September 2022

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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ARTIFICIAL INTELLIGENCE

European Commission Proposes New Liability Rules for Digital Age

On 28 September 2022, the European Commission published two legislative proposals which aim to adapt rules governing liability for defective products to the digital age and the circular economy. This legislative package is comprised of a Proposal for a Directive on liability for defective products (the "Revised Product Liability Directive" or ***Revised PLD***) and a Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (the ***AI Liability Directive***).

Liability for Defective Products

In the EEA, liability for defective products is currently governed by Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (the ***PLD***) and the Member States' rules that transposed it. The PLD established a no-fault liability regime, pursuant to which producers are strictly liable for the harm caused by their defective products. As a result, consumers may seek redress for death, personal injury, damage to or destruction of property (other than the defective product itself) caused by a product that is not only ordinarily intended for private use or consumption, but also actually used by the injured person mainly for his or her own private use or consumption. Consumers may bring an action within a three-year period as of the day on which they became aware (or should reasonably have become aware) of the damage, the defect and the identity of the producer. Consumers bear the burden of proving the damage, the defect and the causal relationship between the damage and the defect. Consumers may primarily seek compensation from the product's manufacturer, but also from the importer of a product originating outside the EEA. Contractual clauses limiting or excluding the producer's liability are prohibited. In limited circumstances, producers may be exempt from the strict liability foreseen by the PLD.

The Revised PLD largely maintains the regime established by the PLD in 1985. At the same time, it acknowledges that defective software and artificial intelligence (***AI***) systems can cause harm, whether embedded in a product (*e.g.*, cleaning robot) or placed on the market as a digital product in their own right (*e.g.*, app). It therefore seeks to provide legal certainty to consumers and businesses alike on issues such as liability for defective software updates, defective machine learning algorithms or defective digital services that are essential to the functioning of a product. As a result, it allows consumers to claim compensation for death, personal injury (including medically recognised psychological harm), damage to property or data loss caused by any product, including software and AI systems. The Revised PLD also establishes liability rules in respect of circular-economy products (*i.e.*, products whose life have been extended through remanufacturing, refurbishing and/or upgrading). It thus makes clear that the strict liability rules apply to remanufacturers and businesses that substantially modify products more generally, unless they show that the defect relates to an unmodified part of the product. It is worth noting that consumers may now claim compensation even if the product was used for professional as well as private purposes (*e.g.*, company cargo bike) and that, unlike under the PLD, damage to property worth less than EUR 500 will be recoverable. The Revised PLD significantly alleviates the burden of proof borne by consumers with respect to the defect, the damage and the causal link between the defect and the damage through the establishment of presumptions. In situations where proving defectiveness would be particularly difficult (*e.g.*, pharmaceutical products or AI systems), a national court may order a producer to disclose evidence that a claimant may need to prove his case. In a context in which consumers increasingly buy products from outside the EEA without the intervention of an importer, the Revised PLD also allows actions

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for compensation against EU-based representatives of non-EU manufacturers. Distributors may be held liable if they fail to give the name of the EU-based representative upon the injured person's request. The same applies to online marketplaces, provided that they present themselves as distributors to consumers.

Liability for Defective AI Systems

In addition to the no-fault liability regime established by the PLD (to be amended by the Revised PLD), all EU Member States have a fault-based liability regime requiring the victim of harm to prove a fault, damage, and a causal link between the fault and the damage (*e.g.*, in Belgium, Article 1382 of the old Civil Code). To seek redress for harm caused by defective products, consumers have a choice between PLD-based strict liability rules and national fault-based liability rules. In addition, they may have to seek redress under national fault-based liability rules in situations which do not fall under the scope of the PLD. This would be the case, for example, if a piece of discriminatory AI recruitment software caused an individual to fail a job interview. Another illustration is an action brought against the user of a product rather than against the manufacturer.

However, when it comes to injury caused by defective AI systems, meeting evidentiary requirements – proving the existence of a fault on the manufacturer's part in particular – is no easy feat. To remedy this information asymmetry, the AI Liability Directive establishes a regime facilitating compensation claims by any kind of victim (whether individuals, businesses or other organisations) for the fault or omission of any kind of economic operator (whether a provider, distributor, developer or user of AI).

To this end, the AI Liability Directive establishes a rebuttable presumption of causality. A victim will merely have to show that a provider, developer or user of AI was at fault for not complying with a given obligation relevant to the harm (*e.g.*, a safety requirement mandatory under EU or national law) and that a causal link with the AI performance is reasonably likely. Provided that this threshold is met, a court may presume that non-compliance caused the damage. Nonetheless, the provider, developer or user of AI may refute this presumption, for example by proving that the harm in question has a different cause.

Additionally, the AI Liability Directive provides for the possibility of court-ordered disclosure of evidence about "high-risk" AI systems, subject to appropriate safeguards to protect trade secrets. AI systems are classified as "high-risk" when they satisfy specific conditions defined by the proposed Regulation laying down harmonised rules on artificial intelligence and amending certain Union legislative acts (the AI Act) and include, for example, AI-operated delivery drones or AI-enabled recruitment services.

Next Steps

The Revised PLD may be consulted here and the AI Liability Directive may be consulted here. Both proposals will now be considered by the European Parliament and the Council of the European Union in accordance with the ordinary EU legislative procedure.

COMPETITION LAW

Belgian Competition Authority Imposes Interim Measures Regarding Cloud Standard Used for Pigeon Races

On 21 September 2021, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) imposed interim measures on the Belgian Colombophile Federation (*Koninklijke Belgische Duivenliefhebbersbond / Royale Fédération Colombophile Belge* - ***KBDB/RFCB***) regarding the standard applied by the KBDB/RFCB in the year 2022 to electronic registration systems used to calculate and record flight times during pigeon races. The standard is used to determine the technical requirements that electronic registration systems must fulfil and to ensure compatibility between different electronic registration systems.

The BCA considered it likely, *prima facie*, that the KBDB/RFCB determined the standard for 2022 in breach of Articles IV.1 and IV.2 of the Belgian Code of Economic Law and of Articles 101 and 102 of the Treaty on the Functioning of the European Union.

As a result, the BCA required the KBDB/RFCB to comply with interim measures aimed at guaranteeing a transparent and non-discriminatory determination of the standard that will be applied in 2023. The interim measures provide for (i) the consultation of all manufacturers of electronic registration systems; (ii) the establishment of tests to ensure that electronic registration systems are approved in due time; (iii) the obligation for the KBDB/RFCB to make public the fact that all electronic registration systems that were deemed compliant in 2020, 2021 or 2022 continue to be valid for one year following the entry into force of a new standard; and (iv) the obligation to publish the text of the interim measures imposed by the BCA on the website of the KBDB/RFBCB as long as no new standard is announced.

CONSUMER LAW

European Commission Proposes New Liability Rules for Digital Age

See, this Newsletter, at p. 3 ("Artificial Intelligence").

DATA PROTECTION

Brussels Market Court Refers Questions on Unlawful Use of Personal Data to Court of Justice of European Union

On 7 September 2022, the Brussels Markets Court (the ***Court***) handed down an interim judgment in the *IAB Europe* case which involves the sector organisation for the digital marketing industry and referred several questions to the Court of Justice of the European Union (***CJEU***). The Court's judgment results from the appeal of IAB Europe against the decision of the Belgian Data Protection Authority (***DPA***) dated 2 February 2022 (nr. 21/2022) in which IAB Europe was convicted for infringing several provisions of the General Data Protection Regulation (***GDPR***) (See, this Newsletter, Volume 2022, No. 1).

IAB Europe owns and runs the "Transparency & Consent Framework" (TCF). The TCF uses cookies to collect consumer data which allows IAB Europe to provide the consumer with advertisements that are specifically targeted to their interests. The DPA, as the leading supervisory authority in the GDPR's one-stop-shop mechanism, qualified this information as personal data within the meaning of the GDPR. The DPA also considered IAB Europe to be a joint data controller and found the firm to be in breach because of the way in which it managed and used the personal data. IAB Europe received an administrative fine of EUR 250,000 and was ordered to revise its TCF.

The impact of this decision on the online advertising industry is potentially massive, since the revision also affects the way in which people give their consent to the use of certain cookies on their devices.

IAB Europe appealed the DPA decision to the Court arguing that is not a "data controller" within the meaning of the GDPR and that the data should not be qualified as "personal data".

In its judgment, the Court decided to ask two questions to the CJEU, namely (i) whether or not companies like IAB Europe are to be considered as "data controllers"; and (ii) whether the collected data should be qualified as "personal data".

A judgment of the CJEU is not expected before mid-2023.

Advocate General Considers that Non-Compliance with Data Protection Laws Can Constitute Competition Law Infringement

On 20 September 2022, Advocate General (***AG***) Rantos delivered his opinion in *Meta* (case C-252/21), a case concerning the interplay between the competition rules and General Data Protection Regulation 2016/679 (***GDPR***). The AG posited that non-compliance with data protection laws can be a relevant factor in competition law investigations and support the finding of a competition law violation.

The *Meta* case follows the request for a preliminary ruling by the Higher Regional Court of Düsseldorf in proceedings involving the review of the decision issued by the German Competition Authority, *Bundeskartellamt* (***BKartA***), against Facebook (now, Meta). In 2019, the BKartA found that Meta had abused its dominant position under national competition law by collecting data from services affiliated with Facebook (*e.g.*, Instagram and WhatsApp) as well as third-party websites and apps, and by linking the data with users' Facebook.com accounts. According to the BKartA, Meta had failed to obtain the users' valid consent pursuant to the GDPR as, in light of Meta's dominant position, users had failed to give their consent "freely" as required by the GDPR. The BKartA concluded that the infringement of GDPR rules was an (abusive) "manifestation of Meta's market power".

DATA PROTECTION

Interplay between Competition Rules and Data Protection Law

The AG firstly observed that the GDPR does not empower a competition authority to establish a breach of the data protection rules. Still, according to the AG, this should not preclude authorities other than the data protection supervisory authority to assess, in an incidental manner, the compatibility of specific conduct with the GDPR. The AG pointed out that the competition authority must assess whether a dominant firm's conduct relied on methods other than those pertaining to competition on the merits. In this analysis, the competition authority must consider the legal and economic context in which the conduct at issue takes place and that context includes the data protection rules. Referring to case C-457/10 P, *AstraZeneca*, the AG indicated that complying with other sets of rules (such as the GDPR) does not shield a firm from a finding of a competition law infringement. The AG pointed out, that, at the same time, a violation of the GDPR does not automatically qualify as a competition law infringement.

Based on the above, the AG concluded that competition authorities may examine GDPR compliance incidentally when assessing conduct in the exercise of their competition enforcement powers.

The AG added that, while there is no clear cooperation mechanism established by law, competition authorities are, at least, obliged to inform, and cooperate with, the relevant data protection supervisory authorities. If the data protection authority has already ruled on the compatibility of the same (or a similar) practice with the GDPR, competition authorities should not deviate from this interpretation. In the AG's view, a duty to inform and cooperate also applies if the competent data protection authority has not yet decided on the practice concerned but has either started an investigation or has indicated its intention to do so.

Validity of Consent Given to Dominant Firm

Under the data protection rules, consent is invalid if it was not freely given. The Düsseldorf court inquired whether consent to data processing can be considered as having been freely given if the addressee is a dominant firm.

The AG considered that, under the GDPR, consent is not freely given if (i) the data subject does not have genuine or free choice or is otherwise unable to refuse or withdraw the consent without detriment; or (ii) there is a "clear imbalance" in the bargaining power between the data subject and the controller.

Based on this, the AG offered the view that holding a dominant position does not in itself confer on that firm the bargaining power that creates an imbalance with the user that would cause that user's consent to be invalid. Nor would the finding of a dominant position be required to create such an imbalance. Rather, a competition authority should, according to the AG, undertake a case-by-case analysis of whether a user's consent was valid.

Other AG Considerations

As regards Meta's practices under review, the AG observed that Meta may benefit from the justifications provided for by the GDPR for the processing of data without the consent of the data subject. However, this will only prove true if the elements of that practice at issue are actually necessary for the provision of the service relating to the Facebook account. When it comes to personalised content, for instance, the AG suggested that, although that activity may, to some extent, be in the user's interest, it is not apparent that it is also necessary in order to provide the social network service. The AG made similar observations with regard to the continuous and seamless use of the Meta Platform group's services, the security of the network or the improvement of the product, such that the processing of personal data for these ends requires the user's consent.

DATA PROTECTION

Lastly, the AG noted that the prohibition on processing sensitive personal data relating, for example, to racial or ethnic origin, health, or sexual orientation of the data subject may also apply to the data processing at issue. To decide whether the processing at hand – which relates to user profiles – includes a processing of sensitive categories of data, the AG recommended considering whether the data processed, individually considered or aggregated, allow user profiling based on the categories that emerge from those types of sensitive personal data. The AG also considered that the prohibition to process sensitive data does not apply if the data subject made this data public. In the case at hand, the user may have clicked on buttons integrated into websites or apps to share specific information with the public outside the website or app in question, but the AG noted that the user may not have been fully aware that he or she was making personal data public by an explicit act.

Key Lessons of AG Opinion

If the CJEU follows the AG's opinion, the judgment would considerably broaden the powers of competition authorities which would not be able to decide formally that a dominant firm violated the GDPR (and therefore not order them to bring a GDPR infringement to an end). Still, the right for competition authorities to review GDPR issues "incidentally" would give them the powers to assess independently key elements of the data protection rules and transform what they consider to be a questionable GDPR practice into an Article 102 infringement. Additionally, the opinion provides no guiding principles that would limit a competition authority's broad powers or that would, more importantly, help firms to assess *ex ante* whether their data protection practices will satisfy not only the competent data protection supervisory authority, but also the competition authorities active in the EU.

It also remains to be seen whether the CJEU will seek to limit the scope of its judgment to GDPR compliance alone or whether it will authorise competition authorities to use compliance with other mandatory rules as a basis for a competition law violation.

Beyond the *Meta* case, the issues examined in the opinion are particularly relevant in the case of consent for the processing of data collected through online services. This case undoubtedly influenced the Digital Markets Act, and more specifically the obligation imposed on gatekeepers in Article 5(a) to obtain end user consent for the combining of data from different services and the signing in of end users to different services.

INTELLECTUAL PROPERTY

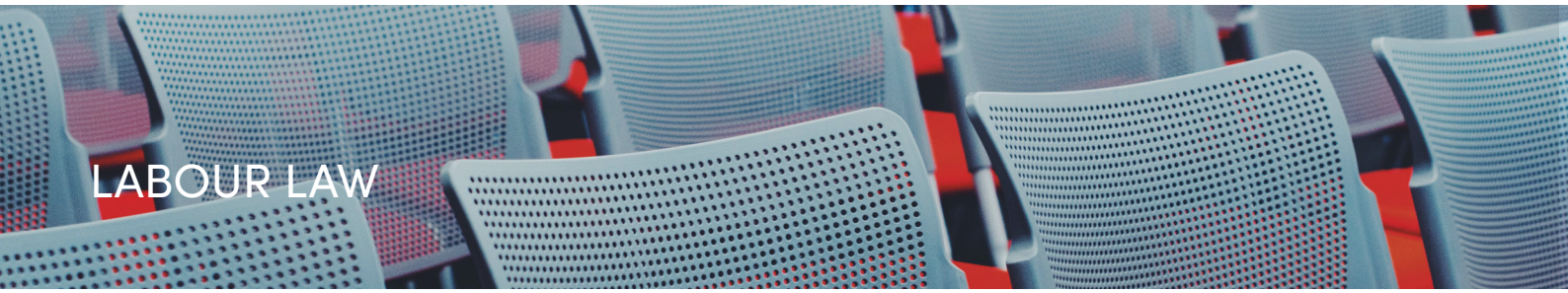
Court of Justice of European Union Rules on Scope of Article 24(4) of Brussels Ia Regulation which Establishes Jurisdiction in Intellectual Property Matters

On 8 September 2022, the Court of Justice of the European Union (***CJEU***) delivered a judgment in *IRnova AB v FLIR Systems AB* (***IRnova v FLIR***) in which it applied Article 24(4) of Regulation (EU) no. 1215/2012 (the ***Brussels Ia Regulation***).

Article 24(4) Brussels Ia Regulation awards exclusive jurisdiction in proceedings regarding the registration and validity of intellectual property rights to those Member State courts in which the rights were registered or applied for. In *IRnova v FLIR*, the CJEU held that Article 24(4) does not apply to a dispute regarding ownership of the rights to inventions covered by patent applications filed and patents awarded in non-Member State countries.

The issue at hand started at the Swedish Patent and Market Court. IRnova and FLIR Systems are two companies registered in Sweden who sought to establish who owned the right to inventions included in international patent applications filed and patents awarded in China, non-EU countries and the US. The Patent and Market Court dismissed for lack of jurisdiction IRnova's claims regarding the patent applications filed in China and the US and the patent awarded in the US. At the same time, it maintained its jurisdiction over the applications filed in Europe.

IRnova appealed that judgment to the Swedish Patent and Market Court of Appeal, which made a request for a preliminary ruling to the CJEU. The CJEU referred to its judgments in *Duijnstee* (judgment of 15 November 1983 in Case C-288/82) and *Hanssen Beleggingen* (judgment of 5 October 2017 in Case C-341/16) in which it had held that entitlement proceedings for patents and registered trademarks were outside the scope of Article 24(4) of the Brussels Ia Regulation. It also clarified that the issue at hand was not concerned with the patent application or the award itself, but with its object (in this case ownership as a result from an invention). The CJEU further held that determining the inventor was a preliminary matter, independent of the filing of a patent application or the awarding of a patent. As such, it concluded that Article 24(4) did not apply to matters concerning "*whether a person is the proprietor of the right to inventions covered by patent applications deposited and by patents granted in third countries*".



LABOUR LAW

Law Establishes Right for Employees to Disconnect from Work

On 29 September 2022, the federal Parliament adopted a law that includes the right for employees to disconnect from work (*Wet houdende diverse arbeidsbepalingen / Loi portant des dispositions diverses relatives au travail*).

The precise terms of the employee's right to disconnect and the associated rules on the use of digital tools will have to be defined in a collective bargaining agreement concluded at company level. The agreement should ensure respect for rest periods and a balance between private and professional life of the employee. If no such collective bargaining agreement is concluded, the rules at issue should be included in the work rules.

The applicable rules must specify the practical terms of the employee's right not to be reachable outside his work schedule and the guidelines for the use of digital tools in a way that protects the employee's rest periods, holidays, private life and family life. The new obligation will apply to private sector employers employing 20 or more employees.

The collective bargaining agreement at company level and the work rules must both be filed with the competent authorities by 1 January 2023.

New Form of Economic Unemployment because of Energy Crisis Enters into Force

Since 1 October 2022, companies experiencing difficulties in keeping their employees employed because of high energy prices will be able to apply for a specific form of economic unemployment (*Wet houdende tijdelijke ondersteuningsmaatregelen ten gevolge van de energiecrisis / Loi portant des mesures de soutien temporaires suite à la crise de l'énergie*). This new form will coexist with the traditional system of economic unemployment.

Framework

Employers can take advantage of economic unemployment for both blue-collar and white-collar employees. However, it will be more difficult for blue-collar employees to take advantage of this new system because that group already benefits from a liberal traditional system of economic unemployment pursuant to which it is sufficient to demonstrate a lack of work, a concept interpreted broadly by the courts.

To claim economic unemployment due to the energy crisis, an employer will have to satisfy the conditions provided for by the European Temporary Crisis Framework as follows:

- The energy costs must be at least 3% of the production value to be considered an energy-intensive enterprise; and
- there is a doubling of the employer's energy bill.

Procedure

The new form for energy-intensive businesses will have to be submitted to the National Employment Office (*Rijksdienst voor Arbeidsvoorzieningen / Office National de l'Emploi* - the ***NEO***) before the notification of the first effective day of unemployment. Employees may be made temporarily unemployed until 31 December 2022.

If the application for economic unemployment is approved, qualifying employees will be entitled to the following allowances:

- a temporary unemployment allowance of 70% (instead of 65%) of the capped gross salary (= €3,075.04 per month); and
- a supplement borne by the employer of 6.22 euro per day of temporary unemployment, unless paid by a sectoral fund.

LITIGATION

Federal Parliament Adopts Law on Central Register for Judgments

On 6 October 2022, the federal Parliament adopted a Bill on the creation of a Central Register for judicial decisions and on the publication of judgments (*Wet van 16 oktober 2022 tot oprichting van het Centraal register voor de beslissingen van de rechterlijke orde en betreffende de bekendmaking van de vonnissen en tot wijziging van de assisenprocedure betreffende de wraking van de gezworenen/Loi du 16 octobre 2022 visant la création du Registre central pour les décisions de l'ordre judiciaire et relative à la publication des jugements et modifiant la procédure d'assises relative à la récusation des jurés* – the ***Law***).

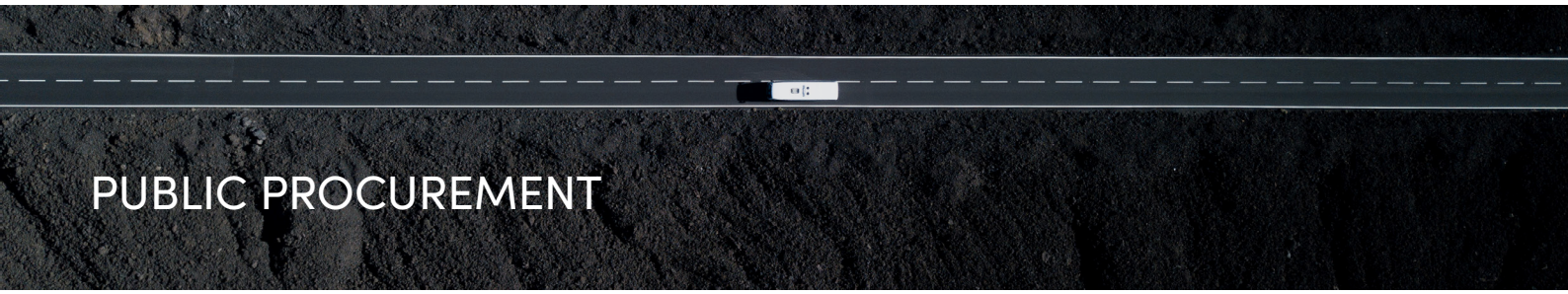
The Law sets out the possibility for a judgment to be validly issued and signed in an intangible form (*gedematerialiseerde vorm/forme dématérialisée*) and to be validly stored in a central database. Concretely, once a judgment is signed by a judge with an e-signature, this judgment is stored, for an undefined period and in intangible form, in the Central Register for judicial decisions (*Centraal register voor de beslissingen van de rechterlijke orde/Registre central pour les décisions de l'ordre judiciaire* – the ***Central Register***).

The Central Register will store the minutes of the intangible judgment (or an intangible copy of the minutes of the tangible judgment) as well as information on the court that delivered the judgment, the judgment itself, the hearing during which the judgment was delivered, and legally required information and identifying data of the persons referred to in the judgment.

Article 8 of the Law only grants access to the Central Register to the following categories of persons: (i) persons who exercise a judicial function; (ii) parties to a judgment stored in the Central Register, as well as their lawyers and/or representatives; (iii) data protection officers; and (iv) in exceptional circumstances, persons responsible for the management of the Central Register.

In addition, Article 9 of the Law aims to make all judgments in the Central Register available, in pseudonymised form, to persons seeking legal advice (*rechtszoekenden/justiciables*) and legal professionals. The pseudonymised form of the judgments guarantees that personal data included in these judgments will not be attributed to a specific data subject. A judge may nevertheless decide to prohibit the publication of a pseudonymised judgment if he/she finds that such a publication would disproportionately harm the fundamental rights of the parties or other persons involved in the proceedings.

The Law will enter into force on 30 September 2023 except for Article 9 (which deals with the publication of pseudonymised judgements in the Central Register) which will enter into force on 31 December 2023.



PUBLIC PROCUREMENT

Court of Justice of European Union Clarifies Obligations of Contracting Authorities Faced with Abnormally Low Tenders In Award Procedures In Fields Of Defence And Security

Both the Court of Justice of the European Union (the ***CJEU***) and the Belgian Council of State have repeatedly ruled on abnormally low tenders in award procedures in the "classic" and "special" sectors. There is, by contrast, far less case law on this subject in award procedures in the fields of defence and security.

On 15 September 2022, in its judgment Veridos, the CJEU was given the opportunity to clarify the obligations of contracting authorities regarding abnormally low tenders in award procedures in the fields of defence and security. In this case, the CJEU interpreted the relevant provisions of Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, but explicitly pointed out that its interpretation also applies to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement which contains identical relevant provisions to those of Directive 2009/81/EC.

The CJEU clarified the obligations of contracting authorities in cases of suspicion that a tender is of an abnormally low nature. It also explained the obligation of contracting authorities to adopt reasoned decisions in the context of abnormally low tenders.

Obligations in Case of Suspicion of Abnormally Low Tender

The CJEU first observed that there is no uniform definition of the concept 'abnormally low tender' in EU law. It is for the Member States and the contracting authorities to determine the method of calculating an anomaly threshold constituting an abnormally low tender or to set its value, provided that an objective and non-discriminatory method is used.

Nevertheless, there are general obligations for contracting authorities faced with doubts regarding the reliability of a tender.

The CJEU held that, only when the reliability of a tender is *a priori* doubtful, a contracting authority is under the obligation:

1. to identify suspect tenders;

   When examining the abnormally low nature of a tender, contracting authorities may take into consideration all the factors that are relevant in the light of the work/supply/service concerned.

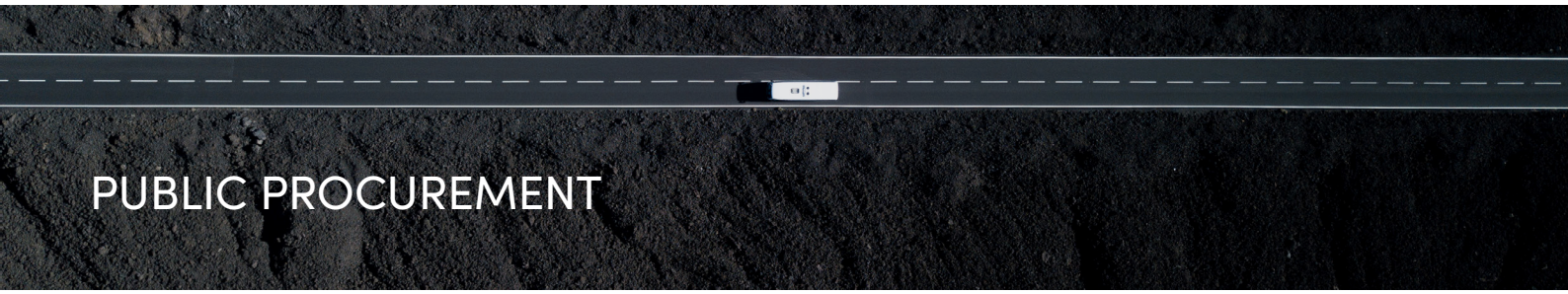
   However, a comparison with other competing tenders cannot constitute the sole criterion relied on by a contracting authority to identify suspect tenders.

   Therefore, even in award procedures in which only two tenders have been submitted, a contracting authority is not exempt from its obligation to identify suspect tenders and to carry out the *inter partes* examination provided for in Article 49 of Directive 2009/81/EC (see steps below).

2. to allow the tenderers concerned to demonstrate their genuineness by asking them to provide the details of the constituent elements of the tender which it considers relevant and appropriate;

3. to assess the merits of the information provided by the persons concerned; and

4. to take a decision as to whether to admit or reject those tenders.



PUBLIC PROCUREMENT

Obligation to Adopt Reasoned Decisions

The CJEU pointed out that Directive 2009/81/EC does not impose on a contracting authority an indiscriminate obligation to state its views expressly on whether a tender might be of an abnormally low nature.

A distinction must be made as to whether there is suspicion that a tender is of an abnormally low nature:

- only if there is suspicion that a tender is of an abnormally low nature, and following a subsequent *inter partes* examination procedure, a contracting authority must formally adopt a reasoned decision admitting or rejecting the tender in question;

- conversely, if there is no suspicion that a tender is of an abnormally low nature, the contracting authority is under no obligation to initiate an *inter partes* examination procedure nor to adopt an express reasoned decision finding that there are no abnormally low tenders.

However, if a contracting authority is under no obligation to adopt an express reasoned decision finding that there are no abnormally low tenders, tenderers who consider themselves wronged must still be able to challenge the award decision by claiming that the successful tender should have been classified as abnormally low.

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