October 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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CAPITAL MARKETS AND FINANCIAL LAW

Financial Services and Markets Authority Publishes Toolbox on Investor Relations

The Belgian Financial Services and Markets Authority (***FSMA***) published the Toolbox Investor Relations (the ***Toolbox***) which clarifies the information disclosure obligations of listed companies and offers guidelines on the following issues:

- The information to submit to the FSMA prior to an initial public offering (***IPO***);
- The information to make public following an IPO;
- The listed company's website;
- Periodic information;
- Inside information;
- General meetings;
- Capital increases within the limits of the authorised capital;
- Transparency notifications;
- Managers' transactions.

For all these information categories, the Toolbox follows a similar structure. It starts with a short introduction of each topic and then discusses whether the issue is regulated and which obligations arise. It concludes with a calendar and deadlines for fulfilling the obligations.

As the Toolbox is intended to serve as a first step in determining the exact disclosure obligations, it refers to the relevant documentation published by the FSMA that discusses the duties of the listed companies in greater detail.

While the Toolbox is not an exhaustive source of information, it serves as a useful start for compliance purposes and can be found on the FSMA's website.

COMMERCIAL LAW

Court of Justice of European Union Holds that Commercial Agency Contracts Can Derogate from Agent's Right to Commission

On 13 October 2022, the Court of Justice of the European Union (***CJEU***) held that Article 7(1)(b) of Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (the ***Directive***) is not a mandatory provision. Under Article 7(1) of the Directive, a commercial agent is entitled to a commission during the period covered by the agency agreement (i) where the transaction has been concluded as a result of his action (Article 7(1)(a) of the Directive); or (ii) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind (Article 7(1)(b) of the Directive). The CJEU confirmed in its ruling that it is possible to derogate contractually from the right of the self-employed commercial agent to receive a commission on the basis of section (b) of this provision. (CJEU, judgment of 13 October 2022 in case C-64/21, *Rigall Arteria Management*, ECLI:EU:C:2022:783, available here).

The CJEU gave its judgment in response to a referral for a preliminary ruling by the Polish Supreme Court in proceedings between a Polish commercial agent pursuing activities in credit intermediation and its principal, a Polish bank. The parties were bound by a contract of financial intermediation, including the brokering of ancillary activities related to the purchase of credit cards and other services. The remuneration of the agent was based on the number of contracts concluded and a bonus for each credit card or loan application obtained, as well as on a fixed compensation at the date of termination. However, the agent received no commission for the contracts concluded during the term of the parties' agency contract between the bank and customers acquired by the agent.

After sixteen years of performance, the bank terminated the agency contract. When the agent inquired how the commission for contracts concluded with customers acquired by the agent would be calculated, the bank claimed that all remuneration due was included in the contract and that it was not liable to pay any additional amount. The agent disagreed and sued its principal before the Warsaw Regional Court and, subsequently, the Warsaw Court of Appeal. Both courts dismissed the action on the ground that the agency contract did not provide for the payment of a commission. The agent challenged this finding before the Polish Supreme Court, which decided to stay the proceedings and question the CJEU on whether the entitlement to a commission under Article 7(1)(b) of the Directive can be contractually excluded. While contracts for the sale of financial services fall outside the scope of the Directive, the Polish implementing provisions of the Directive also applied to such sales. Therefore, the CJEU decided that it had jurisdiction to give a preliminary ruling on the question referred to it.

The CJEU first noted that Article 7 does not purport to have a mandatory nature and, during the legislative preparatory works of the Directive, had even been removed from a draft Article listing all mandatory provisions of the Directive. Further, it follows from Article 6 of the Directive that the agent's remuneration depends primarily on the content of the parties' agreement. Lastly, the CJEU noted that, while the Directive's purpose is to protect commercial agents, it is doubtful whether Article 7(1)(b) of the Directive necessarily protects them as its application could induce principals to reduce the basic commission rate or even forego entering into a contractual relationship with a commercial agent. As a result, the CJEU concluded that there were no grounds for finding that Article 7(1)(b) of the Directive is mandatory law.

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In view of this ruling, parties to an agency contract are free to exclude the agent's entitlement to a commission in respect of transactions concluded during the term of the agency contract with a third party whom the agent previously acquired as a customer for transactions of the same kind and can provide for a different remuneration method in their contract. The rule of Article 7(1)(b) of the Directive will only apply to the extent that the contract does not provide for a different method of remuneration.

The CJEU's ruling comes as a surprise as most legal scholars in Belgium have defended that the rule of Article 7(1)(b) of the Directive is mandatory. Although this was not expressly confirmed by the CJEU, its ruling presumably extends to Article 7(1)(a) of the Directive governing the agent's entitlement to commission for transactions concluded during the term of the agency contract as a result of the agent's action. It is less clear whether the same applies to the other provisions of the Directive governing the agent's entitlement to commission. As long as this remains uncertain, principals should remain cautious in excluding the application of these provisions.

COMPETITION LAW

Brussels Markets Court Orders Belgian Competition Authority to Disclose Documents Relied on in Decision to Approve Merger

On 5 October 2022, the Markets Court of the Brussels Court of Appeal (*Marktenhof / Cour des Marchés* – *the* ***Markets Court***) delivered a judgment in which it required the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) to disclose the anonymous version of a survey relied on in merger review proceedings.

The judgment constitutes the first stage of the appeals brought by Ads & Data and IPM (the ***Applicants***) to seek the annulment of the decision of the Competition College (*Mededingingscollege / Collège de la concurrence*) of the BCA of 29 March 2022 which approved the acquisition of RTL Belgium by DPG Media and Groupe Rossel (the ***BCA Decision***).

In its judgment, the Markets Court noted that the legal position of third parties challenging a decision adopted by the BCA before the Markets Court is entirely different from that of third parties involved during the administrative procedure before the BCA.

The Markets Court added that the case law shows that third parties may be granted access to specific documents of the procedural file if (i) the equality of arms between the parties before the Markets Court, the effectiveness of the appeal and the proper exercise of its jurisdiction by the Markets Court require access to these documents; and if (ii) at least one plea raised by the applicants is serious and may *prima facie* lead to the annulment of the contested decision. Even if these cumulative conditions are satisfied, the Markets Court is still not obliged to grant access to the requested documents and may balance the advantages derived from the disclosure of documents against the disadvantages for the public interest resulting from such a disclosure. The Markets Court may also take measures to limit the access and protect confidential information.

In this case, the Markets Court held that the conditions which it spelled out were met regarding the results of an online survey organised by the BCA among key advertisers and media agencies during the administrative procedure. In particular, the Markets Court held that the pleas made by the Applicants regarding (i) the BCA's failure to state the reasons linked to the conclusions derived from the survey results; and (ii) the erroneous interpretation of the survey results were *prima facie* not manifestly unfounded and should therefore be further substantiated and investigated.

As a result, the Markets Court decided that the Applicants should be granted access to the consolidated and anonymised results of the survey used by the BCA, provided these results would only be used in the proceedings before the Markets Court. In response to a request of the BCA, the Markets Court specified that giving access only to the legal counsel of the Applicants would be insufficient to ensure the principle of equality of arms and the adversarial principle and therefore allowed the Applicants themselves to gain access to the survey results.

The Markets Court also held that the conditions for access were not met with regard to the replies of advertisers and media agencies to requests for information addressed to them by the BCA. It considered that the Applicants had not adequately supported their claim and that, in future, the inhibiting effect of the disclosure could compromise the sincerity and cooperation of firms during investigations carried out by the BCA.

The hearing on the merits of the case will take place on 22 February 2023.

The text of the judgment is available here.

COMPETITION LAW

Leuven Enterprise Court Delivers Judgment After Espousing Amicus Curiae Brief Submitted by Belgian Competition Authority

At the request of the Leuven Enterprise Court (*Ondernemingsrechtbank van Leuven / Tribunal de l'entreprise de Louvain*), the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) was given the opportunity to clarify in an *amicus curiae* brief the obligations that a sports association may have under the competition rules when awarding sponsorship or similar rights. The BCA submitted its brief in a dispute between the Royal Belgian Billiard Federation (*Koninklijke Belgische Biljartbond / Fédération Royale Belge de Billard* – the ***Federation***) and Hector Cue Sports Belgium (***HCSB***). When delivering its judgment on 30 November 2021, the Leuven Enterprise Court considered and applied the findings of the BCA's *amicus curiae* brief.

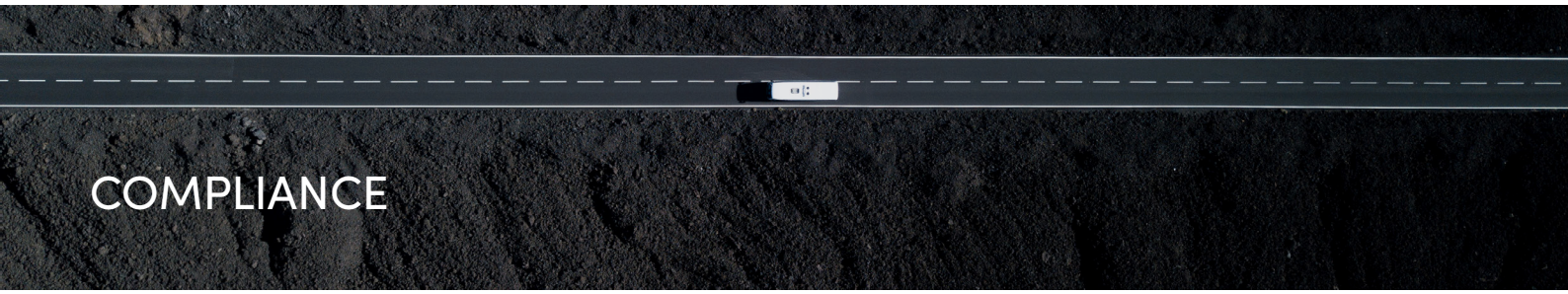
The Federation is a billiard association and the sole national organisation to run "official" billiard competitions in Belgium. It signed an exclusive sponsorship agreement with a Belgian manufacturer of billiard balls and made the latter the official and exclusive supplier of billiard balls for specific competitions. The Federation also agreed only to promote this supplier in competitions. Additionally, the Federation signed an exclusive sponsorship agreement with another Belgian company, granting that company the exclusive right to supply all other billiard equipment and necessities for all Belgian competitions. HCSB claimed that both agreements were unlawful, and that the Federation had infringed Articles IV.1 and IV.2 of the Code of Economic Law (the ***CEL***) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (the ***TFEU***).

In its *amicus curiae* brief, the BCA asserted that the Federation holds a dominant position in the market for the organisation and exploitation of competitions, and, on the basis of its special responsibility as a dominant company, is obliged to organise an objective, non-discriminatory and transparent competitive procedure when it wishes to award an exclusive sponsorship agreement to a particular firm.

Moreover, when examining whether the exclusive sponsorship agreements had the effect of appreciably restricting competition, the BCA offered five indications pointing to noticeable exclusionary effects on the non-elected competing suppliers of billiard balls and tables in the downstream market. These indicia were (i) the possible premium nature of the three championships in question; (ii) the existence of viable alternatives for competitors; (iii) the market position of the selected suppliers; (iv) the duration of the contracts; and (v) the non-discriminatory and transparent bidding procedure.

In its judgment of 30 November 2021, the Leuven Enterprise Court embraced the entire submission made by the BCA. The Court thus decided that the Federation was in violation of Articles IV.1 and IV.2 of the CEL (and Articles 101 and 102 of the TFEU), given that the commercialisation of billiard balls and tables by HCSB had become more difficult as a result of the exclusivity agreements which the Federation had concluded while it had failed to provide in an objective, non-discriminatory and transparent manner a similar opportunity to HCSB. As a result, the Leuven Enterprise Court ordered the cessation of the infringing practices.

The original judgment in Dutch can be found here and the *amicus curiae* brief of the BCA can be found here.



COMPLIANCE

Belgium Implements Directive on Whistleblowers in Private Sector

On 24 November 2022, the federal Chamber of Representatives adopted Bill 55K2912 on the Protection of Persons Reporting Breaches of Union Law or National Law in the Private Sector (*Wetsontwerp betreffende de bescherming van melders van inbreuken op het Unie- of nationale recht vastgesteld binnen een juridische entiteit in de private sector / Projet de loi sur la protection des personnes qui signalent des violations au droit de l'Union ou au droit national constatées au sein d'une entité juridique du secteur privé* – the Bill). The ***Bill*** implements into Belgian law Directive (EU 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law (the ***Directive***).

The Bill introduces common minimal rules for the protection of persons who report breaches of EU law which they observe in their professional activities.

The protection is afforded for a wide range of breaches of the law in areas as diverse as public health (including pharmaceuticals and medical devices), food, animal health and transport; activities as wide-ranging as competition law, consumer protection, data protection and privacy, money-laundering and terrorist financing, product safety and public procurement; as well as violations affecting the EU financial interests and relating to the internal market.

The protection applies to workers (including part-time, fixed term or temporary workers, volunteers, and paid trainees) as well as self-employed persons, consultants, shareholders, directors, managers and any person working under the supervision and management of (sub)contractors and suppliers. By contrast and despite the broad reach of the Directive, the Bill does not apply to the public sector which is governed by specific rules.

Many organisations will be subject to the new rules as these will apply to all firms with at least 50 employees. These firms are required to create **internal channels** and procedures to handle whistleblowers' reports.

Next to the internal reporting procedures, **external channels** are put in place with competent authorities. Whistleblowers will be protected provided that they (i) had reasonable grounds to believe that the information was true at the time of the report and (ii) have already reported through the internal, external or press channels. If both the internal and external channels were unsuccessful, employees can still publicly report EU violations through **press**, provided that (i) there is an immediate threat to the public interest or (ii) in case of external reporting channel, there is a risk of retaliation.

In addition, reporting must result in follow-up and feedback by a reporting supervisor (*meldingsbeheerder / gestionnaire de signalement*) and requires the back-up of a record-keeping obligation. The Bill also introduces several protection measures. Among others, (i) any form of retaliation against whistleblowers, including threats of retaliation and attempted retaliation, is expressly prohibited; (ii) whistleblowers should benefit from supporting measures, where appropriate; and (iii) whistleblowers who are victims of retaliation are allowed to file a complaint.

Lastly, whistleblowers will be able to rely on several federal ombudsmen responsible to assess the admissibility of reports and forward the information to a competent authority. Moreover, the Federal Institute for the Protection and Promotion of Human Rights (*Federaal Instituut voor de bescherming en de bevordering van de Rechten van de Mens / Institut Fédéral pour la protection et la promotion des Droits Humains*) will provide whistleblowers with professional, legal and psychological support.

The Bill will become law shortly and will enter into force two months after its publication in the *Belgian Official Journal*. It will modify several legal instruments, such as the Judicial Code and the Law of 3 July 1978 on employment contracts.

The Bill is available here in Dutch and French.

CONSUMER LAW

Council of Ministers Adopts Draft Bill to Further Alleviate Burden of Consumer Debt

On 28 October 2022, the Council of Ministers adopted a Draft Bill inserting a new Book XIX "Consumer Debts" into the Code of Economic Law (*Voorontwerp van wet houdende invoeging van boek XIX "Schulden van de consument" in het Wetboek van Economisch Recht / Avant-projet de loi portant insertion du livre XIX « Dettes du consommateur » dans le Code de droit économique* – the ***Draft Bill***).

The Draft Bill introduces the obligation for companies faced with unpaid consumer debts to send a first payment reminder to the consumer and grant a minimum period of time that will allow the consumer still to pay his/her debt. This payment reminder should be free of charge for the consumer. It is only when the consumer fails to pay within the additional time granted, that the company will be entitled to charge a penalty payment (*schadebeding/clause indemnitaire*) to the consumer. Moreover, penalties will be capped to avoid accumulation of consumer debt.

Furthermore, the Draft Bill aims to update the rules on the amicable recovery of consumer debts, by the creditor or by a third party on his behalf, as currently laid down in the Law of 20 December 2002 on the amicable recovery of consumer debts (*Wet van 20 december 2002 betreffende de minnelijke invordering van schulden van de consument / Loi du 20 décembre 2002 relatif au recouvrement amiable des dettes du consommateur*). The Draft Bill provides that all actors involved in the amicable recovery of consumer debts, including lawyers and bailiffs, will be subject to the supervision of the Economic Inspectorate (*Economische Inspectie/Inspection économique*).

The Draft Bill will be submitted for review to the Council of State.

CORPORATE LAW

Belgian Corporate Governance Commission Publishes Explanatory Note Regarding Independent Directors

In October 2022, the Corporate Governance Commission (***BCGC***) released an explanatory note on the status of independent directors (the ***Note***). The BCGC was founded by the Financial Services and Markets Authority, the Association of Belgian Enterprises and Euronext Brussels with the purpose of preparing and releasing the Corporate Governance Code, in line with the requirements of the Belgian Companies and Associations Code (***BCAC***). The latest version of the Corporate Governance Code (***CGC***) was released in 2020. It sets out a series of principles that Belgian listed companies must comply with, including the framework for independent directors. As the notion of an independent director, derived directly from the BCAC, is an important concept for governance purposes, the BCGC opted to clarify the rights and obligations linked to this concept in the Note and provide guidelines for the independent directors' role in the company.

First, the Note covers several rules that apply to all directors, regardless of their status. In particular, it stresses that the board of directors must act as a collegial body. Therefore, all directors play the same role and must pursue the objective of wealth creation for the company. They must also avoid the creation of entrenched coalitions within the board and the asymmetrical distribution of information. Further, all directors must remain independent during the decision-making process – they should be able to form their own opinion.

Further, the Note focuses on the composition of the board and other specific committees and the number of independent directors required by the BCAC and CGC. Additionally, the Note defines "independence" as the absence of relations with the company or any important shareholder. This requirement of independence is clarified by reference to additional professional, functional, commercial, financial and personal standards set by the CGC. The Note underlines the importance of qualitative criteria of competence, motivation and added value.

The Note elaborates on the situations and items provided for in BCAC and CGC that require special attention or action from the independent directors:

- Intra-group transactions;
- During Initial Public Offerings relating to assets with voting rights carried out by a bidder who exercises some degree of control on the target;
- The Audit Committee must include at least one independent director; and
- The Remuneration and Nomination Committees must be composed of a majority of independent directors.

Lastly, the Note stresses the importance for independent directors to act with a critical mindset and offers the following examples: (i) to monitor the transparency and quality of the company's communication, in particular towards the shareholders; (ii) to seek advice from legal, financial and technical experts to understand the matters they must decide on; and (iii) to express their concerns during board meetings, inform the other directors of the reasons for such concerns and ensure the possibility for a dialogue.

The Note can be found online in Dutch and French.

DATA PROTECTION AND ARTIFICIAL INTELLIGENCE

Belgian Data Protection Authority Sanctions Heavy Identification Verification Procedures

On 12 October 2022, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) gave a decision relating to the principle of data minimisation. In response to a request to have his data erased, a data subject was asked by the data controller required to submit some proof of identity. This was foreseen in the controller's privacy policy.

According to the DPA, the requirement to produce proof of identity infringed Article 5.1 c) of the General Data Protection Regulation (***GDPR***), from which the principle of data minimisation derives. When applied in relation to the exercise of a data subject's rights, this principle prevents a data controller from asking for further personal data when it already has sufficient data to fulfil the request.

If – as in the case at hand – the data controller used the complainant's e-mail address to send direct marketing messages, the DPA considered that it would be sufficient for the complainant to exercise his rights to contact the data controller using the same e-mail address. According to the DPA, the data controller would have had sufficient data to identify the data subject and did not have the right to request further personal data to accede to the request.

The DPA did not impose a fine on the controller as it was its first established breach of the data protection rules. The controller was asked to inform the DPA within 30 days of the changes made to its privacy policy. The case illustrates the importance of light identification procedures when further safeguards are not necessary, especially when it comes to allowing data subjects to exercise their rights under the GDPR.

The decision is available in Dutch here.

Advocate General of Court of Justice of European Union Advises Against Broad Scope of Damage Claims for Infringements of General Data Protection Regulation

On 6 October 2022, Advocate General (***AG***) Campos Sánchez-Bordona delivered his opinion in *UI v Österreichische Post* (Case C-300/21). In the national proceedings before the Austrian Supreme Court (the ***Referring Court***), a natural person is claiming damages from the Austrian postal service for collecting information on the political party affinities of Austrian citizens for the purpose of election advertising. The claimant opposed the processing of his/her data and claimed to have suffered damage due to the political party affinities attributed to him/her. The Referring Court sought guidance from the Court of Justice of the European Union (***CJEU***) regarding the application of the General Data Protection Regulation (***GDPR***).

The claimant invoked Article 82 of the General Data Protection Regulation (GDPR), which foresees compensation for data subjects who have suffered damages due to an infringement of the GDPR.

The referring Court firstly asked whether, under Article 82 of the GDPR, a breach of the GDPR is enough to open the right to compensation or whether specific damage is necessary. According to the AG, any compensation prescribed under the GDPR requires the existence of a material or non-material damage, as the GDPR does not provide for punitive damages. Further, nothing in the GDPR allows for the presumption that a breach of the GDPR gives rise to injury.

Secondly, the referring Court asked whether the assessment of the compensation should be based on EU law requirements beyond the principles of effectiveness and equivalence. The AG started out by observing that these principles are not as such relevant to assess compensation under Article 82 of the GDPR. He referred to recital 146 of the GDPR, which provides that compensation must be full and effective, and then addressed potential types of compensation available

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under the laws of the Member States. The concept of "symbolic damage", which exists in some countries, could apply if there is no damage at all. Furthermore, some Member States award damages for the purpose of depriving the infringer of the profit obtained, which typically exists in case of infringement of IP rights. The AG merely noted that the GDPR does not provide for such damages without indicating whether these are allowed under the GDPR.

Lastly, the referring Court asked whether the award of compensation for non-material damage under Article 82 of the GDPR is conditional on an infringement of at least some weight that goes beyond the upset caused by that infringement. The AG answered this question in the affirmative. In his view, there is a difference between actual non-material damage and mere upset. Any violation of the GDPR upsets data subjects to some extent. As a result, compensation for a mere upset would amount to compensation without damage, which the GDPR does not allow for. However, the AG left it to the national court to determine whether a subjective feeling of displeasure can be considered as non-material damage.

Concretely, if the CJEU follows the AG's opinion, this would mean that data controllers could only be ordered to pay compensation if the data subject is able prove the existence of actual (material or non-material) damage. A simple violation of the GDPR or the data subject's upset would not be enough to give rise to compensation.

The opinion of the Advocate General is available here.

EU and US Establish New Framework for Personal Data Transfers between these Territories

On 7 October 2022, US President Biden signed the Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities (the ***Executive Order***). The Executive Order is an important step towards a new transfer mechanism that should facilitate transfers of personal data between EU and US companies. Such a mechanism must be confirmed by the adoption of a so-called adequacy decision by the European Commission pursuant to Article 45 of the General Data Protection Regulation (***GDPR***).

The previous adequacy decision (Decision 2016/1250) was cancelled by the Court of Justice of the EU (***CJEU***) on 16 July 2020 in what became known as the *Schrems II* judgment (Case C-311/18 – see our News Alert on the judgment, which is available here). This landmark judgment held that the EU-US Privacy Shield mechanism failed to offer EU data subjects a level of protection that is equivalent to the GDPR, understood in the light of the EU Charter of Fundamental Rights. In particular, the CJEU held that the mechanism (i) did not meet the requirements of necessity and proportionality; and (ii) contained insufficient redress rights to challenge unlawful government surveillance before an independent body.

The newly adopted Executive Order and updated framework purport to address these shortcomings. First, they introduce a list of national security objectives and oblige US intelligence agencies to verify that their data processing is necessary for and proportionate with these objectives. Second, the updated framework includes a set of handling requirements and appropriate actions to be taken in case of non-compliance, as well as the duty for US intelligence agencies to update their policies and procedures under the supervision of the Privacy and Civil Liberties Oversight Board.

Finally, the updated framework creates a multi-layer mechanism to deal with individual complaints, whereby:

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- In the first stage, complaints are investigated by the Civil Liberties Protection Officer in the Office of the Director of National Intelligence (***CLPO***). He/she will then determine if the Executive Order has been violated and, if so, decide on possible remedies.

- In addition, a Data Protection Review Court will be created by the Attorney General. It will hear appeals against the CLPO's decisions brought by data subjects or the concerned intelligence service. The Executive Order introduces new safeguards for the Review Court's independence.

Following the signing of the Executive Order, the ball is in the court of the European Commission which will review the new framework. If it is satisfied with its adequacy, the European Commission will adopt an adequacy decision pursuant to Article 45 of the GDPR allowing transfers of personal data from the EU without additional safeguards. Until that decision is published, businesses will still have to rely on appropriate safeguards, such as binding corporate rules or standard contractual clauses. However, as the Privacy Shield was struck down by the CJEU, just as the EU-US Safe Harbor before it, questions already arise on the permanence of this new framework.

Data protection NGOs expressed their concerns regarding the Executive Order. For instance, noyb, the NGO founded by Maximillian Schrems who was responsible for the annulment of the earlier frameworks, is of the opinion that the system does not prevent bulk surveillance and questioned the independence of the Data Protection Review Court. It is therefore likely that the new framework will again be challenged in court and the CJEU may again review its legality.

That should not deter US organisations from signing up for the new "EU-US Data Privacy Framework" when it becomes available. Indeed, once the European Commission confirms the adequacy of the new "EU-US Data Privacy Framework", US organisations will be able to self-certify and transfer personal data to the EU without requiring additional safeguards. The European Commission's adequacy decision is expected in four to six months.

European Data Protection Supervisor Opinion on Upcoming Council of Europe Convention on Artificial Intelligence

A new convention on artificial intelligence (***AI***), human rights, democracy and the rule of law is currently under discussion within the Council of Europe (***CoE***) in order to regulate the use of AI in the member states of the CoE (the ***Convention***). The European Union (***EU***) participates in these discussions. The European Commission issued a Recommendation for a Council Decision authorising the opening of negotiations on behalf of the EU on 18 August 2022. In an opinion of 13 October 2022, the European Data Protection Supervisor (***EDPS***) reacted to this Commission Recommendation and issued recommendations on the upcoming Convention.

The EDPS's main recommendations are the following:

- to give prominence to protecting human rights, especially over the objective of ensuring compatibility of the Convention with EU single market law.

- to include in the Convention a methodology for assessing the risks posed by AI systems for fundamental rights (which involves a "human rights impact assessment").

- in the area of law enforcement, to strike the right balance between the public interest and the interests of the persons subject to AI systems to ensure full compliance with fundamental rights to privacy, presumption of innocence and fair trial.

- to include procedural safeguards and rights for what the EDPS calls "AI subjects", namely persons affected by the use of AI systems, which would be the equivalent of "data subjects" as defined under data protection laws.

- to assess and mitigate the risks posed by AI systems, not only on AI subjects but also on groups of individuals and on society.

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- to specify that AI systems posing unacceptable risks should be prohibited. The EDPS provides an indicative list of such AI systems, citing social scoring (e.g., the social credit system currently implemented in China), the biometric identification of individuals in publicly accessible spaces (e.g., facial recognition by surveillance cameras), AI systems used by law enforcement authorities for making individual risk assessments of natural persons (e.g., systems that predict the risk for a given individual to commit a criminal offence), etc.

- to adopt the data protection by design and by default approach at every step of AI systems' life cycle.

- for high-risk AI systems, to impose a prior conformity assessment carried out by a third-party (as opposed to self-assessment by the provider of the AI system).

- to ensure that supervisory authorities will be granted adequate investigatory and enforcement powers and that the Convention will facilitate and encourage cross-border cooperation between competent authorities.

The EDPS also refers to the Commission proposal for a Regulation laying down harmonised rules on artificial intelligence of 21 April 2021 (***AI Act***), which aims to regulate the use of AI inside the EU. According to the EDPS, the Convention should complement the AI Act by strengthening the protection of fundamental rights of all persons affected by AI systems. Both the AI Act (at EU level) and the Convention (at the level of the CoE) are still under discussion and have not yet been adopted. This implies that most of AI systems in Europe remain subject to general data protection rules and fundamental human rights.

The EDPS opinion can be consulted here.

Creation of Belgian Authority of Cybersecurity Certification

Regulation (EU) 2019/881 of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification (the ***Cybersecurity Act*** or ***CSA***) introduced an EU-wide cybersecurity certification framework to inform users about the cybersecurity risks of a product or a service in order to increase trust and security in ICT products inside the EU. The CSA classifies cybersecurity certificates according to three assurance levels: (i) basic, (ii) substantial and (iii) high.

The CSA was incorporated into Belgian law by the Law of 20 July 2022 on the cybersecurity certification of information and communication technologies and on the designation of a national authority for cybersecurity certification (*Wet inzake de certificering van de cyberbeveiliging van informatie- en communicatietechnologie en tot aanwijzing van een nationale cyberbeveiligingscertificeringsautoriteit / Loi relative à la certification de cybersecurité des technologies de l'information et des communications et portant désignation d'une autorité nationale de certification de cybersécurité* – the ***Law***). The Law designates the Belgian Centre for Cybersecurity (*Centrum voor Cybersecurity België / Centre pour la Cybersécurité Belgique* – the ***CCB***) as the National Authority of Cybersecurity Certification, in charge of monitoring and overseeing the enforcement of the CSA in Belgium. The CCB is also in charge of delivering certificates of assurance level "high". By contrast, certificates of assurance level "basic" and "substantial" are to be delivered by product certification bodies approved by the Belgian Accreditation Body (BELAC), which falls under the authority of the Belgian Ministry of Economy.

The Law can be consulted here.

INTELLECTUAL PROPERTY

Belgian Intellectual Property Law Is Given Facelift

On 24 October 2022, the Law of 25 September 2022 concerning the insertion of various provisions on intellectual property into Book XI of the Economic Code and the Judicial Code (*Wet houdende invoeging in Boek XI van het Wetboek van Economisch Recht en in het Gerechtelijk Wetboek van diverse bepalingen betreffende intellectuele eigendom/ Loi portant insertion dans le livre XI du Code de droit économique et dans le Code judiciaire de diverses dispositions en matière de propriété intellectuelle* – the ***Law***) was published in the Belgian Official Journal.

The Law modernises the current statutory framework governing intellectual property on several points and includes the following changes:

- The Law introduces some flexibility regarding language requirements, allowing patent applicants to submit specific application documents in English. In particular, the description of the invention, drawings and the extract may be drafted in English instead of in Dutch, German or French.
- The Law allows specific aspects of the filing procedures and managing intellectual property rights to be governed Royal Decree in the event of a public safety crisis.
- The Law also implements the Digital Access Service of the World Intellectual Property Organisation which offers Belgian patent applicants the possibility to use documents from the Belgian patent application procedure to obtain patent protection abroad.

Advocate General Szpunar Opinion Proposes to Discard Liability for Streaming Platforms when Subscribers Use Virtual Private Networks

On 20 October 2022, Advocate-General Szpunar (***AG***) delivered his opinion in a dispute between Grand Production d.o.o. (***Grand Production***) and GO4YU d.o.o. (***GO4YU***) (the ***Opinion***). Grand Production is a producer of audio-visual entertainment TV programmes that are broadcast in Serbia. GO4YU operates as an internet streaming platform which can be accessed from Serbia and other countries. GO4YU is not allowed to make the content available outside Serbia and Montenegro. As a consequence, GO4YU is obliged to geo-block access to the TV entertainment shows for internet users from abroad. However, this geo-blocking system can be circumvented by using a virtual private network (***VPN***).

According to Grand Production, GO4YU was well aware of the use of VPNs. Moreover, it allowed Austrian users to have access to the content for several months without having any geo-blocking system in place. Consequently, Grand Production sued GO4YU before the Austrian Courts. The Oberste Gerichtshof (the ***Court***) stayed the proceedings and referred a question for a preliminary ruling to the Court of Justice of the European Union (the ***ECJ***) regarding the concept of communication to the public in Article 3(1) of Directive 2001/29 of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (***Information Society Directive***).

In his Opinion, the AG first held that a streaming platform like GO4YU does not violate Article 3(1) of the Information Society Directive when its users circumvent the block through a VPN. However, the platform operator can be held liable in case it intentionally provides for ineffective geo-blocking measures for users outside the territory for which a licence was granted. The fact that the streaming platform is aware of the fact that its users could circumvent the geo-blocking measures is not sufficient for holding the streaming platform liable.

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Second, the AG observed that the promotion of a platform and the conclusion of agreements with customers by an entity connected to the platform, without that entity having influence on the content made available through the platform or technical protection measures applied, does not constitute an act of communication to the public in the meaning of Article 3(1) of the Information Society Directive.

Third, regarding the jurisdiction of national courts in online copyright infringement cases, the AG expressed the opinion that the relevant question should be declared not admissible, since it involves the interpretation of national law.

In this Opinion, the AG emphasised that the internet is a worldwide instrument of communication. This in contrast to regulations which are of a territorial nature. Geo-blocking is used as an instrument to territorialise the internet. It is therefore expected that the ECJ's judgment will also be relevant for the interpretation and application of Article 17 of the Directive on Copyright in the Digital Single Market.

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Court of Justice of European Union Finds Enforcement of Micula Arbitral Award Incompatible with EU Law

On 21 September 2022, the Court of Justice of the European Union (the ***CJEU***) issued an order (the ***Order***) ruling that enforcing an intra-EU investment arbitral award (the ***Award***) handed down against Romania in favour of Swedish investors was incompatible with European Union law.

Facts

The *Micula* case finds its origins in the investment made by the Miculas, two investors of Swedish nationality, in the food production sector in Romania in the 1990s. At the time of their investment, the Miculas relied on numerous tax incentive regimes that Romania had put in place in order to attract foreign investment.

In 2005, as Romania prepared to accede to the European Union (the ***EU***), these tax incentives were revoked in an effort to conform with EU law on State aid.

The Miculas then instituted proceedings under the aegis of the International Centre for Settlement of Investment Disputes against Romania based on the Romania-Sweden Bilateral Investment Treaty (***Romania-Sweden BIT***), arguing that the revocation of these tax incentives constituted a breach of their rights under the Romania-Sweden BIT. The arbitral tribunal issued the Award in 2013, holding that, by revoking the tax incentives, Romania had indeed failed to award the claimants fair and equitable treatment. The arbitral tribunal awarded the Miculas EUR 180 million.

The Miculas then initiated enforcement proceedings of the Award in various jurisdictions, including Belgium.

EU State Aid

In 2015, the European Commission handed down a decision (the ***2015 EU decision***) declaring that the Award in favour of the Miculas amounted to State aid. The 2015 EU decision required Romania to refrain from paying the amount due under the Award. The Commission also ordered Romania to recover any compensation already awarded to the Miculas. The Miculas sought to challenge the 2015 EU decision before the General Court (***GC***).

Although the 2015 EU decision was initially annulled by the GC in June 2019 (See, this Newsletter, Volume 2019, No. 6), that judgment was set aside in a CJEU judgment of January 2022 (Case C-638/19). The case was therefore referred back to the GC where proceedings are still pending (Case T-624/15 RENV).

Intra-EU Investment Context

In addition, since the Award was handed down in favour of Swedish investors against Romania, an EU Member State, the *Micula* case should also be examined in the broader context of the compatibility with EU law of intra-EU investment arbitration proceedings.

In the 2018 case *Achmea* (Case C-284/16), the CJEU held that investment arbitration (***ISDS***) clauses contained in bilateral investment agreements concluded between different EU Member States (***intra-EU BITs***) that allow investors from one of the EU Member State parties to that agreement to initiate arbitral proceedings against the other EU Member State party to the agreement, was incompatible with EU law. According to the CJEU in *Achmea*, such ISDS clauses violate the principle of autonomy of the EU legal order and jeopardise the effectiveness, primacy and direct effect of EU law and the principle of mutual trust between EU Member States. In essence, the CJEU ruled in *Achmea* that an ISDS clause in an intra-EU BIT was incompatible with EU law since such a clause allowed an arbitral tribunal to apply and interpret EU law, despite the fact that such a tribunal did not form part of the EU Member States' judicial system and could therefore not refer questions on the interpretation of EU law

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for preliminary rulings to the CJEU. This ruling was later repeated in *Komstroy* (Case C-741/19) and *PL Holdings* (Case C-109/20).

Belgian Enforcement Proceedings and Order

As part of the enforcement proceedings taking place in Belgium, the Brussels Court of Appeal (*Hof van Beroep / Cour d'appel*) sought a preliminary ruling from the CJEU asking whether the 2015 Decision superseded the enforcement proceedings of the Award.

In the Order, given that the GC still has to rule on the legality of the 2015 Decision (in Case T-624/15 RENV), the CJEU did not discuss the interaction between the enforcement of the Award and the 2015 Decision. Instead, the CJEU focused exclusively on the fact that the Award had been handed down in the intra-EU context and was therefore invalid.

In particular, the CJEU observed that according to its case-law (*Achmea*, *Komstroy* and *PL Holdings*), an arbitral tribunal, such as the one that delivered the Award in favour of the Miculas, did not constitute "*a court or a tribunal of a Member State*" and that therefore the Award could not be subject to any substantial review by a court or tribunal of an EU Member State.

The CJEU hence found that the arbitral clause contained in the Romania-Sweden BIT, in so far as it formed the basis of the Award referred in the 2015 Decision, jeopardised the preservation of the proper character of EU law and breached the principles of loyal cooperation and autonomy of EU law. Consequently, the CJEU held that the Award was incompatible with EU law, could not produce any effects, and could not be enforced.

The full Order is available here in French.

New Cooperation Agreement Among Benelux Arbitration Institutions for Promotion of Arbitration and Alternative Dispute Resolution

On 8 September 2022, the Belgian Centre for Arbitration and Mediation (***CEPANI***), the Netherlands Arbitration Institute (***NAI***), the Dutch Arbitration Association (***DAA***), the Chamber of Commerce of the Grand Duchy of Luxembourg, and the Luxembourg Arbitration Association (***LAA***) (together, the ***Institutions***) concluded a cooperation agreement (the ***Agreement***) establishing a Benelux Arbitration and ADR Group (the ***Group***).

While the Agreement provides that the Institutions will retain their full independence and autonomy, it aims to promote and strengthen arbitration and alternative dispute resolution (***ADR***) mechanisms jointly within and outside the Benelux area. It also tries to boost the visibility of the Institutions on the international arbitration and ADR scenes.

The Agreement is structured around three topics:

- **Joint promotion of arbitration and ADR mechanisms**. The Agreement encourages the Institutions to cooperate in the advancement of arbitration and ADR as means of resolving disputes arising out of domestic and international commercial transactions. In particular, the Agreement provides that the Institutions will use their best efforts to hold a joint colloquium on an arbitration or ADR-related topic every two years. In addition, while nothing should prevent the Institutions from organising or joining an event on their own, they will also consider organising joint events.

- **Cooperation**. The Agreement will require the Institutions to (i) exchange information and publications on arbitration and ADR mechanisms (including sending a copy of all books they publish to the other Institutions); (ii) facilitate lectures of mutual interest on arbitration

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and ADR mechanisms; (iii) recommend to each other suitable individuals to serve as arbitrators or neutral individuals in particular cases; (iv) exchange information regarding conferences and transcription services; (v) inform the other Institutions of their public events and invite them to these events; and (vi) promote mutual visits of their respective bodies.

- **Functioning**. The Group will have a Steering Committee, composed of delegates of the Institutions and presided over by a chair appointed for a two-year term. The Steering Committee will meet at least once a year, successively in each Benelux country.

The Group plans to organise its first conference in Luxembourg on 20 April 2023. It also intends to "explore the possibility" of a uniform arbitration act for international arbitrations seated in the Benelux.

The Agreement will replace the Belgium-Netherlands Arbitration Protocol (*Belgisch – Nederlands Arbitrage Protocol / Protocole d'arbitrage belgo-néerlandais*) which was concluded in 1990 by the CEPANI and NAI.

The full Agreement is available here.

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