US citizenship by being born in the US but had no significant link with the US and was regarded as an "accidental American". In his complaint, the plaintiff was supported by an association protecting the interests of accidental Americans.

The defendant argued that the General Data Protection Regulation (***GDPR***) did not apply in this case. In particular, Article 96 GDPR states that international agreements involving the transfer of personal data to third countries which were concluded prior to 24 May 2016, and which comply with Union law as applicable prior to that date, will remain in force until amended, replaced or revoked.

The DPA considered that the absence of a specific time limit in Article 96 GDPR cannot allow such international agreements to remain incompatible with the GDPR for an indefinite duration. Instead, the provision should be understood as a requirement for the Belgian State to renegotiate its international treaties as soon as possible after 24 May 2016 and bring them in line with the GDPR.

The DPA also held that FACTA breaches the principles of purpose limitation, necessity, and data minimisation established by the GDPR. Indeed, the DPA established that the automatic transfer of data applies to all US nationals, in the absence of any indication of fraud or tax evasion. As a result, FACTA was not even compliant with EU directive 95/46/CE, which regulated the protection of personal data before the GDPR's entry into force.

As regards the transfer of personal data to the US, the defendant argued that it relied on Article 46.2.a. GDPR. According to this provision, the transfer of personal data to a third country is allowed if appropriate safeguards are included in a legally binding and enforceable instrument between public authorities to protect the data subject's rights and establish effective legal remedies. The DPA did not accept this argument and considered that FACTA does not contain appropriate safeguards. As a result, the DPA reached the conclusion that the defendant could not rely on that provision to justify the transfer of personal data to the US.

The DPA also established that the transfer mechanism failed to meet the obligation of information and the principle of accountability. It also observed that no data protection impact assessment had been conducted as is required under Article 35 GDPR.

On this basis, the DPA prohibited the processing of personal data of accidental Americans living in Belgium with a view to transferring such data to the US under FACTA. The DPA also ordered corrective measures against the defendant, including the requirement to inform accidental Americans about the processing of their personal data according to the GDPR, and to conduct a data processing impact assessment.

The decision is only available in French here.

DATA PROTECTION

Court of Justice of European Union Clarifies Conditions of Compensation for Infringement of General Data Protection Regulation

On 4 May 2023, the Court of Justice of the European Union (***CJEU***) delivered its judgment in *Österreichische Post* (C-300/21), clarifying when an individual can claim compensation for injury under Article 82(1) of the General Data Protection Regulation (***GDPR***). According to the CJEU, the infringement of the GDPR is not, in and of itself, sufficient to establish a right to compensation. Individuals must show that they have suffered material or non-material damage resulting from the infringement of the GDPR. At the same time, the degree of seriousness of the injury is irrelevant to the establishment of the right to compensation. Finally, compensation is calculated pursuant to domestic law.

Background

The case before the CJEU concerned Österreichische Post, the Austrian national post operator, which also acts as an address broker and processed information regarding the political preferences of Austrian citizens. It later sold this data to third parties to enable them to send targeted advertisements. During this processing, Österreichische Post associated the applicant with a particular political party without his consent. This attribution was factually incorrect, and the applicant felt offended, claiming it caused him "*great distress, a loss of confidence and a feeling of exposure*" (para. 12). The applicant also stated to have suffered no other harm.

The applicant brought an action before the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna) requesting an injunction ordering Österreichische Post to stop processing his personal data. The applicant also claimed EUR 1,000 in compensation for the non-material damage which he had suffered. On 14 July 2020, the Vienna court upheld the application for an injunction but rejected the claim for compensation. On appeal, the Oberlandesgericht Wien (Higher Regional Court) confirmed the judgment handed down at first instance. On 15 April 2021, the Oberster Gerichtshof (Supreme Court; the ***Referring Court***) upheld the injunction but referred a set of questions to the CJEU for a preliminary ruling regarding the request for damages.

CJEU Judgment

The CJEU judgment gave a response to several questions.

Does any and every infringement of EU data protection law automatically result in the individual's right to compensation for damages suffered?

First, the Referring Court asked whether Article 82(1) GDPR, which deals with the action for damages, implies that the mere fact of infringing the GDPR is sufficient to confer a right to compensation on individuals.

In its response, the CJEU examined the wording of Article 82(1) GDPR, which contains three cumulative criteria that must be met to qualify for compensation: (i) that there is 'damage' that is 'suffered' by the individual; (ii) that there is an infringement of the GDPR; and (iii) that there is a causal link between the damage and the infringement. In this regard, Article 82(1) shows a distinction between the concept of 'damage' and that of 'infringement'. Therefore, the CJEU considered it clear from the wording of that provision that a mere finding of an infringement cannot suffice to award compensation.

The CJEU held that this interpretation is supported by Recitals 75, 85 and 146 GDPR. For example, Recital 146 GDPR states that there might be "*damage which a person may suffer as a result of processing that infringes this Regulation*" (emphasis added). The CJEU interpreted this wording as meaning that the "*occurrence of damage in the context of such processing is only potential*" and that an "*infringement of the GDPR does not necessarily result in damage*" (para. 37).

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According to the CJEU, such an interpretation is also consistent with Chapter VIII GDPR, which governs remedies, liability and penalties for breaches of EU data protection law. The CJEU observed that there is no requirement of any 'damage' for taking action before or against a data protection authority (***DPA***) pursuant to Articles 77-78 GDPR; the mere alleged 'infringement' is sufficient in that context. By contrast, not only must there be an 'infringement' of EU data protection law, but an individual must also actually 'suffer' some 'damage' in order to bring an action pursuant to Article 82(1) GDPR. The CJEU also observed that Articles 83-84 GDPR on administrative fines "*have essentially a punitive purpose and are not conditional on the existence of individual damage*" (para. 40).

Therefore, the CJEU reached the conclusion that the mere infringement of EU data protection law is not enough to establish a right to compensation under Article 82(1) GDPR.

Must the non-material damage be serious enough to give rise to compensation?

Second, the Referring Court inquired whether national law could make the compensation for non-material damage dependent on a degree of seriousness.

In response, the CJEU analysed the wording of the GDPR. The Court observed that "*in the absence of any reference to the domestic law of the Member States*", the concept of 'damage' "*must be given an autonomous and uniform definition specific to EU law*" (para. 44). The text of Article 82 GDPR contains no "*reference* [...] *to any threshold of seriousness*" (para. 45).

Furthermore, the CJEU recalled that Recital 146 GDPR states that the concept of 'damages' must be interpreted broadly, in line with CJEU jurisprudence, and reflecting wholly the objectives of the GDPR. To conclude otherwise would be contrary to the intent of the legislature, which – according to the Court – favours a "*broad conception of 'damage'*" (para. 46). Moreover, establishing any threshold for damages would risk undermining the consistent application of the GDPR throughout the EU, as the threshold of severity could be assessed differently by different courts.

Therefore, the CJEU held that Article 82(1) GDPR must preclude Member States from creating any threshold for the seriousness of non-material damage.

How must financial compensation be calculated?

Third, the Referring Court raised the question whether national courts must apply domestic rules for the determination of financial compensation under Article 82 GDPR.

In response, the CJEU considered the procedural autonomy of EU Member States as well as the related principles of equivalence (*i.e.*, national rules must not be, "*in situations covered by EU law, less favourable than those governing similar domestic situations*") and effectiveness (*i.e.*, those rules must not "*make it excessively difficult or impossible in practice to exercise the rights conferred by EU law*") (para. 53).

The CJEU noted that the GDPR "*does not contain any provision intended to define the rules on the assessment of the damages*" (para. 54) and further pointed to Recital 146 GDPR, which states that individuals must receive "*full and effective compensation for the damages they have suffered*". The CJEU also indicated that the compensation cannot be punitive in nature, as there are other remedies in the GDPR to serve that aim.

On this basis, the CJEU concluded that national courts must apply their domestic rules in determining the financial compensation for damages suffered by the infringement of EU data protection law.

Key Takeaways

The judgment in *Österreichische Post* sheds new light on the individual's right to compensation for damages from infringements of the GDPR.

DATA PROTECTION

First, the CJEU explained that an infringement of EU data protection law may result in an administrative fine or even a criminal penalty, but an individual must suffer real material or non-material 'damage' resulting from that infringement to be able to claim compensation.

Second, the degree of seriousness of the non-material damage is irrelevant to the establishment of the right to compensation.

The CJEU differed from the opinion of Advocate-General Campos Sánchez-Bordona, who had suggested that "*compensation for non-material damage* [...] *does not cover mere upset which the person concerned may feel as a result of the infringement*" (para. 117). Moreover, the judgement should be compared with the pending case of *Natsionalna agentsia za prihodite* (C-340/21) in which Advocate General Pitruzella offered the opinion that an infringement of the GDPR "*may constitute non-material damage giving rise to a right to compensation, provided that the person concerned demonstrates that he or she has individually suffered* real *and* certain *emotional damage*" (para 84; translation; emphasis added).

Third, the degree of seriousness of the damage may nonetheless be relevant for the calculation of the compensation, as this aspect is left for domestic law. The only guidance offered here is that the compensation should make the individual whole in full and effectively restore the balance of the legal situation which was negatively affected by the infringement. However, under no circumstances can the compensation serve any punitive objectives.

The CJEU has left national courts with a difficult task in the absence of guidance. This state of affairs should be contrasted with the process for calculating administrative fines under Article 83 GDPR, for which the European Data Protection Board (***EDPB***) developed guidelines.

Irish Data Protection Authority Suspends Meta's EU-US Transfers and Imposes €1.2 Billion Fine

The Data Protection Commission (***DPC***) – the Irish data protection authority – imposed an administrative fine of EUR 1.2 billion on Meta Platforms Ireland (formerly known as Facebook Ireland) (***Meta***) for the infringement of the rules on international personal data transfers under the General Data Protection Regulation (***GDPR***). The Irish DPA also ordered Meta to bring its processing operations in line with the GDPR rules by "*ceasing the unlawful processing, including storage, in the US of personal data of EEA users transferred in violation of the GDPR*". Finally, the DPC ordered Meta to suspend any further transfers of personal data from the European Union (***EU***) to the United States (***US***).

International Transfers of Personal Data under GDPR

Under the GDPR, transfers of personal data outside the EU – and, by extension – the European Economic Area (***EEA***) are prohibited, unless the intended destination offers a "standard of essential equivalence" in terms of protection of fundamental rights when compared to that guaranteed by the EU data protection rules. There are several ways to achieve essential equivalence. For years, transfers of personal data from the EEA to the US have been based on a so-called adequacy decision (regulated by Article 45 GDPR, previously by Article 25 of Directive 95/46). An adequacy decision, in essence, allows for the unrestricted transfers of personal data from the EEA to a jurisdiction offering an essentially equivalent level of protection to the GDPR. The adequacy status is granted by a decision of the European Commission based on a thorough assessment of national rules and practices in the third country.

The US created two self-certification schemes that benefitted from adequacy status, but both were annulled: the Safe Harbor, from 2000 until its invalidation by the Court of Justice of the EU (***CJEU***) (judgment of 6 October 2015, *Schrems I*), and – subsequently – the Privacy Shield, from 2016 until its invalidation in 2020 (judgment of 16 July 2020, *Schrems II*).

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In the absence of an adequacy decision, data transfers can be based on appropriate safeguards (Article 46 GDPR), which include – and which are used most frequently – the Standard Contractual Clauses (***SCC***) or derogations in specific situations (Article 49 GDPR), such as transfers based on the individual's consent.

In its judgment invalidating the Privacy Shield, the CJEU confirmed the validity of SCCs with an important proviso: that the parties to the SCCs should assess whether the law and practice in the jurisdiction where data are transferred are able to prevent the data importers from complying with the SCCs. This requirement became known as Transfer Impact Assessment (***TIA***) and must be carried out on a case-by-case basis for each transfer. In case of a negative assessment, organisations are precluded from transferring personal data without first implementing supplementary safeguards. The recommendation of the European Data Protection Board (***EDPB***) explains that such safeguards can include technical measures, such as strong encryption or pseudonymisation.

Long Road from Complaint to Decision

The DPC decision in *Meta* forms the culmination point of a long procedure that started in June 2013 after Maximillian Schrems, a privacy activist, had lodged a complaint with the DPC against Meta (then Facebook) concerning the alleged undue access by US surveillance authorities to the personal data of EEA citizens. Mr. Schrems' complaint was prompted by the then-recent revelations made by Edward Snowden on how large technology companies were the subject of surveillance programmes operated by the US National Security Agency (***NSA***). The complaint's long-winding road to a decision included two preliminary rulings by the CJEU and an appeal to the Irish Supreme Court.

The DPC finally reached a draft decision on 6 July 2022. As Meta had been processing the personal data of individuals in more than one EEA Member State, the DPC had to send its draft decision to the EDPB for an opinion (pursuant to the cooperation procedure provided for by Article 60 GDPR). The EDBP issued its binding decision on 13 April 2023 using the so-called consistency mechanism (Articles 63-67 GDPR). The DPC – bound by the EDPB's findings – issued its final decision on 22 May 2023.

DPC's Decision

In its decision, the DPC noted that since 2020 (*i.e.*, after the CJEU's invalidation of the EU-US Privacy Shield) Meta had based its international personal data transfers on SCCs. Following the requirements imposed by the CJEU in *Schrems II*, the DPC had to assess whether US law and practice could prevent the data importer from complying with the SCCs, and whether any supplementary measures were needed and sufficient.

The DPC concluded that "*US law does not provide a level of protection that is essentially equivalent to that provided for by EU law*". In such a situation, as the CJEU held in *Schrems II* – when public authorities in third countries have access to personal data, and the controller has not implemented supplementary measures to ensure adequate protection – the controller must suspend the transfers. The DPC clarified that the supplementary measures must "compensate" for the insufficiencies of data protection in third countries, and not just "address" or "mitigate" concerns.

Whichever mechanism the controller relies on for its international transfers – be they adequacy decisions, SCCs or derogations – the mechanism should achieve "essential equivalence" with the protection provided for under EU data protection rules. While the DPC recognised that the EU fundamental right to data protection is not absolute, it also observed that any interference must respect the "essence" of this fundamental right. Referring to the CJEU's assessment of US rules in the context of *Schrems I* and *Schrems II*, the DPC concluded that US surveillance rules failed to meet this requirement.

DATA PROTECTION

On this basis, the DPC held that Meta "*does not have in place supplemental measures which compensate for the inadequate protection provided for by US law*" and that Meta cannot "*rely on the derogations* [...] *when making the data transfers*". The DPC concluded that Meta had infringed the GDPR.

When deciding whether to impose sanctions and/or corrective measures, the DPC had to follow the EDPB's binding decision. The EDPB held that Meta's infringement is particularly serious considering its nature, scope, duration and the number of data subjects "potentially" affected by the infringement. As a result, the DPC ordered Meta to suspend its US transfers (effective 12 weeks after the term to appeal or annul the decision expires; in the meantime, it ordered Meta to tell the DPC how it will organise an effective suspension of its transfers). The DPC also ordered Meta to bring its practices in line with the GDPR within 6 months "*by ceasing the unlawful processing, including storage, in the US of personal data of EEA users transferred in violation of the GDPR*". Finally, the DPC imposed an administrative fine of 1.2 billion EUR.

Meta announced that it would appeal the decision. Meta also assured users that there would be "no immediate disruption" to Facebook's operations in Europe.

Consequences

The DPC's decision has made headlines around the world. Although formally taken at the national level, it highlights the profound consequences for all organisations that transfer personal data from the EEA outside that territory. It may also be relevant for data transfers from Switzerland or the UK. In the absence of an adequacy decision, many organisations will face practical and legal difficulties in implementing the supplementary safeguards to their SCCs to satisfy the scrutiny of national data protection authorities (***DPAs***), the EDPB, and – as it remains to be seen on appeal – courts of law. Indeed, although Meta had conducted its TIA, the DPC (and EDPB) considered that this was insufficient given Meta's failure to put in place effective measures ensuring that the personal data transferred would always be protected in accordance with the EU standards.

The DPC's decision was issued while the latest version of the EU-US data protection framework (***DPF***) is still under negotiation. It is expected to be finalised and enter into force in late 2023, and may facilitate transatlantic data transfers, at least temporarily. While the EDPB issued a moderately welcoming opinion on the draft DPF, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (***LIBE***) adopted a negative opinion. Some commentators expect the framework to be reviewed by the CJEU once adopted. Should the DPF fail to survive the scrutiny of the CJEU regarding whether it offers "essentially equivalent" protection, organisations will again be forced to revert to the use of SCCs and/or other appropriate safeguards.

The decision further adds to the uncertainty surrounding data transfers outside the EEA, both to the US and other third countries. Nonetheless, the protracted proceedings leading to the DPC's decision exemplify the slow progress towards a foolproof solution for international transfers of personal data. Progress is difficult in part because an important societal issue is at stake. The GDPR raised awareness globally about *why* it is important to protect personal data, and offers a model of how to regulate personal data that is followed in many third countries. Still, data protection is often trumped by considerations of national security, and it may still take a while for democratic societies to move the discussion from a trade-off (security or data protection) to a positive sum situation (security and data protection). Until then, the onus is on organisations to set up their personal data transfers in a manner which protects EEA residents.

DATA PROTECTION

Court of Justice of European Union Clarifies Right of Access Pursuant to Article 15 General Data Protection Regulation

On 4 May 2023, the Court of Justice of the European Union (***CJEU***) delivered its judgment in *Österreichische Datenschutzbehörde and CRIF* (C 487/21) clarifying the data subjects' right of access under Article 15 of the General Data Protection Regulation (***GDPR***). According to the CJEU, the right to obtain a copy of one's personal data under Article 15(3) GDPR means that the data subject must be given a "*faithful and intelligible*" reproduction of its personal data and may entail the right to obtain copies of documents and extracts of databases, or even entire documents, if they are essential for the effective exercise of the data subject's rights under the GDPR.

Background

The case before the CJEU concerned a data subject who had had his personal data processed by CRIF, a business consulting agency that provides clients with information concerning the creditworthiness of third parties. He requested that the CRIF grant him access to his personal data under Article 15 GDPR. In addition, he requested a copy of documents containing his data, including e-mails and extracts from databases in a standard technical format. CRIF, in response, provided him with a summary listing the data subject's personal data, but did not give him copies of the documents. The data subject was not satisfied with the summary information and lodged a complaint with the Austrian data protection authority (***DSB***). The DSB rejected the complaint, stating that CRIF had not infringed the right of access to personal data under Article 15 GDPR. Following the rejection by the DSB, the data subject appealed against the DSB's decision to an Austrian court (the ***Court***). The Court referred questions on the interpretation of the right of access under the GDPR to the CJEU for a preliminary ruling.

CJEU Judgment

In its response to the questions from the Austrian Court, the CJEU noted at the outset that the definition of 'personal data', or any information which may make a person 'identifiable', must be construed broadly. Importantly, the CJEU clarified that this concept does not only cover personal data stored and collected, but also includes all information resulting from the processing of personal data.

The CJEU stressed the importance of the right of access under Article 15 GDPR in enabling the data subject to exercise his/her other rights under the GDPR (such as the right to rectification, the right to erasure, and the right to bring proceedings). The CJEU noted that the controller should provide any other information necessary to the data subject, considering the circumstances and context in which the personal data are processed. This information must be concise, easily accessible, and easy to understand.

The CJEU stated that Article 15(3) GDPR must be interpreted as meaning that the data subject be provided with a faithful and intelligible reproduction of all such data. According to the CJEU, this means that the right of access includes the right to obtain 'copies' of extracts from documents and databases, or even full documents, depending on the context and whether the provision of copies is necessary to enable the data subject to understand the processing of his/her personal data and assert his/her rights under the GDPR. Especially in cases where the data is generated from other data, the context in which the data is processed is considered essential. Yet, the CJEU also indicated that the information that is provided should not negatively affect the rights and freedoms of others. Hence, if there is conflict between the right of access to personal data and the rights and freedoms of others, the controller should balance the data subject's rights with the rights and freedoms of others before deciding which information to provide.

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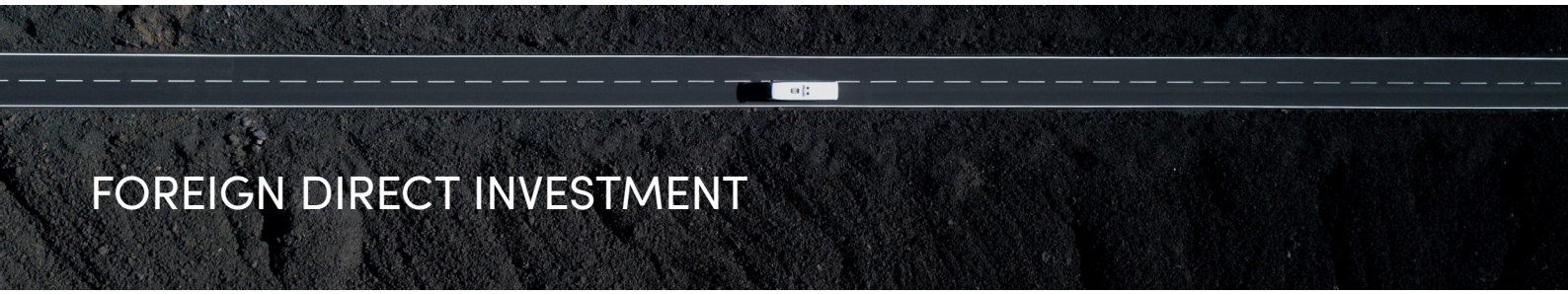
Finally, the CJEU judgment addressed an interesting question regarding the interpretation of 'information' as used in the third sentence of Article 15(3) GDPR: '*the* information *shall be provided in a commonly used electronic form*'. The Court sought to know whether 'information' relates exclusively to personal data of which the controller must provide a copy under Article 15(1) GDPR, whether it refers also to all the information in Article 15(1) GDPR, or whether it even includes elements going beyond that category, such as metadata. On this, the CJEU held that the concept of 'information' in Article 15(3) GDPR relates exclusively to personal data, of which the controller must provide a copy pursuant to the first sentence of Article 15(3) GDPR.

Key Takeaways

The judgment provides useful clarifications on the data subject's right of access. It confirms that data controllers should respond to data subjects' access requests, accounting for the context and complexity of the processing, to comply with the principles of fairness and transparency.

Organisations should review their internal procedures for responding to data subject requests to ensure that their response to such requests is in line with the CJEU's judgment. In most cases, controllers only have one month to respond to data subject requests. Therefore, it is critical to have adequate procedures to determine which information should be given to data subjects, and how to protect the rights and freedoms of others.



FOREIGN DIRECT INVESTMENT

Belgian Foreign Direct Investment Screening Mechanism Entered into Force on 1 July 2023

On 9 February 2023, the federal Chamber of Representatives adopted a draft bill approving the cooperation agreement of 30 November 2022 (the ***Agreement***) between the federal government, the regional governments and the communities, establishing a foreign direct investment screening mechanism in Belgium (*Samenwerkingsakkoord van 30 november 2022 tussen de Federale Staat, het Vlaamse Gewest, het Waals Gewest, het Brussels Hoofdstedelijk Gewest, de Vlaamse Gemeenschap, de Franse Gemeenschap, de Duitstalige Gemeenschap, de Franse Gemeenschapscommissie en de Gemeenschappelijke Gemeenschapscommissie tot het invoeren van een mechanisme voor de screening van buitenlandse directe investeringen / Accord de coopération du 30 novembre 2022 entre l'État fédéral, la Région flamande, la Région wallonne, la Région de BruxellesCapitale, la Communauté flamande, la Communauté française, la Communauté germanophone, la Commission communautaire française et la Commission communautaire commune visant à instaurer un mécanisme de filtrage des investissements directs étrangers* - the ***Mechanism***) (*See*, this Newsletter, Volume 2023, No. 1).

Subsequently, the parliaments of the regions and communities also adopted decrees approving the Agreement (*See*, this Newsletter, Volume 2023, No. 4).

On 7 June 2023, the acts by the relevant parliaments approving the Agreement were published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*). As a result, the Mechanism entered into force on 1 July 2023.

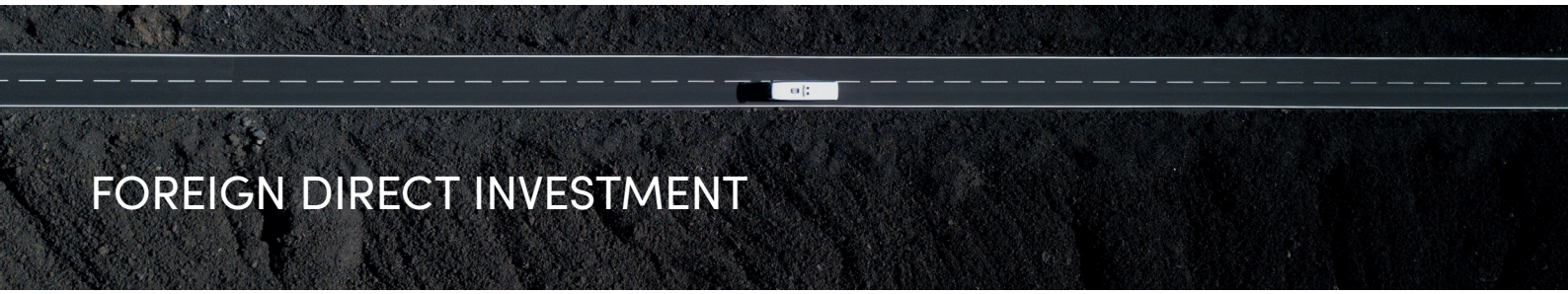
The publications can be found in Dutch and French here. The text of the Agreement can be found here. For more information on the Agreement, we refer to the January edition of this Newsletter (*See*, this Newsletter, Volume 2023, No. 1) and to the VBB client alert on the subject.

Belgian Interfederal Investment Screening Committee Publishes Proposed Guidelines on Interpretation Belgian FDI Screening Mechanism

The Interfederal Investment Screening Committee, within the Belgian Federal Public Service of Economy (*Interfederale Screeningscommissie / Comité de Filtrage Interfédéral* - the ***ISC***) responsible for coordinating the application of the incumbent Belgian FDI screening mechanism (the ***Mechanism***), published proposed guidelines for the interpretation of the intergovernmental cooperation agreement introducing the Mechanism (the ***guidelines***).

The guidelines offer additional insight into the functioning of the Mechanism by answering a series of 51 questions. These answers explicitly confirm specific aspects of the scope of application of the Mechanism. For example, the guidelines indicate

- that investors from EFTA countries qualify as foreign investors under the Mechanism;
- that there are no safe havens amongst non-EU countries for investors to escape the qualification as foreign under the Mechanism's scope of application;
- that investments 'signed' prior to the Mechanism's entry into force on 1 July 2023, but 'closing' after this date, are not subject to the notification obligation;
- that the ISC has retroactive call-in powers to launch *ex officio* investigations into investments that took place up to two years (and under specific circumstances even five years) prior to 1 July 2023;
- that greenfield investments do not fall under the scope of application of the Mechanism; and



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- that the Mechanism does not exclude internal group restructurings from its scope of application. Such restructurings can therefore be subject to screening, provided the other conditions for application are satisfied and even if the Belgian firm were ultimately to remain under the control of the same non-EU company as before.

The text of the guidelines can be found in Dutch and French here.

INTELLECTUAL PROPERTY

Court of Justice of European Union Holds That Cross-border Retransmissions of Copyright Material by Satellite May Be Subject to Authorisation by Copyright Holder in Member State where Signal is Introduced in Chain of Communication

On 25 May 2023, the First Chamber of the Court of Justice of the European Union (the ***CJEU***) delivered its judgment in Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (AKM) v Canal+ Luxembourg (C-290/21). The case concerns the interpretation of Article 1(2)(b) of Directive 93/83/EEC (the ***Directive***) on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

AKM, a licensed Austrian broadcasting applicant, sued Canal+ Luxembourg for broadcasting unauthorised musical works in Austria. Canal+ offered both encrypted satellite programmes from other EU Member States to its paying customers in Austria and free-to-air television programmes accessible to the general public. AKM sought an injunction and damages, claiming that Canal+ lacked the required authorisation under Austrian law to transmit these works via satellite. Canal+ argued that it only provided equipment for signal encoding and reception with the consent of the broadcasting organisations. The Supreme Court of Austria referred the case to the CJEU after AKM had initiated proceedings in an Austrian commercial court in 2019.

In its first question to the CJEU the Supreme Court inquired whether, according to Article 1(2)(b) of the Directive, a copyright authorisation for the act of communicating to the public is required not only for a broadcasting organisation but also for a satellite package provider like Canal+ for the Member State where the signal is broadcast.

The CJEU confirmed that in this case the programme signals form an "uninterrupted chain of communication" and established specific cumulative criteria, as outlined in Article 1(2)(a) and (c) of the Directive, which must be satisfied for an act to qualify as communication to the public. Pursuant to these criteria (i) the introduction of signals under the control and responsibility of the broadcasting operation must (ii) establish an uninterrupted communication channel to and from earth with (iii) the intention for public reception of the signals and, (iv) if the signals are encrypted, the broadcasting organisation should provide the decoding device to the public or give consent for its provision.

Additionally, the CJEU referred to its prior case law in cases C-431/09 and C-432/09 *Airfield and Canal Digitaal*, in which it established that a communication by satellite, as understood within the meaning of Article 1(2)(b) of the Directive, requires prior authorisation from the appropriate copyright holders. Furthermore, the broadcasting organisation is responsible for obtaining authorisation in the Member State where the signals are introduced into the chain, particularly when the transmission becomes accessible to a new audience.

The CJEU emphasised that when determining the appropriate remuneration for copyright holders, all aspects of the broadcast must be considered, including both its actual and potential audiences. Hence, whenever a part of the relevant audience is in a Member State other than that in which the television signals are introduced into the chain of communication via satellite, it is relevant collecting societies' responsibility to find a solution on compensation. However, this cannot be extended to a situation where the communication reaches a new or broader public than permitted by the broadcasting organisation. In such an event, the intervention of operators is not covered by the authorisation granted by the right holders. The CJEU clarified that, according to the Directive, a satellite package provider like Canal+ is only required to seek authorisation in the Member State in which the satellite signals are introduced in the communication chain. Regarding the definition of "communication to the public" in recitals 5, 14, and 15 of the Directive, it would

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go against the purpose of Article (1)(2)(b) to mandate satellite package providers to obtain authorisations from copyright holders in other Member States.

This case is significant in providing clarity on the conditions under which a satellite retransmission of copyrighted material may occur, as well as determining the principle that copyright holders are entitled to remuneration. The CJEU made it clear that this is contingent upon the receiving audience – whether real of hypothetical – and its location. By contrast, the CJEU remained silent on the question of how to determine the remuneration for broadcasts outside the original territory.

Court of Justice of European Union Clarifies Standard of Proof for Information Request under Enforcement Directive

On 27 April 2023, the Court of Justice of the European Union (the ***CJEU***) delivered its judgment in case C-628/21 TB v Castorama Polska and Knor. The CJEU clarified the standard of proof required for a request for information under Article 8(1) Directive 2004/48 on the enforcement of intellectual property rights (the ***Directive***).

The Polish Regional Court of Warsaw referred a case to the CJEU regarding a dispute that pitted TB, the alleged creator of simple graphic images, against Castorama Polska and Knor, which sold replicas of those images without TB's consent. TB sought an order compelling Castorama Polska and Knor to provide information about the reproductions. To support its claim, TB submitted printouts of her website printouts and sale invoices from the articles she displayed for sale on her website, as well as printouts of pages from Castorama Polska's website and of invoices relating to the sale of images in the latter's online shops.

The Regional Court of Warsaw was unsure of how to interpret Article 8(1) of the Directive, and referred questions to the CJEU for a preliminary ruling. The court sought to know whether the claimant must definitively prove ownership of the intellectual property rights in question or whether it is sufficient for the claimant to present a credible claim.

The CJEU started by examining the context of Article 8(1) of the Directive and the objectives pursued by the Directive. The CJEU noted that Articles 6, 7 and 9 of the Directive refer to the standard of "*reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the rightholder*".

The CJEU then continued its analysis by considering the objective of the Directive, *i.e.*, to ensure a high, equivalent and homogeneous level of protection of intellectual property. The CJEU held that the request for information provided for in Article 8 of the Directive pursues a different objective than an action seeking a finding that there was an infringement of an intellectual property right. If that request were subject to the same standard of proof as proceedings seeking a finding that an intellectual property right was infringed, the separate procedure established by Article 8 would lose much of its practical use.

The CJEU stated that when assessing whether evidence in information request procedures is adequate, it is important to consider the type of intellectual property right involved and any related ownership formalities. Additionally, the CJEU indicated that the referring court is responsible for determining if enough evidence is presented, evaluating the reasonableness and proportionality of the information request, and making sure that it is not being misused.

Based on this, the CJEU interpreted the standard of proof under Article 8 of the Directive as requiring the applicant to provide "*any reasonably available evidence*" which would enable the court handling that request to satisfy itself to a sufficient degree of certainty that the applicant is the right holder, by submitting evidence appropriate to the nature of that right and any special applicable formalities.

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The CJEU thus confirmed that Article 8 of the Directive can be relied on even if an infringement has not yet been established. However, while the CJEU correctly recognised that the information request serves a distinct purpose, it failed to establish safeguards for the defendant, such as the risk of losing evidence.

European Commission Publishes Report on State of Intellectual Property Rights in Third Countries

On 17 May 2023, the European Commission (the ***Commission***) published its biennial Report on the Protection and Enforcement of Intellectual Property Rights in third countries (the ***Report***). The Commission vowed to channel its energies and resources into mitigating infringement issues, particularly in China, which was earmarked as the top priority country for these efforts. Additionally, the Report serves as an asset for businesses, equipping them with the insights that are useful for assessing potential risks tied to intellectual property rights in these priority countries.

The Report can be found here.

"EMMENTALER" Cheese Fails To Secure EU Trade Mark

On 24 May 2023, the General Court of the European Union (the ***GC***) issued a decisive ruling against Emmentaler Switzerland, asserting that the trade mark "EMMENTALER", in reference to a cheese variety, is ineligible for protection as a European Union trade mark. The Court held that the mark bears a descriptive nature in part of the European Union, notably Germany, and thus fails to meet the criteria for the recognition as a collective mark.

The GC based its reasoning on Articles 7(1) (c) and 74(2) of Regulation 2017/1001 of 14 June 2017 on the European Union trade mark (the ***Regulation***).

First, addressing the descriptive nature of the mark, the GC established that the German public could immediately perceive that the sign "EMMENTALER" was designating a type of cheese. In this regard, the Court emphasised that for trade mark protection to be denied it is enough if the mark presents a descriptive character in part of the European Union, even a single Member State, as exemplified by a country like Germany.

Second, addressing the protection of the mark as a collective mark, the GC considered that the derogation from Article 7(1) (c), provided for in Article 74(2) of the Regulation, should be interpreted strictly. Therefore, the scope of the derogation cannot cover signs viewed as depicting the kind, quality, quantity, intended purpose, value, time of production or other characteristic of the specific goods. Rather, the sign should indicate the geographical origin of such goods. Since the mark in question was perceived by the German public as a type of cheese and not as an indication of the geographical origin of that cheese, the GC concluded that it could not benefit from protection as a collective mark.

This judgment follows the 2020 decision of the Board of Appeal of the European Union Intellectual Property Office (***EUIPO***), which rejected Emmentaler Switzerland's appeal for trade mark protection on the grounds that the name 'EMMENTALER" is descriptive.

The ruling of the GC highlights the risk of a term becoming generic or descriptive and therefore incapable of trade mark protection. In this case, the generic nature of the term may not come as a surprise considering that the term "EMMENTALER" can be found in the dictionary and has been used for centuries for a variety of cheese. To obtain trade mark protection, such as a collective mark, brand owners are encouraged to specify certain characteristics of the mark they want to register, such as a geographical indication. Taking that into consideration, the GC might have ruled differently if the mark was registered as "SWISS EMMENTALER". Echoing the judgment of the European Court of justice (the ***ECJ***) in case C-614/17 *Queso Manchego*, brand owners might also consider opting for a figurative mark.

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Coinbase Secures Key Victory in Trade mark Tussle with Bitflyer

The General Court of the European Union (***GC***) recently ruled in favour of Coinbase, a prominent player in the cryptocurrency market, in a trade mark dispute with bitFlyer, a Japanese cryptocurrency platform (case T-366/21, *Coinbase, Inc. v. bitFlyer Inc.*). The basis of the contention is the registration of the "*Coinbase*" mark by bitFlyer, which Coinbase argues should be invalidated on the grounds that it was registered in bad faith.

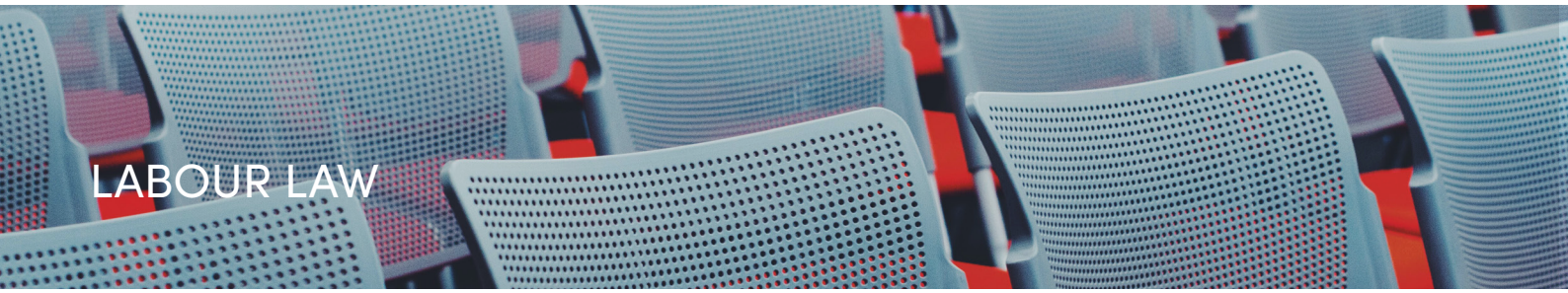
The origin of this dispute can be traced back to 2016 when bitFlyer registered the trade mark "*Coinbase*" under classes 9, 35, 36, 38, and 42 via international registration, including in the EUP. However, Coinbase had already obtained registration for its own "Coinbase" trade mark within the European Union in 2014 for classes 9, 36, and 42.

In 2018, Coinbase initiated legal proceedings to contest bitFlyer's registration of the trade mark, alleging bad faith. Coinbase argued that bitFlyer, being a prominent Japanese cryptocurrency firm, should have been aware of Coinbase's extensive prior use of the mark, particularly in the United States.

Two years later, Coinbase celebrated a first partial victory when the Cancellation Division of the European Union Intellectual Property Office (***EUIPO***) acknowledged that there might be some confusion surrounding the goods and services linked to both "Coinbase" trade marks, due to their similarities. However, Coinbase's attempt to fully invalidate bitFlyer's trade mark across various categories of goods and services stumbled, as it was unable to furnish sufficient evidence demonstrating bitFlyer's bad faith. As a result, bitFlyer's trade mark registration was stripped away for the goods and services that were similar to Coinbase's, but it managed to keep its registration intact in the EU for those goods and services which were distinct and not alike. The Fourth Board of Appeal of the EUIPO (the ***Board***) confirmed this decision.

Coinbase resolved to pursue the issue further by escalating the matter to the GC, contending that the Board's assessment of bad faith was excessively restrictive as it failed to consider bitFlyer's intentions holistically at the time of the trade mark application. The GC concurred with Coinbase's position and held that the evaluation of bad faith necessitates a comprehensive examination of "*all the relevant factors specific to the particular case which pertained at the time of filing the application for registration of the sign as an EU trade mark*." The GC overturned the Board's decision for its failure to scrutinise the entirety of relevant factors, encompassing both analogous and dissimilar goods/services, and consequently ruled in favour of Coinbase.

The GC's judgment, which aligns with its prior Chocoladefabriken Lindt & Sprüngli AG judgment, stands as a logical measure to protect businesses from exploitation by opportunistic individuals or companies. By emphasising that the evaluation of bad faith necessitates a comprehensive analysis of case-specific factors, the judgment reinforces the importance of fair trade and adds nuance to the grounds for invalidity based on bad faith. Although the GC did not directly evaluate bitFlyer's intentions, its decision to send the case back to the Board is important in protecting the integrity of trade marks, as it prevents setting a precedent that could encourage malicious EU trade mark filings and is expected to influence future cases.



LABOUR LAW

Rules Pertaining to Sequential Arrangement of 'Temporary' Employment Agreements and Replacement Agreements Are Revised

The federal Parliament adopted the Law of 20 March 2023, amending the Law of 3 July 1978 on employment agreements, to limit the duration of successive fixed-term employment agreements and replacement agreements (*Wet van 20 maart 2023 tot wijziging van de wet van 3 juli 1978 betreffende de arbeidsovereenkomsten met het oog op de beperking van de duur van opeenvolgende arbeidsovereenkomsten voor een bepaalde tijd en vervangingsovereenkomsten / Loi de 20 mars 2023 modifiant la loi du 3 julliet 1978 relative aux contrats de travail en vue de limiter la durée de la succession des contracts de travail à durée déterminée et contrats de remplacement* – the ***Law***). The Law now limits the total duration of successive agreements for a definite duration, or for a clearly defined work and one or more replacement agreements, to two years. The Law entered into force on 8 May 2023.

Prior to the enactment of the Law, there were no provisions within the Law of 3 July 1978 on employment agreements (the ***Law on employment agreements***) that explicitly regulated the combination of consecutive fixed-term agreements and replacement agreements. The existing Articles 10 and 11 of the Law on employment agreements only addressed the separate successive utilisation of these types of agreement without considering their simultaneous application. Consequently, a strict interpretation of these provisions suggested that there was no explicit prohibition on combining successive fixed-term agreements and replacement agreements.

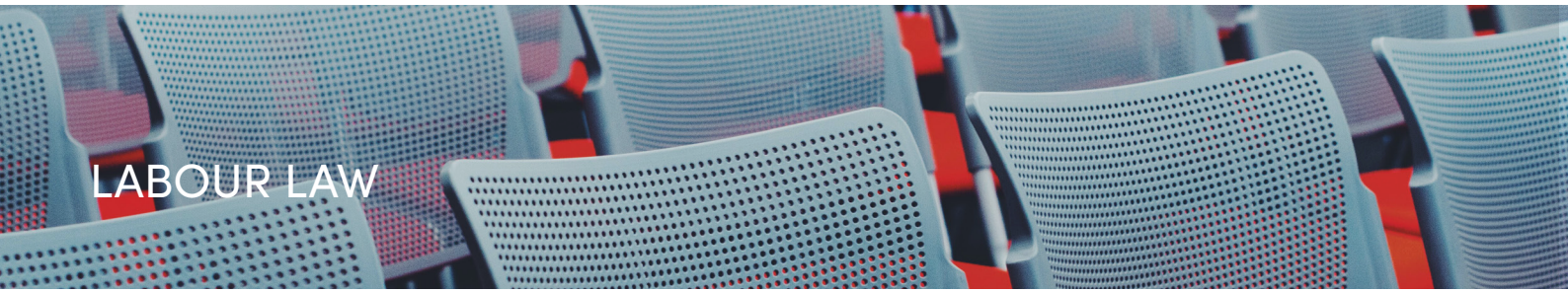
The lack of specific provisions regarding the succession of fixed-term agreements and replacement agreements led to extensive discussions. Ultimately, the Constitutional Court issued a judgment on 17 June 2021 and held that Articles 10 and 11*ter*, §1 of the Law on employment agreements violated the constitutional principle of equality to the extent that the continuous use of such agreements was not restricted to any maximum duration.

In order to reflect this judgment, the Law introduced a new Article 11*quater* into the Law on employment agreements, which limits the total duration of the succession of one or more agreements for a definite duration or for a clearly defined task, along with one or more replacement agreements, to two years in total. In the event that the specified duration is exceeded, the agreement will be considered as an employment agreement of indefinite duration.

However, there are two exceptions to this rule:

- The first exception pertains to situations in which an interruption between consecutive agreements can be attributed to the employee. In such cases, the interruption will initiate a new two-year period.

- The second exception arises when a replacement agreement follows a sequence of fixed-term agreements. This can be justified by legitimate reasons or the inherent nature of the job. However, the total duration of this succession of agreements cannot exceed three years.



LABOUR LAW

Notice Period Governing Employee Resignations Is Revised

The Law of 20 March 2023 amended the Law of 26 December 2013 on the introduction of a harmonised status between blue-collar and white-collar employees regarding notice periods (*Wet van 20 maart 2023 tot wijziging van de wet van 26 december 2013 betreffende de invoering van een eenheidsstatuut tussen arbeiders en bedienden inzake de opzeggingstermijnen en de carenzdag en begeleidende maatregelen / Loi de 20 mars 2023 modifiant la loi de 26 decembre 2013 concernant l'introduction d'un statut unique entre ouvriers et employés en ce qui concerne les délais de préavis et le jour de carence ainsi que de mesures d'accompagnement* - the ***Law***). The new rules pertain to the statutory maximum notice periods in the event of resignation by the employee whose employment agreement commenced prior to 1 January 2014. The Law will enter into force on 28 October 2023, while resignations submitted prior to the Law's enforcement will retain their full legal effect.

The aim of the initial Law of 26 December 2013 on the introduction of a harmonised status between blue-collar and white-collar employees regarding notice periods was to achieve equal treatment between blue-collar and white-collar employees. The practical implementation of this law has caused a level of ambiguity in situations in which an employee decides to terminate his employment agreement.

Initial Situation

One of the key reforms introduced was the standardisation of notice periods for both blue-collar and white-collar employees. To accommodate employees who were already in employment prior to 2014, the law implemented a two-step calculation method that incorporated the notice periods applicable on 31 December 2013. Consequently, the overall notice period comprises the sum of the following two components:

- Part 1: a notice period determined based on the seniority accrued until 31 December 2013;
- Part 2: a notice period determined based on the seniority accrued from 1 January 2014 onwards.

As a standard rule, a maximum notice period of 13 weeks applies in the event of resignation by the employee. This means that the combined duration of the notice period before 2014 and after 2014 cannot exceed 13 weeks. However, an exception is made for white-collar employees whose annual salary on 31 December 2013 exceeded EUR 32,254 gross, allowing for a (substantially) longer notice period.

The 13-week Maximum Duration of Notice Period

In practice, several issues have arisen regarding the calculation of the notice period and the maximum notice period in the event of resignation by the employee. There is legal ambiguity regarding the 13-week maximum duration in the case of resignation by a blue-collar employee. Additionally, the Constitutional Court held that differentiating the notice period based on the salary of white-collar employees is in breach of the constitutional principle of equality. The Law seeks to rectify these issues.

The Law abolished the two-step approach to calculate the applicable notice period and now provides for a single calculation of the notice period. The calculation is based on the total seniority accrued, with a maximum cap of 13 weeks, which is reached after eight years' seniority in the event of resignation by an employee.

LITIGATION

Supreme Court Favours Jurisdiction of Place of Original Proceedings in Actions on Warranty

On 4 May 2023, the Supreme Court (*Hof van Cassatie / Cour de cassation*) held that by declaring itself without jurisdiction to hear an action for forced intervention and on a warranty against a German company, the Court of Appeal of Liège violated Regulation (EU) No 1215/2012 of 12 December 2012 regarding jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (***Brussels Ibis Regulation***).

The dispute first arose between a Belgian company specialising in wood construction (the ***Applicant***) and the company I.N.G. Lease (***ING***). The latter claimed that the Applicant owed EUR 608,025 as payment for the performance of a leasing contract for which a German bank (the ***Defendant***) acted as warrantor. Accordingly, the Applicant summoned the Defendant for forced intervention and on warranty before the Liège courts.

On appeal, the Defendant questioned the jurisdiction of the Liège courts. The Court of Appeal of Liège declared itself without jurisdiction based on Article 7(1)(a) of the Brussels Ibis Regulation, according to which, in contract related matters, a person domiciled in a Member State may be sued in the courts where the performance obligation will be fulfilled. The Court of Appeal further held that, based on the German Civil Code, when a dispute concerns an obligation to pay the place to be considered in case of conflict of jurisdiction is the debtor's headquarters. Accordingly, it found that only German courts had jurisdiction to hear the dispute.

The Supreme Court relied on the specific rule of jurisdiction laid down in Article 8(2) of the Brussels Ibis Regulation, which states that "*a person domiciled in a Member State may also be sued as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case*."

In the case at hand, since ING had first summoned the Applicant before the Enterprise Court of Liège, the Supreme Court concluded that the Court of Appeal of Liège had jurisdiction regarding the Applicant's action for forced intervention and on a warranty. Therefore, the Supreme Court held that the Court of Appeal had violated Article 8(2) of the Brussels Ibis Regulation and referred the case back to the Court of Appeal of Mons.

The Supreme Court decision is available in French here.

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