September 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

Commission Proposes Regulation on Combatting Late Payment in Commercial Transactions

On 12 September 2023, the European Commission (the ***Commission***) submitted a proposal for a Regulation on combatting late payment in commercial transactions (the ***proposed Regulation***). The proposed Regulation updates and improves the current Directive 2011/7/EU of 16 February 2011 on combatting late payment in commercial transactions (the ***Directive***), which was implemented in Belgium by the Law of 2 August 2002 on combatting late payment in commercial transactions (*Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties / Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales*). Seeking to tackle the high number of bankruptcies due to late payments in the EU, the proposed Regulation aims to provide more efficient remedies to creditors and to adapt the existing rules to the increased digitisation of the economy.

The proposed Regulation has the same scope as the Directive and applies to payments made in transactions between (i) undertakings; and (ii) undertakings and public authorities acting as debtors for the delivery of goods or the provision of services for remuneration. The proposed Regulation does not apply to (i) payments for transactions with consumers; (ii) payments made as compensation for damages; and (iii) payments in relation to debts that are subject to insolvency proceedings.

The Proposed Regulation reduces the current maximum payment period of 60 days to 30 days, save if national law provides for an exceptional procedure of acceptance or verification due to the specific nature of the goods or services. Moreover, EU Member States can provide for a maximum payment period of less than 30 days.

Additionally, the proposed Regulation introduces an obligation for main contractors in public procurement procedures to supply evidence to contracting authorities that their direct subcontractors have been paid in accordance with the proposed Regulation. Contracting authorities will have to notify enforcement authorities (*see*, below) if such evidence is not given.

The proposed Regulation provides that interest is due automatically from the expiration of the contractual or statutory payment period. Interest will start accruing from the date of receipt by the debtor of the invoice or of the goods or services, whichever occurs latest. Furthermore, the proposed Regulation harmonises interest rates for late payments, setting them at eight percentage points above the reference rate. In the Eurozone, this reference rate is determined by the European Central Bank's main refinancing operations. As under the current rules, the rate will be updated biannually. The obligation for EU Member States to publish the applicable interest rates remains in place as well.

As is the case under the current regime, any contractual terms and practices violating these rules will be considered null and void. Unlike the Directive, however, the proposed Regulation provides for a limitative list of void clauses.

A major novelty of the proposed Regulation is the creation of national enforcement authorities responsible for taking measures necessary to ensure that the proposed Regulation's deadlines for payment are complied with. These authorities will have the power to launch investigations and inspections and to impose, or to initiate proceedings for the imposition of, fines, penalties and interim measures. In addition to creditors, representative organisations will have the

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right to submit complaints to the enforcement authorities. Moreover, EU Members States are required to create alternative dispute resolution mechanisms for the settlement of disputes between debtors and creditors.

Finally, several existing rules will remain in place, such as (i) the fixed minimum compensation for recovery costs; (ii) the rules on retention of title to the goods if a retention of title was expressly agreed upon between the debtor and the creditor before the delivery of the goods; and (iii) the expedited recovery procedures for unchallenged claims.

The proposed Regulation will now be discussed by the Council and the European Parliament. Once the final text is agreed, adopted and published, it will come into effect after a transition period of one year.

The proposed Regulation is available here.

Default Commercial Interest Rate Increases Again

On 29 September 2023, the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) published – belatedly – the bi-annual default interest rate for commercial transactions which will amount to 12% during the second semester of 2023. This marks an increase in respect of the rate of 10.5% which applied in the first semester of this year (*See*, this Newsletter, Volume 2023, No. 3).

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

The Law implemented in Belgian law Directive 2011/7/EU of 16 February 2011 on combatting late payment in commercial transactions. This Directive will likely be replaced by a Regulation in the near future (*See, this Newsletter,* previous item).

COMPETITION LAW

Belgian Competition Authority Suspends Investigation into "Gentlemen's Agreement" in Banking Sector

On 25 September 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence* - ***BCA***) announced the suspension of its investigation into a suspected anticompetitive agreement in the banking sector. This suspension will enable the BCA to focus its resources on the preparation of a report requested by the Federal Ministry of Economy and Labour regarding the same practices.

This case started in August 2023, when Belgian media outlets reported on a "gentlemen's agreement" between banks not to compete with the State Treasury bond launched by the Belgian government through other financial products and not to raise interest rates on saving accounts during the subscription period for the State Treasury bond. This information was denied by the banks and by the Belgian Financial Sector Federation (Febelfin). Febelfin published a press release stating that commercial agreements between banks on interest rates would be prohibited by the competition rules.

However, the BCA's preliminary investigation revealed that certain banks had "*a free, extensive and inaccurate interpretation*" of a provision of the contract between each of them and the Federal Debt Agency concerning the issuance of the State Treasury bond. According to the BCA, while this provision only restricts the release by banks of savings certificates during the subscription period of the State Treasury bond, the banks interpreted it as applying more broadly to "*a range of savings and investments products, and their yields*". The BCA points to the "*concomitant use by two of the country's leading banks of the term "gentlemen's agreement*" to designate a specific contractual provision when, in the banks' own opinion, this term is not commonly used in the banking sector". The BCA considers that these communications raise questions, particularly since they involved experienced individuals.

Although at a preliminary stage, this case appears to raise interesting questions as to the signals that banks can send to each other to align their competitive behaviour. The BCA's investigation might resume once the BCA has issued its report to the Ministry of Economy and Labour, which is due by the end of October 2023.

General Court Declares Belgian Excess Profit Exemption System to be Unlawful State Aid

On 20 September 2023, the General Court of the European Union (the ***GC***) held that the European Commission (the ***Commission***) was right to find in its decision of 11 January 2016 that the Belgian exemption system on excess profits infringed the European rules on State aid.

This case began in 2005, when Belgium started issuing tax rulings exempting from corporate income tax the "excess" profits earned by Belgian entities of multinational corporate groups, particularly if these centralise activities, foster employment, or make investments in Belgium (the ***Excess Profit Exemption System***). Excess profits are those exceeding the profit that these entities would have made had they not been part of a multinational group.

On 11 January 2016, the Commission decided that the Excess Profit Exemption System constituted a State aid scheme incompatible with the internal market and ordered the Belgian government to recover the unlawful aid provided to 55 beneficiaries (*See*, this Newsletter, Volume 2016, No. 1 and this Newsletter, Volume 2016, No. 5).

Belgium and several beneficiary companies appealed this decision. On 14 February 2019, the GC annulled the Commission decision. The GC found that the Excess Profit Exemption System was not an aid scheme within

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the meaning of Article 1(d) of Regulation 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (***Regulation 2015/1589***). (*See*, this Newsletter, Volume 2019, No. 2).

The Commission, in turn, appealed this judgment to the Court of Justice of the European Union (the ***CJEU***). On 16 September 2021, the CJEU held that the GC had made several errors of law in its interpretation of the notion of "aid scheme" defined in Regulation 2015/1589 and had incorrectly concluded that the Commission did not accurately classify the Excess Profit Exemption System as an aid scheme. However, the CJEU was not in a position to hand down a final verdict on whether the Excess Profit Exemption System satisfied the remaining criteria to be categorised as State aid, particularly the existence of an advantage or selectivity. Consequently, the CJEU invalidated the GC's ruling and referred the case back to the GC which was required to rule on the other aspects raised in the initial appeal against the Commission's decision (*See*, this Newsletter, Volume 2021, No. 9).

This long procedural path resulted in the judgment delivered by the GC on 20 September 2023. In this judgment, the GC held that, in its decision of 2016, the Commission had correctly established that the Excess Profit Exemption System provided tax benefits to its recipients. The GC also established that the Commission correctly concluded that the Excess Profit Exemption System was selective, as it treated multinational group members benefiting from it differently from entities under the standard corporate income tax regime. In addition, the GC validated the Commission's finding that the Excess Profit Exemption System was not accessible to companies that did not make investments, centralise activities, or generate employment in Belgium. As a result, the GC confirmed the Commission's 2016 decision, compelling Belgium once more to recover the unlawful aid granted to the 55 beneficiaries.

The GC's judgment can be appealed to the CJEU. It is unclear whether the Belgian Government or any of the affected beneficiaries will choose to do so.

The GC's judgment can be found here.

Belgian Supreme Court Seeks Guidance from Court of Justice of European Union on Application of Principle of "Res Judicata" to Arbitration Award

On 8 September 2023, the Belgian Supreme Court (*Hof van Cassatie / Cour de cassation*) decided to stay the proceedings in the case pitting Royal Football Club Seraing (***RFC Seraing***) against the International Football Association (***FIFA***) to refer preliminary questions to the Court of Justice of the European Union (***CJEU***). The Supreme Court seeks to know whether it is compatible with EU law for national law to grant "*res judicata*" to an arbitration award when this award was reviewed by a court of a non-EU Member State which itself was unable to refer a question for a preliminary ruling to the CJEU.

Background

The dispute began in July 2015 when FIFA initiated disciplinary proceedings against RFC Seraing for transferring a player under the third-party ownership regime (***TPO***). The TPO regime involves transferring the economic rights attached to a player to a third party. TPO agreements are prohibited under Articles 18bis and 18ter of the FIFA Regulations (*Reglement betreffende het Statuut en de Transfers van Spelers / Règlement du Statut et du Transfert des joueurs*). FIFA therefore banned RFC Seraing from registering players for four transfer periods.

The Court of Arbitration for Sport (***CAS***), an arbitral tribunal based in Switzerland, confirmed this disciplinary sanction (except for the ban on registering players, which was limited to three transfer periods). RFC Seraing challenged the CAS award before both the Swiss Federal Court and the Brussels Court of Appeal (*Hof van Beroep te Brussel / Cour d'appel de Bruxelles*).

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The football club argued that the total ban on TPO agreements infringed EU competition law (Articles 101 and 102 TFEU) and the freedom of movement guaranteed under EU law. RFC Seraing also challenged the independence and impartiality of the CAS.

This claim was rejected by both the Swiss and the Belgian courts.

Judgment Swiss Federal Court

In its judgment of 20 February 2018, the Swiss Federal Court observed that arbitral awards can only be overturned based on public policy. It added that any breach of EU law that CAS may have committed would not infringe Swiss public policy, as this notion does not include the competition rules. The Swiss Federal Court also confirmed the independence of the CAS.

Judgment Brussels Court of Appeal

Before the Brussels Court of Appeal, RFC Seraing contended that FIFA's infringement of EU law (competition rules and freedom of movement of workers, services and capital) gives rise to its civil liability under Belgian law. The Brussels Court of Appeal relied on Article 1713, §9 of the Belgian Judicial Code (*Gerechtelijk Wetboek / Code judiciaire*), according to which an arbitration award has the same effect as a court judgment and therefore also benefits from *res judicata* once it can no longer be appealed. Additionally, Article 22(1) of the Belgian Code of International Private Law (*Wetboek van Internationaal Privaatrecht / Code de droit international privé*) provides that foreign judgments are recognised by law in Belgium, without the need for a specific procedure. According to the Brussels Court of Appeal, this means that the judgment of the Swiss Federal Court of 20 February 2018 has res judicata in Belgium and that RFC Seraing is no longer entitled to challenge the legality of the ban on TPO under the CAS award.

Questions Referred by Belgian Supreme Court to CJEU

The Belgian Supreme Court decided to stay the proceedings and refer several questions to the CJEU. It asked whether national law infringes EU law if it confers the status of *res judicata* on an arbitration award whose conformity with EU law was reviewed by a court of a non-EU Member State (which was thus not entitled to seek a preliminary ruling from the CJEU). The Supreme Court also asked the CJEU whether EU law precludes the application of a rule of national law giving third parties the right to rely on an arbitration award which was reviewed under EU law by the court of a non-EU Member State.

INTELLECTUAL PROPERTY

Court of Justice of European Union Clarifies Joint Jurisdiction in Trade Mark Infringement Proceedings with Multiple Defendants

On 7 September 2023, the Court of Justice of the European Union (***CJEU***) delivered a judgment in case C-832/21, *Beverage City & Lifestyle GmbH, MJ, Beverage City Polska Sp. z o.o., FE v Advance Magazine Publishers Inc* holding that in trade mark infringement proceedings the exclusive distribution agreement between a supplier and a retailer may suffice to establish joint jurisdiction under Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (***Brussels I*bis *Regulation***).

Background

Advance Magazine Publishers, the owner of several European Union trademarks containing the word element 'Vogue' (***Advance***), brought an action against Beverage City Polska (***Beverage Polska***), a company incorporated under Polish law and established in Poland, Beverage City & Lifestyle (***Beverage Germany***), a company incorporated under German law and established in Germany, and their respective managers before the Regional Court of Düsseldorf. Advance sought injunctive relief across the European Union, as well as specific information, the disclosure of financial records, and a declaration of liability for damages. Beverage Polska and Beverage Germany do not belong to the same group. They are only linked to each other through an exclusive sales contract under which Beverage Germany sourced the energy drink Diamant Vogue from Beverage Polska.

The Regional Court of Düsseldorf confirmed its international jurisdiction to adjudicate on the dispute based on Article 8(1) of the Brussels I*bis* Regulation. According to this provision, a person domiciled in a Member State may also be sued in the courts in the Member State where any of the co-defendants is domiciled "*provided the claims are so closely connected that it is expedient to her and determine them together to avoid the risk of irreconcilable judgments*". Beverage Polska appealed this judgment to the Higher Court of Düsseldorf (the ***Referring Court***) arguing that the German courts do not have jurisdiction since the goods in relation to the exclusive sales contract had been exclusively delivered to Polish customers. However, as the Referring Court was uncertain whether the existence of an exclusive distribution agreement between Beverage Polska and Beverage Germany is sufficient to satisfy the condition laid down in Article 8(1) of the Brussels I*bis* Regulation, the Referring Court decided to stay the case and requested the CJEU for a preliminary ruling.

CJEU Judgment

The CJEU noted that the special jurisdiction clause in Article 8(1) of the Brussels I*bis* Regulation cannot be used for the sole artificial purpose of removing one of the defendants from the jurisdiction of the states in which they are domiciled, and thus, circumventing the general rule of jurisdiction of the Brussels I*bis* Regulation. It may only be used in cases in which there is a close connection that can be established and to hear the defendants together to avoid the risk of irreconcilable judgments. To be regarded as irreconcilable, the CJEU clarified that the mere divergence in the outcome of the disputes is not sufficient. That divergence must also arise in the context of the same situation of fact and law.

The "same situation of law" requirement, was considered to be met as the CJEU referred to the *Nintendo* case (CJEU, 27 September 2017, Case C-24/16 and C-25/16, *Nintendo*) in which it had decided that the "same situation of law" requirement was fulfilled considering the universal effect of trade marks within the European Union.

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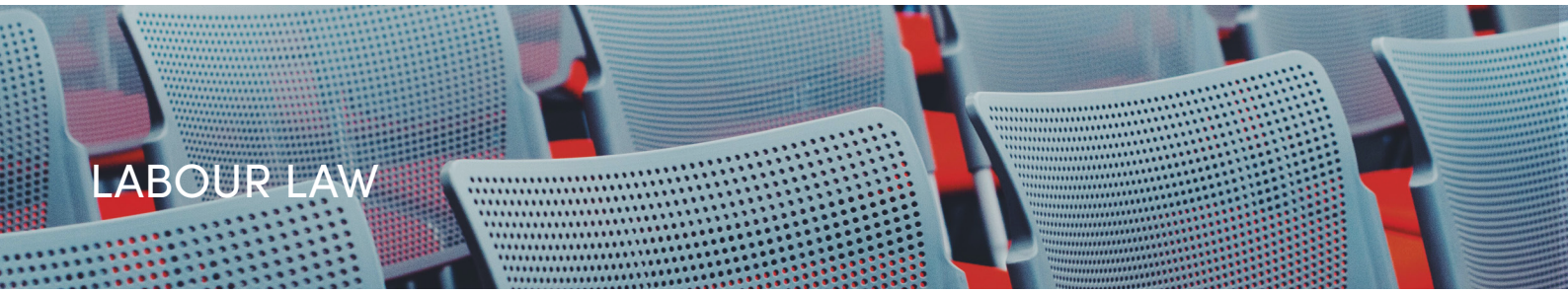
The CJEU then assessed whether the "same situation of fact" requirement was satisfied bearing in mind that the two defendants did not belong to the same group and were solely connected through the exclusive distribution agreement. In this regard, the CJEU found that both companies are accused of the same acts of infringement regarding the same goods. In line with the Advocate General's Opinion, the CJEU paid particular attention to the contractual relationship. The CJEU reasoned that the existence of the exclusive distribution agreement makes it more plausible and foreseeable that the acts of infringement of which the defendants are accused may be regarded as concerning the same situation of fact. Moreover, the foreseeability and the close collaboration between Beverage Polska and Beverage Germany was reinforced by the operation of the defendants' two websites, the domains of which belong to only one of the co-defendants. As a consequence, both defendants could validly be sued in front of the courts of Germany as it is the Member State where one of the defendants is domiciled.

This case underscores the significance of the contractual relationship in meeting the "same situation of fact" requirement under Article 8(1) of the Brussels I*bis* Regulation in a trademark infringement case. In the present case, the presence of allegations regarding the same acts of infringement, and specifically the existence of an exclusive distribution agreement, was considered sufficient to satisfy this requirement.



LABOUR LAW

Purchasing Power Premiums are Due by Employers Belonging to Joint Committees No. 200 and No. 207

The Royal Decree of 13 May 2023 for the implementation of Article 7, section 1, of the Law of 26 July 1996 for the promotion of employment and the preventive safeguarding of competitiveness (*Koninklijk Besluit van 13 mei 2023 tot uitvoering van artikel 7, § 1, van de wet van 26 juli 1996 tot bevordering van de werkgelegenheid en tot preventieve vrijwaring van het concurrentievermogen / Arrêté royal du 13 mai 2023 portant exécution de l'article 7, § 1er de la loi du 26 juillet 1996 relative à la promotion de l'emploi et à la sauvegarde préventive de la compétitivité*) fixed the salary norm for the period 2023 and 2024 at 0%. The salary norm is defined every two years and determines the maximum increase in salary costs of an employer. Consequently, no salary increases are permissible in 2023 and 2024 beyond adjustments for inflation or pay scale indexations. Despite the limitation established by the salary norm, employers in specific positions or industries not only have the option but often even the obligation to grant their staff a one-off net purchasing power premium in 2023. Prominent examples are the purchasing power premiums provided for by Joint Committees No. 200 (the auxiliary Joint Committee) and No. 207 (the Joint Committee for the chemical and life sciences industries).

Joint Committee No. 200

The purchasing power premium is due by employers who had "high profits" or "exceptionally high profits" in 2022. The determination of high and exceptionally high profits relies on the operational business profit and its comparison to the return on assets ratio for the three preceding fiscal years (2019-2021). An organisation that achieved high profits should pay a purchasing power premium of EUR 250 per employee, while for exceptionally high profits, the premium per employee amounts to EUR 375.

The premium will be paid to all white-collar employees who have been employed for at least one month as of 31 October 2023, and will be adjusted based on their actual and equivalent days worked between 1 November 2022 and 31 October 2023. The payment should be effected in December 2023.

Joint Committee No. 207

For employees in firms not bound by a collective labour agreement regarding salary and employment conditions at company level for the period 2021-2022 (these are usually smaller firms) a purchasing power premium is due if the firms had "high" or "exceptionally high" profits in 2022. "High profits" arise if the result of the addition of codes 9901, 630, 631/4, and 635/8 of the annual accounts for 2022 is positive. A purchasing power bonus of EUR 350 per employee will be due. "Exceptionally high profits" are computed based on the operational profit in relation to the return on assets ratio. Qualifying employers will be required to pay a purchasing power premium of EUR 351 per employee.

The purchasing power premium should be granted to all employees that were on the payroll on 1 June 2023 and will be awarded on a pro-rata basis according to actual and equivalent days worked during the reference period from 1 June 2022 to 31 May 2023. Payment should be effected no later than September 2023.

LITIGATION

Federal Government Seeks to Amend Judicial Code Governing Civil and Commercial Matters

On 13 September 2023, the federal government submitted Bill 55K3552 containing various provisions governing civil and commercial matters (the ***Bill***). The Bill modernises specific provisions of the Judicial Code by (i) extending the positive effect of *res judicata* (*gezag van gewijsde / autorité de la chose jugée*); (ii) generalising settlement chambers (*kamers voor minnelijke schikking / chambres de règlement à l'amiable*); (iii) widening the general information duty regarding legal remedies; and (iv) modifying the procedure before the Supreme Court.

Extending Positive Effect of Res Judicata

The Bill inserts an Article 23(2) into the Judicial Code to codify the right of a third party to a court judgment to rely on the positive effect of its status *res judicata*. A third party to a court judgment that acquired *res judicata* status will be allowed to invoke that status against a party to the judgment. The new provision codifies a Supreme Court judgment of 2009.

Generalising Settlement Chambers

The Bill modifies the Judicial Code to encourage the use of amicable dispute resolution methods. It will create settlement chambers in most civil and commercial courts and tribunals, including the Court of First Instance, the Enterprise Court and the Court of Appeal. Judges in such chambers will have to follow specific training provided by the Judicial Training Institute (*Instituut voor gerechtelijke opleiding / Institut de formation judiciaire*).

Widening General Information Duty Regarding Legal Remedies

The Bill modifies Article 780/1 of the Judicial Code to allow for the attachment of the general information sheet regarding the possible legal remedies to a certified copy of the judgment, and not only to the documents used for the formal notification of the judgment. The general information obligation was introduced by the Law of 26 December 2022 on the indication of remedies and laying down various provisions in judicial matters (*See*, this Newsletter, Volume 2022, No. 12), following judgments of the Constitutional Court of 10 February 2022 (*See*, this Newsletter, Volume 2022, No. 2) and 30 June 2022.

Modifying Supreme Court Procedure

The Bill inserts a new Article 1094/2 into the Judicial Code to allow a claimant before the Supreme Court to put forward a new plea based on a new law that came into force after the expiry of the deadlines applicable to the submission of briefs. This new provision seeks to remedy the violation by Belgium of Article 6 of the European Convention on Human Rights (which guarantees the right to a fair trial) which the European Court of Human Rights found to exist in a judgment of 16 February 2021.

The Bill is available here (in Dutch and in French).

Court of Justice of European Union Extends Scope of Ne Bis In Idem Principle

On 14 September 2023, the Court of Justice of the European Union (***CJEU***) issued a judgment (Case C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft v Autorità Garante della Concorrenza e del Mercato*; the ***judgment***) following a request for a preliminary ruling made by the Italian Council of State regarding the principle of *ne bis in idem*. This principle, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union (the ***Charter***), guarantees the right not to be tried or punished twice for the same offence.

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Background

On 4 August 2016, the Italian Competition and Markets Authority (*Autorità Garante della Concorrenza e del Mercato*; the ***AGCM***) imposed an administrative fine of EUR 5 million on Volkswagen Group Italia S.p.A. (***VWGI***) and Volkswagen Aktiengesellschaft (***VWAG***) for unfair commercial practices (the ***Contested Decision***). VWGI and VWAG challenged the Contested Decision before the Italian Regional Administrative Court (*Tribunale Amministrativo Regionale per il Lazio*; the ***TAR***).

On 13 June 2018, the German Public Prosecutor's Office of Brunswick imposed a fine of EUR 1 billion on VWAG in accordance with the German Law on Administrative Offences (the ***German Decision***). The German Decision, which covered facts also covered in the Contested Decision, became final on 13 June 2018 after VWAG had waived its right to challenge it and paid the fine.

However, in the proceedings that were still pending before the TAR, VWGI and VWAG contended that the Contested Decision had become unlawful on the ground of infringement of the principle of *ne bis in idem*, as enshrined in Article 50 of the Charter, due to the subsequent German Decision. On 3 April 2019, the TAR dismissed the action and held that the principle of *ne bis in idem* does not preclude the fine prescribed by the Contested Decision.

On appeal, the Italian Council of State referred three questions to the CJEU that dealt with the scope of the principle of *ne bis in idem*, as enshrined in Article 50 of the Charter.

CJEU Judgment

The CJEU started by referring to its 2022 *bpost* judgment (Case C-117/20, *bpost; See*, VBB on Competition Law, Volume 2022, No. 3), observing that the application of the principle of *ne bis in idem* is subject to a twofold condition: (i) there must be a prior final decision (the *bis* condition) and (ii) the prior decision and the subsequent proceedings or decisions must concern the same facts (the *idem* condition).

As regards the *bis* condition, the CJEU built upon and went slightly beyond its *bpost* judgment. It held that although the *ne bis in idem* principle presupposes the existence of a prior final decision, its application is not limited to subsequent decisions adopted after the prior final decision. Accordingly, the CJEU specified that if a final decision already exists, *ne bis in idem* also precludes all "criminal proceedings in respect of the same facts from being initiated or maintained", even if that final decision is subsequent to the criminal proceedings. It follows that VWGI and VWAG should have been allowed to raise the *ne bis in idem* principle in the pending proceedings before the TAR.

As regards the *idem* condition, the CJEU confirmed its *bpost* judgment by reiterating that the principle of *ne bis in idem* "may apply only where the facts to which the two sets of proceedings or the two penalties at issue relate are identical", *i.e.*, when there is "a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned". Whether this condition is met is for the referring court to assess.

The CJEU accordingly held that the *ne bis in idem* principle precludes national legislation which allows a fine of a criminal nature imposed on a legal person for unfair commercial practices to be maintained if that person has been the subject of a criminal conviction in respect of the same facts in another Member State, "even if that conviction is subsequent to the date of the decision imposing that fine but became final before the judgment in the judicial proceedings brought against that decision acquired the force of *res judicata*." Interestingly, the CJEU thus established a link between the principle of *ne bis in idem* and the concept of *res judicata*.

The judgment is available here.

LITIGATION

Court of Justice of European Union Clarifies Scope of "Public Policy" in Cross-Border Judgment Recognition

On 7 September 2023, the Court of Justice of the European Union (***CJEU***) delivered a judgment (case C-590/21, *Charles Taylor Adjusting Ltd, FD v Starlight Shipping Co., Overseas Marine Enterprises Inc.*; the ***judgment***) following a request for a preliminary ruling by the Greek Supreme Court on the concept of "public policy" as laid down in Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels I Regulation***).

The Brussels I Regulation provides for harmonised rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. It has now been repealed by Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels Ibis Regulation***) but applies *ratione temporis* to the facts referred to in the judgment.

Background

On 3 May 2006, a cargo vessel sank and was lost off the bay of Port Elizabeth in South Africa. After refusal from the insurers to indemnify the damage, the owners of the vessel started proceedings against the insurers before a United Kingdom (***UK***) court (the ***UK Court***). While legal action was pending, the parties signed settlement agreements, which were subsequently ratified by the UK Court. In the same judgment, the UK Court ordered the suspension of all subsequent proceedings arising from the same action (the ***UK Court Decision***).

The owners of the vessel brought new actions in compensation before the Greek courts. In addition, the insurers sued the owners of the vessel before the UK courts seeking a declaration that the legal actions started in Greece were in breach of the settlement agreements.

After exhaustion of all legal remedies, the UK High Court ordered compensation to be paid by the owners of the vessel to the insurers in respect of the proceedings started in Greece, based on the settlement agreements and the choice of jurisdiction clause (the ***UK High Court Decision***).

A Greek Court of First Instance recognised and ordered the partial enforceability of the UK High Court Decision in Greece. The owners of the vessel appealed against that judgment to a Greek Court of Appeal, which found that the UK High Court Decision contained "'quasi' anti-suit injunctions" (*i.e.*, injunctions restraining the continuation of proceedings), in breach of the right to a fair trial, which is at the very core of the concept of public policy in Greece.

The insurers appealed to the Greek Supreme Court, which referred the case to the CJEU for a preliminary ruling on the interpretation of Article 34(1) of the Brussels I Regulation, which provides that: "*a judgment shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought*".

CJEU Judgment

The CJEU first insisted on the need for mutual trust between Member States and observed that the prohibition imposed by a court restraining a party from introducing proceedings in the context of an "anti-suit injunction", backed by a penalty, constitutes a form of interference with the foreign court's jurisdiction.

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The CJEU then noted that although the UK High Court Decision was not directly addressed to the Greek courts, it contained grounds relating to: (i) the breach of the settlement agreements; (ii) the penalties for failure to comply with the UK Court Decision; and (iii) the jurisdiction of the Greek courts based on the settlement agreements, which were sufficient to classify the UK High Court Decision as "'quasi' anti-suit injunctions". These may have a deterring effect on one of the parties from bringing or continuing proceedings having the same purpose before Greek Courts, which, as such, would not be compatible with the Brussels I Regulation.

However, the CJEU went on to state that this incompatibility is not sufficient to refuse the recognition or enforcement of a foreign judgment. The cases in which such a refusal is justified are limited by the grounds set out in Articles 34 and 35 of the Brussels I Regulation. The CJEU has already held that the public policy exception, as laid down in Article 34(1), must be interpreted strictly and may only be relied on in exceptional cases (*i.e.*, when a fundamental principle and/or a rule essential within a specific legal order is infringed).

The CJEU then noted that while it is for the national court to define the content of the public policy of its Member State, the CJEU is required to review the limits of this definition. In the case at hand, the UK High Court Decision contained measures which could be qualified as "'quasi' anti-suit injunctions", which go against the principle of mutual trust between Member States and undermine access to justice.

Accordingly, the CJEU held that the Brussels I Regulation must be interpreted as meaning that a court or tribunal of a Member State may refuse to recognise and enforce a judgment of a court or tribunal of another Member State on the ground that it is contrary to public policy, if that judgment impedes the continuation of proceedings pending before another court or tribunal of the former Member State in that it grants one of the parties provisional damages in respect of the costs borne by that party on account of its bringing those proceedings in the former Member State.

The full judgment is available here.

Court of Justice of European Union Confirms Choice of Law Applicable to Consumer Contracts

On 14 September 2023, the Court of Justice of the European Union (***CJEU***) delivered a judgment on the interpretation of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (the ***Rome I Regulation***) for consumer contracts (case C-632/21, *JF & NS v Diamond Resorts Europe Limited & Diamond Resorts Spanish Sales & Sunterra Tenerife Sales*; the ***judgment***).

Background

On 14 April 2008 and 28 June 2010, two club-points-based timeshare contracts were concluded between British consumers and Diamond Resorts Europe, an English company operating through a branch in Spain. Both of those contracts allowed the consumers to enjoy, for a fixed period, a range of accommodation possibilities in various countries in Europe, in particular in Spain (the ***contracts***).

The British consumers requested the contracts to be declared invalid on the ground that they did not satisfy specific requirements of Spanish Law. However, Diamond Resorts Europe maintained that the contracts were governed by English law because the consumers were British nationals and had their habitual residence in the United Kingdom (***UK***). In addition, the seat of Diamant Resorts Europe was also in the UK.

The Spanish Court of First Instance dealing with this case stated that the determination of the law applicable to the contracts at issue depends on the answer to the question which provisions of the Rome I Regulation apply and that that answer has consequences for the validity of those contracts, specifying that several interpretations were possible. In this context, the Spanish Court of First Instance referred the dispute to the CJEU for a preliminary ruling.

LITIGATION

CJEU Judgment

The CJEU started by noting that the provisions of the Rome I Regulation apply to any contractual relationship with (at least) a foreign element, despite the fact that both parties to the contract are nationals of the same state. The CJEU also observed that the UK's withdrawal from the European Union had no influence on the application of the provisions of the Rome I Regulation.

The CJEU then focused on the question of which provision of the Rome I Regulation applies to the contracts. First, the CJEU noted that these provisions only apply to contracts concluded on or after 17 December 2009. Consequently, the CJEU only had to rule on the interpretation relating to the second contract at issue, which had been signed on 28 June 2010 (the ***contract at issue***).

Furthermore, the CJEU recalled the importance of the will of the parties who have the freedom to choose the law applicable to their contract. It is only in the absence of such a choice of law that the specific provisions of the Rome I Regulation come into play. But the CJEU added that in accordance with Article 6(2) of the Rome I Regulation, the choice of law of the parties cannot deprive the consumer of the protection afforded to him or her by Article 6(1) of the Rome I Regulation, which provides that consumer contracts are governed by the law of the country in which the consumer has his or her habitual residence. The CJEU added that this provision is not only specific, but also exhaustive.

In the case at hand, the CJEU noted that the contract at issue designated English law as the applicable law, meaning the country in which the consumers have their habitual residence.

Accordingly, the CJEU confirmed its previous case law and held that "*where a consumer contract fulfils the requirements laid down in Article 6(1) of* [the Rome I Regulation], *the parties to that contract may, in accordance with Article 3 of that same Regulation, choose the law applicable to that contract, provided, however, that that choice does not result in depriving the consumer concerned of the protection afforded to him or her by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of Article 6(1), which provides that such a contract is to be governed by the law of the country where the consumer has his or her habitual residence*".

Lastly, the CJEU noted that in view of the mandatory and exhaustive nature of Article 6(2) of the Rome I Regulation, it is not possible to derogate from that provision for the benefit of legislation allegedly more favourable to the consumer, as this would "*necessarily seriously undermine the general requirement of predictability of the applicable law and, therefore, the principle of legal certainty in contractual relationships involving consumers*".

The judgment is available here.

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