October 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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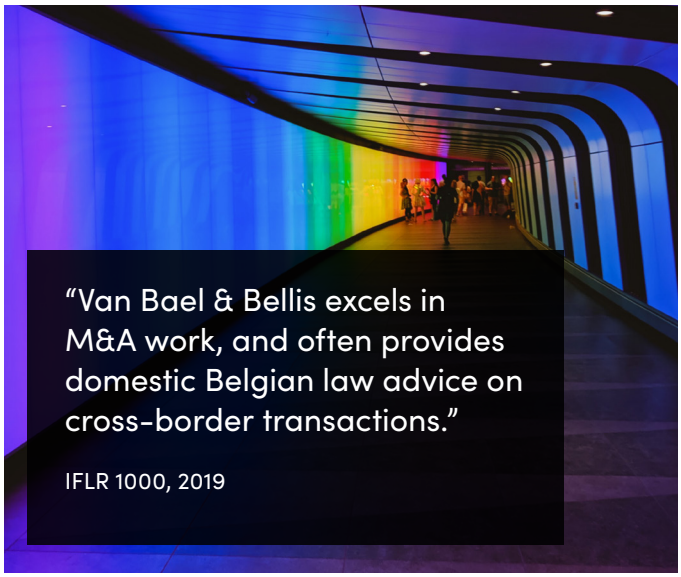




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# COMPETITION LAW

***Court of Appeal of Antwerp Seeks Guidance from Court of Justice of European Union Regarding Ban on Active Sales in Distribution Agreements***

On 13 September 2023, the Court of Appeal of Antwerp (*Hof van Beroep Antwerpen / Cour d'appel d'Anvers* – the ***Court of Appeal***) decided to stay the proceedings in the case pitting cheese distributor Beevers Kaas against supermarket chains Albert Heijn and Delhaize – both owned by Ahold Delhaize – to refer preliminary questions to the Court of Justice of the European Union (the ***CJEU***). The Court of Appeal seeks to clarify whether an exclusive distribution agreement protecting the buyer from active sales by other buyers into its exclusively allocated territory is compatible with the competition rules in circumstances in which the second category of buyers did not explicitly agree to a limitation of their active sales into the territory of the first buyer.

*Context*

The dispute relates to the exclusive distribution agreement which the Dutch Beemster cheese producer Cono and its exclusive distributor for Belgium and Luxembourg, Beevers Kaas, concluded in 1993. Beevers Kaas claimed that its exclusive distribution rights entailed a ban on the active sale of Beemster cheese in its exclusive territory by other parties buying Beemster cheese from Cono and accused Ahold Delhaize, which had started actively selling Beemster cheese in Belgium, of engaging in unfair trade practices contrary to Article VI.104 of the Belgian Code of Economic Law (*Wetboek van Economisch recht / Code de droit économique* – ***CEL***). Conversely, Ahold Delhaize contended that the exclusive distribution agreement did not require Cono to protect Beevers Kaas from active sales into the latter's exclusive territory.

The President of the Antwerp Commercial Court (*Voorzitter van de Ondernemingsrechtbank Antwerpen* – the ***President***) dismissed Beevers Kaas' claim, observing that the agreement only prevented Cono from selling Beemster cheese to Belgian producers. The President added that Beevers Kaas' view that all undertakings, wherever established, must comply with the exclusive agreement which it concluded with Cono and refrain from selling Beemster cheese in Belgium "would lead to a conflict with competition law", which is a matter of public policy.

*Procedure before Court of Appeal and Amicus Curiae Opinion of Belgian Competition Authority*

Beevers Kaas appealed the judgment to the Court of Appeal. In an interlocutory judgment of 27 April 2022, the Court of Appeal confirmed that Beevers Kaas has the exclusive right to sell cheese; that the Beemster exclusive agreement concluded between Cono and Beevers Kaas was intended to protect the latter against active sales in Belgium and Luxembourg; and that Cono had applied the prohibition of active sales in Belgium and Luxembourg to its other customers.

However, the Court of Appeal decided to stay the proceedings to seek the amicus curiae opinion of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) on the compatibility of this agreement with the competition rules. The Court of Appeal sought guidance regarding Article 4 (b)(i) of EU Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. The BCA interpreted this provision as subjecting the validity of restrictions on active sales to three cumulative conditions:

1. the supplier has appointed an exclusive distributor for a given territory (or customer base);

2. the sales of the customers of the distributor on whom the active sales restriction has been imposed are not hindered; and

3. the exclusive distributor must be protected by the supplier against active sales into its territory (or to its customers) by the supplier's other buyers in the European Economic Area (the so-called "parallel imposition" condition).

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(The dispute focused on how to determine whether this third condition was satisfied. The BCA found that the parallel imposition condition requires an explicit or implicit agreement of the other buyers, which can be expressly provided for in their contract with the supplier or can be inferred from their behaviour. The BCA added that, except for Albert Heijn, all of Cono's customers comply with the prohibition of active sales into Beevers Kaas' exclusive territory. Cono and Beevers Kaas considered the parallel imposition condition to be fulfilled, which Ahold Delhaize argued was not the case.

*Questions Referred to CJEU*

The Court of Appeal decided to refer two questions to the CJEU, both regarding the parallel imposition condition. First, the Court of Appeal asked the CJEU whether the parallel imposition condition can be regarded as satisfied solely based on the finding that the other buyers do not actively sell into the territory. Second, the Court of Appeal also inquired whether the parallel imposition condition can be regarded as satisfied if the supplier obtains the consent of its other buyers not to sell in the exclusively allocated territory only if and when the latter manifest their intention to sell into that territory, or, conversely, whether the competition rules require that the supplier obtain the consent of all other buyers not to actively sell into the exclusively allocated territory, irrespective of their intention to do so.

***Federal Council of Ministers Takes Institutional Decision and Adopts Draft Bill Modifying Competition Rules***

On Friday 13 October 2023, the Council of Ministers of the Belgian federal government took the following decisions:

- It appointed two new members to the competition college of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – ***BCA***): Caroline Cauffman and Luc Gyselen. Significantly, the federal government has still not managed to resolve a long-standing stalemate and designate a new President of the BCA (and President of the competition college) as the successor to Jacques Steenbergen who resigned his post in early 2023.

- It approved a draft bill that will bring several changes to the statutory provisions governing competition. The draft bill will now be reviewed by the Council of State. It remains to be seen whether it will still be submitted to and approved by the federal parliament before that body's dissolution at the end of April 2024 ahead of next year's federal elections. The draft bill tackles a variety of subjects:

    - It implements the Digital Markets Act (***DMA***) (Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector). The DMA has already become applicable on 2 May 2023.

    - It effects several procedural changes.

    - It expands the BCA's management board by adding a fifth member in charge of planning and budget.

    - It will exempt merging hospitals from the requirement to obtain competition clearance under the Belgian merger control rules.

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***Belgian Competition Authority Examines Agreements Aimed at Pooling Roll-out of Fiber Optic Networks***

On 16 October 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – ***BCA***) announced in a press release that it would examine agreements between telecommunications operators for pooling the roll-out of fiber optic networks. The BCA will carry out its supervisory work together with the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications* – ***BIPT***).

The BCA referred to the BIPT's communication of 10 October 2023 on cooperation agreements to roll-out FTTH ("fiber-to-the-home") networks. In this communication, the BIPT discussed the following conditions which a cooperation agreement should satisfy to "ensure effective and sustainable competition for the benefit of end-users":

- access to the rolled-out infrastructure for all operators under transparent and non-discriminatory conditions, including wholesale tariffs allowing for effective competition;
- a roll-out at least as fast and as extensive as what operators would have planned absent the cooperation;
- any exchange of information should be limited to what is strictly necessary for purposes of the cooperation.

The BCA considers the roll-out of high-performance fiber networks "essential for the future of our economy and society as a whole" and refers to its investigation of last year into potential anticompetitive practices in relation to the roll-out of fiber optic networks in Flanders (*See*, this Newsletter, Volume 2022, No. 6), which was closed earlier this year further to the commitments offered by Telenet and Fluvius (*See*, this Newsletter, Volume 2023, No. 4).

The press release of the BCA can be found here.

***Belgian Competition Authority Publishes Analytical Framework for Examination of Hospital Mergers***

On 18 October 2023, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) published its analytical framework for the examination of hospital mergers. This framework seeks to answer several questions pertaining both to the characteristics of the hospitals concerned and to the proposed transaction. Subjects covered include the type of care provided by the hospitals; the geographical origin of the patients and the presence of other hospitals in the area; the main reasons for the proposed transaction; the impact of the proposed transaction on the key performance indicators of the hospitals concerned, on the range and quality of the care which they offer, on revenues and operating costs, on recruitment and employment conditions, on organisation of care and care units across sites, on "unregulated rates/charges" (fee surcharges); and whether the proposed transaction entails a significant risk of delay in consultation, hospitalisation and/or travel times for patients. The BCA makes clear that, while this framework is applied systematically, the extent of the BCA's examination will depend on the particularities of each proposed merger.

The BCA's stated aim is "to ensure that the entities resulting from such operations will continue to have the incentives to provide quality care at affordable conditions, in the interests of society and the sustainability of the social security system".

The publication of the BCA's methodology follows a note of 14 July 2023, in which the BCA confirmed its competence to review mergers and acquisitions between hospitals under the Belgian merger control regime (*See*, this Newsletter, Volume 2023, No. 7). This note was issued in response to a Law of 29 March 2021 that excluded the constitution of local hospital networks from the scope of the Belgian merger control regime (*See*, this Newsletter, Volume 2021, No. 2). The 2021 Law itself was adopted following an earlier note from the BCA, which announced on 22 July 2020 that the creation of local hospital networks may fall under the scope of the Belgian merger control rules (*See*, this Newsletter, Volume 2020, No. 7).

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It looks as if the BCA will end up losing its powers to review hospital mergers: on 13 October 2023, the federal Council of Ministers adopted a draft bill that will change the competition rules in several respects. Pursuant to one such change, the hospital sector will be excluded entirely from the scope of the BCA's merger review powers.

The press release describing the BCA's analytical framework can be found here.

***Belgian Competition Authority Imposes Low Fine on Pharmaceutical Wholesaler for "Transfer Order" Practices in First Hybrid Settlement Case in Belgium***

On 23 October 2023, the Competition College (*Mededingingscollege / Collège de la Concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) imposed a fine of EUR 778,777 on pharmaceutical wholesaler CERP for participating in a cartel concerning the service of transfer orders (***TOs***). TOs involve orders placed directly by pharmacists with medicine suppliers, but the actual sales and logistical operations are carried out by the wholesalers.

*Hybrid Settlement*

This decision was adopted as part of the first hybrid settlement case in Belgium, *i.e.*, the first Belgian competition case in which only some of the prosecuted companies decided to settle. Last year, wholesalers Febelco and then McKesson-owned Pharma Belgium-Belmedis, which had been prosecuted alongside CERP, settled the case. They acknowledged their participation in two infringements. The first one was an agreement on the prices and services that are part of the TO system. The second infringement involved an agreement regarding the application of uniform conditions for the yearly sale of influenza vaccines to pharmacists. Febelco was granted immunity because it had revealed the case to the BCA but Pharma Belgium-Belmedis agreed to pay a sizeable settlement fine of EUR 29.8 million (*See*, this Newsletter, Volume 2022, No. 2).

*Infringement by Object*

A focal point of this case was the notion of "infringement by object". The Competition College of the BCA found that the TO system has positive features and that its advantages "are obtained when all wholesalers participate in the system". Despite these findings, the Competition College still took issue with the creation of such a system, which entailed an agreement on the conditions of the service and on the profit margins applied by the wholesalers, and labelled it as an infringement by object.

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*Fine*

The fine imposed on CERP is very low – less than 5% of the fine which the chief prosecutor had sought against CERP. This is due to several reasons. First, the Competition College found that the alleged collusion regarding the yearly sale of influenza vaccines to pharmacists, of which CERP had also been accused, was time-barred. Second, the Competition College disagreed with the calculation of the proposed fine made by the chief prosecutor. While the chief prosecutor had taken as a reference the sales of pharmaceutical products by suppliers to pharmacists, CERP successfully argued that these sales should be excluded since CERP does not determine the price of the products sold by suppliers to pharmacists and delivered through the TO system. Lastly, the Competition College applied a further reduction of the fine for fairness reasons.

***Belgian Competition Authority Dismisses Wide-Ranging Complaint in Vehicle Insurance and Repair Sectors***

On 27 October 2023, the prosecution service (*Auditoraat / Auditorat*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) dismissed the complaint lodged by the non-profit organisation ASBL Carrossiers Réunis against all Belgian motor insurance companies active in motor insurance, three professional associations (Assuralia, Brocom and ACAM-VMVM), and Informex, which provides a platform helping insurance companies and experts to manage vehicle appraisal processes.

Carrossiers réunis had alleged that four agreements among these parties were contrary to Article IV.1 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* – the ***CEL***) and Article 101 TFEU. It also targeted two alleged abuses of dominance contrary to Article IV.2 CEL and Article 102 TFEU.

*Alleged Anticompetitive Agreements*

First, Carrossiers Réunis claimed that the appraisal contracts concluded between insurance companies and experts regarding insured car repairs are anti-competitive because the insurance companies (i) required that the expert reports be delivered via Informex software; and (ii) set up control and sanction mechanisms against experts who authorised repairs for amounts considered excessive by the insurers.

However, the BCA found that the clauses at issue were not likely to restrict competition. Experts entrusted with an appraisal task were free to modify the data of the calculation tool integrated into the Informex platform and could therefore carry out their mission impartially. The BCA added that the investigation did not "establish that the pressure exerted by the insurance companies was coordinated and had the effect of significantly restricting the experts' independence". Finally, the BCA observed that the termination of contracts due to the experts' failure to achieve their objectives was very rare.

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Second, Carrossiers Réunis alleged that the approval contracts concluded between insurers and authorised repairers restricted competition by (i) excluding independent repairers from the market; (ii) discriminating between repairers; and (iii) fixing prices.

Again, the BCA found that this was not the case. Independent repairers were not excluded from the market: more than 87% of repairers had concluded at least one approval contract and the approval criteria did not constitute insurmountable constraints. Additionally, insured repairs represented only 50% of total repairs and policyholders remained free to choose their repairer. Moreover, the BCA found no discriminatory treatment, be it between unauthorised and authorised repairers or between authorised repairers. Lastly, the price fixing alleged by Carrossiers Réunis referred to a contractual clause used by three insurers only, pursuant to which authorised repairers were prevented from attracting the company's customers or brokers through commission and/or rebates. The BCA found this clause to pursue a legitimate objective.

Third, Carrossiers Réunis contended that insurance companies exchanged sensitive information with the help of Informex. However, the BCA examined the statistical information available via Informex's optional tool, EBIS, and did not find any exchange of sensitive information.

Fourth, Carrossiers Réunis suspected horizontal collusion between insurance companies. This allegation, based on the "similarity of approval contracts and commercial strategies deployed by insurers", was readily dismissed. On the contrary, the BCA found that differences in the contracts concluded by insurance companies were "substantial".

*Alleged Abuse of Dominant Position*

Carrossiers Réunis also argued that Informex abused its dominant position in two ways: (i) by charging excessive prices; and (ii) by encoding erroneous information which benefits the insurance companies and thus strengthens its position, thereby excluding its competitors from the market.

While the BCA confirmed that Informex enjoyed a dominant position on the market for calculation software used to assess damage to vehicles, it rejected the two allegations of abuse.

Regarding the allegation of excessive pricing, the BCA observed that only a price that is "manifestly" too high can be abusive, which was not established as regards Informex's tariffs during the period 2014-2018. The BCA added that the tariffs applied by Informex from 2019 onwards are still under investigation in a different procedure.

Concerning the allegation that Informex provided erroneous information, the BCA found that Informex did not alter the "work units" data supplied by the manufacturers and that the price of spare parts featuring on its platform was that of original equipment manufacturers (OEM), based on importers' rates. Lastly, hourly rates for the repair work were communicated to Informex by the insurance companies.

# CONSUMER LAW

***Court of Justice of European Union Limits Consumer's Right of Withdrawal Following Free Trial Period and Automatic Renewal of Distance Contract***

On 5 October 2023, the Court of Justice of the European Union (***CJEU***) held that the consumer's right to withdraw from a distance contract can be guaranteed only once, even if the contract features an initial free trial period which subsequently converts into a paid contract and is automatically extended unless terminated (CJEU, 5 October 2023, *Sofatutor,* ECLI:EU:C:2023:735).

*Background*

The case at hand revolved around Sofatutor GmbH (***Sofatutor***), a company that operates online learning platforms for students. Its general terms and conditions stipulate that, when a consumer uses the platform for the first time, Sofatutor allows for the platform to be tested free of charge for 30 days, during which the subscription can be terminated at any time. After the initial 30-day trial period, the subscription becomes payable and is automatically renewed for a fixed term.

The Austrian consumer protection organisation, Verein für Konsumenteninformation (***VKI***), brought an action against Sofatutor before the Commercial Court of Vienna, Austria, arguing that such a practice infringes the consumer's right of withdrawal, as set forth by Article 9(1) of Directive 2011/83/EU of 25 October 2011 on consumer rights (***CRD***). VKI specified that the right of withdrawal should not only apply when the consumer enters into the 30-day free trial subscription but also when the trial period is converted into a standard subscription and the subscription is renewed.

The Vienna Commercial Court ruled in favour of VKI, after which Sofatutor lodged an appeal before the Higher Regional Court of Vienna which, in turn, dismissed VKI's action. VKI then brought a further appeal on a point of law before the Austrian Supreme Court (the ***referring court***).

The referring court requested the CJEU to clarify whether Article 9(1) CRD grants consumers a new right of withdrawal when a distance contract is automatically extended.

*Judgment of CJEU*

In its judgment, the CJEU answered in the negative. It held that, if all essential and relevant terms and conditions of the distance contract were communicated to the consumer in a clear, comprehensible, and explicit manner at the time of conclusion of the contract, the right of withdrawal from the contract can be guaranteed only once, even if there is an initial free trial period. Given that the consumer can make an informed decision regarding the entire distance contract at that moment, a new right of withdrawal after the free trial period cannot be justified. This is because the contractual terms brought to the attention of the consumer do not change at the end of the free trial period.

Conversely, when a consumer was not informed in a clear, comprehensible, and explicit manner at the time of the subscription that, after that initial free trial period, payment will be required for the performance of services, he or she must benefit from a new right of withdrawal following the free trial period.

The judgment can be consulted here.

# CORPORATE LAW

***Royal Decree Establishing Checklist Relating to Reorganisation Plans for SMEs Published in Belgian Official Journal***

On 4 October 2023, the Royal Decree of 24 September 2023 establishing a checklist relating to reorganisation plans for SME's was published in the Belgian Official Journal (*Koninklijk Besluit van 24 september 2023 tot vaststelling van een checklist voor reorganisatieplan van kleine en middelgrote ondernemingen / Arrêté royal du 24 septembre 2023 établissant une liste de contrôle relative au plan de réorganisation des petites et moyennes entreprises* - the ***Royal Decree***).

The checklist was prepared to implement Article XX.70/1 of the new Book XX of the Code of Economic Law (***CEL***), which contains the information list that reorganisation plans must include in the context of the judicial reorganisation procedure through collective agreement (***Collective Agreement Procedure***) applicable to small and medium-sized enterprises (***SMEs***).

Book XX of the CEL now provides for two different Collective Agreement Procedure regimes, namely for large firms and SMEs. However, SMEs may choose to be made subject to the regime that applies to large firms. The main differences between these two regimes are the classification and the voting per class of creditors for large entities.

Moreover, Book XX requires that reorganisation plans should include a number of mandatory references that are different for each regime. However, a checklist relating to reorganisation plans for large firms has not yet been published.

The Royal Decree is available here.

# DATA PROTECTION

### *Belgian Data Protection Authority Publishes Cookie Checklist*

On 20 October 2023, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* - the ***DPA***) published a checklist (the ***Checklist***) concerning the use of cookies and other similar technologies (*i.e.*, phone app trackers, pixels, fingerprinting, local storage). The Checklist is supported by further materials and a list of Frequently Asked Questions regarding the lawful use of cookies (link and link).

The Checklist confirms that only strictly necessary cookies are exempt from the requirement to ask for consent, while all other categories of cookies can only be placed and read with prior consent. Such consent should (i) be unbiased, which means that the use of cookie walls or 'deceptive designs' are forbidden; (ii) be specific and informed, which means that notices to users should be transparent and contain all mandatory information, including the disclosure of the complete list of cookies in use; and (iii) be proactive, unambiguous, and easy to withdraw. Consent cannot be pre-filled, tied to specific forms of behaviour, or included in general terms and conditions of use.

Finally, controllers are obligated to implement proper cookie policies and retention periods. Visitor cookies should only be retained for a limited and reasonable period which, as a rule, the DPA considers amounts to six months. Controllers must maintain an audit trail of their cookie policies, including dates and version numbers.

The Checklist was published in the context of the European Data Protection Board (***EDPB***) report of the work undertaken by the Cookie Banner Taskforce (*see*, here) and the EDPB Guidelines 03/2022 on deceptive design patterns in social media platform interfaces (*see*, here).

The checklist is available in Dutch and in French.

### *Constitutional Court Partially Annuls Belgian Passenger Name Record Law*

On 12 October 2023, the Belgian Constitutional Court (*Grondwettelijk Hof / Cour Constitutionnelle* - the ***Court***) delivered a judgment (the ***Judgment***) which partially annulled the Law of 25 December 2016 concerning the treatment of passenger information (*Wet van 25 december 2016 betreffende de verwerking van passagiersgegevens / Loi du 25 décembre 2016 relative au traitement des données des passagers* - the ***Law***), transposing in Belgian law Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (the ***PNR Directive***).

*Background*

In 2017, the non-profit organisation "Ligue des droits humains" (the ***Applicant***) brought an action for annulment of the Law on the grounds that it infringes the right to privacy and the protection of personal data in breach of Article 22 of the Constitution (protection of privacy and private life) and Articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter of Fundamental Rights of the European Union (the ***Charter***). The Court upheld several challenged provisions in its judgment No. 135/2019 but referred ten questions to the Court of Justice of the European Union (***CJEU***) for a preliminary ruling.

In its judgment of 21 June 2022 (C-817/19), the CJEU validated the principle of the Passenger Name Record (***PNR***) – a system of collecting and processing passengers' data – insofar as the system seeks to fight terrorism and serious crime. It also expressed conditions of interpretation to ensure the conformity of the PNR Directive with the Charter.

In the Judgment, the Court examined the applicant's remaining criticisms which it had not examined in judgment No. 135/2019 in the light of the CJEU's answers to its questions. As a result, the Court (i) annulled specific provisions; and (ii) held that other provisions required a restrictive interpretation.

# DATA PROTECTION

*Annulled Provisions*

First, the Court annulled Article 8, § 1er, 4° of the Law which permitted the processing of PNR Data for monitoring tasks generally performed by intelligence and security services. Although the Court conceded that intelligence and security services "*generally participate in national and international security*", it considered that this provision was "too vague" and was not limited to what is necessary for the purpose of fighting terrorism and serious crime.

Second, the Court also annulled Article 27 of the Law as it does not require the Belgian Passenger Information Unit (***BelPIU***), the Belgian authority in charge of collecting PNR data, to ask for an ex-ante control by another independent authority or jurisdiction, before communicating that data to law enforcement authorities. The Court therefore held that the provision must be annulled insofar as it does not designate the independent body responsible for prior control. However, the Court held that, pending the designation of this independent body by the legislator, the Belgian Data Protection Authority would have the power to perform this function and Article 27 would continue to be applied accordingly.

*Provisions Subject to Restrictive Interpretation*

First, the Court ruled that cross-checks between PNR data and other databases (and the processing of PNR Data by BelPIU) should only be permitted on a non-discriminatory and strict necessity basis.

Second, the Court considered that AI-powered and automated PNR Data processing without human intervention would not be compatible with the Law. The definition of criteria used for passenger profiling based on PNR Data should be objective and non-discriminatory. Furthermore, application of these criteria should specifically target individuals in respect of whom there may be reasonable suspicion of involvement in terrorist offences or serious crime.

Third, the Court held that re-examining to avoid false positives in detecting suspicious individuals should be done pursuant to clear and precise rules ensuring a consistent administrative practice by BelPIU, in the most efficient and in a non-discriminatory manner. BelPIU's methodology should therefore allow to control whether and to what extent an individual matching the screening criteria actually is an individual who is likely to be involved in terrorist offences or serious crime.

Fourth, the Court gave a restrictive interpretation to Article 18 of the Law which defines the retention period of PNR data as five years maximum. The Court explained that, since this period is a maximum, it should only concern PNR Data of people who have been identified by the profiling system as being potentially linked to terrorism or serious crime. Other PNR Data should be deleted after six months.

The full judgment is available in Dutch and in French. An English press release can be retrieved here.

# FOREIGN DIRECT INVESTMENT

***European Commission Publishes Third Annual Report on Foreign Direct Investment Screening***

On 19 October 2023, the European Commission (the ***Commission***) published its third Annual Report (the ***Report***) on the screening of foreign direct investments (***FDI***) into the European Union (the ***EU***). The Report offers data on 2022 FDI trends in the EU, as well as the treatment of FDI under national FDI screening mechanisms of the Member States. In addition, the Report provides an update of the status of national FDI screening mechanisms in the different Member States. For example, the Report noted that the legislative framework for the Belgian FDI screening mechanism was adopted in 2023 (*See*, this Newsletter, Volume 2023, No. 1 and this Newsletter, Volume 2023, No. 4) and that the mechanism entered into force on 1 July 2023 (*See*, this Newsletter, Volume 2023, No. 5).

The main takeaways from the Report are as follows:

- *More FDI screening* – More FDI (55% out of all the authorisation requests and *ex officio* cases) is subject to formal screening. Conversely, 45% of the applications did not require formal screening. This corresponds to local experience in specific Member States in which approximately half of notified FDI was notified unnecessarily.

- *More FDI screening Member States* – Out of 27 Member States, Bulgaria was the only Member State that has not yet adopted a FDI screening mechanism. However, even Bulgaria has now made significant progress.

- *Screened sectors* – Most FDI subject to phase 1 screening were in manufacturing, ICT, professional services (e.g. law, accounting, consultancy, and engineering), wholesale and retail. FDI in manufacturing (including energy, aerospace, defence, semiconductors and health) and ICT accounted for most phase 2 screenings (59% and 23% respectively).

- *EU's openness to FDI* – The majority (86%) of screened FDI was cleared without conditions. Only 9% of screened FDI was cleared with conditions (down from 23% in 2021). 1% of screening procedures resulted in negative decisions, while 4% resulted in the investor withdrawing the investment. The EU cooperation mechanism is also reported not to have a significant delaying impact on notification procedures.

- *Next steps* – The Commission is working on a revision of EU Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (the ***FDI Regulation***) and organised a public consultation on the subject over the Summer. It is expected that the Commission will propose a new version of the FDI Regulation by the end of 2023 or the beginning of 2024. The new rules will reportedly focus on (i) closing the missing links in the EU FDI screening chain; (ii) requiring a minimum strength in the links of the chain; and (iii) ensuring that the links effectively interlink.

The full Report can be consulted here.

# INTELLECTUAL PROPERTY

***Court of Justice of European Union Holds Criminal Sanctions for Infringements of Intellectual Property Rights To Be Disproportionate***

On 19 October 2023, the Court of Justice of the European Union (***CJEU***) delivered a judgment in case C-655/21, G. ST. T., answering questions for a preliminary ruling raised by Bulgaria's District Court of Nesebar (***Bulgarian Court***). The questions concerned the enforcement of intellectual property rights and, in particular, the lawfulness of imposing criminal sanctions on trade mark infringers.

*Background*

G. ST. T. is a Bulgarian sole trader selling counterfeit clothing. In 2016, the company was charged by the Bulgarian Public Prosecutor with an aggravated trade mark infringement under threat of imprisonment of five years and a fine of BGN 5,000. According to the Bulgarian Criminal Code (***BCC***), offering counterfeit clothing for sale can be punished with imprisonment for a term not exceeding five years and a fine not exceeding BGN 5,000 or, if there are aggravating circumstances because of repetition and significantly harmful effects, five to eight years of imprisonment and a fine of BGN 5,000 to BGN 8,000. The harm is evaluated based on the retail price of original products, following the settled Bulgarian case law.

As the Bulgarian Court considered these sanctions to be too severe, it decided to stay the proceedings and refer four questions to the CJEU asking whether the criminal sanctions under Bulgarian law are in line with EU law, including the principle of legality of criminal offences as set out in Article 49 of the Charter of Fundamental Rights of the European Union (the ***Charter***).

*CJEU Judgment*

The CJEU held that even though Directive 2004/48/EC on enforcement of intellectual property rights does not cover criminal enforcement, Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the ***TRIPS Agreement***), which binds both the EU and its Member States, allows Member States to determine criminal sanctions. Nevertheless, under the principle of proportionality enshrined in Article 49(3) of the Charter, these must be proportionate to the offences.

The CJEU observed that the use of the term "using a trade mark" is broad and does not offer the possibility to consider nuances between the different acts. It is not guaranteed that the competent authorities are able to ensure in each individual case, in accordance with the obligation under Article 49(3) of the Charter, that the severity of the penalties imposed does not exceed the seriousness of the offence identified. In light of the difficulty in the Bulgarian system to reduce penalties or suspend sentences, the imposition of such high penalties might be disproportionate. Therefore, the Court concluded that the Bulgarian law which in specific cases provides for a minimum sentence of five years infringes Article 49(3) of the Charter and the principle of proportionality.

As the CJEU pointed out, the blanket minimum five-year imprisonment is not proportional to the offence in many cases, especially as the scope of this provision is very broad. The proportionality principle requires authorities to take into consideration the individual circumstances of a case.

# INTELLECTUAL PROPERTY

***New Regulation on Geographical Indications for Craft and Industrial Products Published***

On 27 October 2023, Regulation 2023/241 of 18 October 2023 on the protection of geographical indications for craft and industrial products (the ***Regulation***) was published in the Official Journal of the European Union. The Regulation offers protection to geographical indications (***GIs***) for products such as Boleslawiec pottery, Donegal tweed, Murano glass, Porcelaine de Limoges and Solingen cutlery.

Until now, EU law had focused on the protection of geographical indications in the agricultural domain. By contrast, pursuant to the Regulation, protection will be afforded to a large variety of craft and industrial products, such as natural stones, woodwork, jewellery, textiles, lace, cutlery, glass, porcelain, and hides and skins. This will improve awareness in relation to the authenticity of products as well as strengthen and modernise the enforcement of GI rights.

The Regulation also aims to ensure that producers can fully benefit from the international framework for the registration and protection of GIs. In November 2019, the EU acceded to the Geneva Act of the Lisbon Agreement on Appellations of Origins and Geographical Indications, a treaty administered by the World Intellectual Property Organization. The Regulation allows EU producers of GI products to claim protection under the Geneva Act and EU producers can now benefit from the protection granted by EU trade agreements.

This new uniform scheme sets up centralised Union-wide authorisation, coordination, and supervision arrangements. It will be administrated by the European Union Intellectual Property Office (***EUIPO***) at EU level and by Member State public authorities. To ensure the same level of protection across the EU, the EUIPO will be the competent authority for the administration of the Geneva Act in the territory of the Union as regards geographical denominations of industrial and craft products.

The Regulation will start to apply on 1 December 2025 (with a few provisions relating to the implementation of the new system applying as from 16 November 2023).

***European Union Intellectual Property Office and European Patent Office Publish Study on Relationship between Intellectual Property Rights and Startup Success in Securing Funding***

On 17 October 2023, the European Union Intellectual Property Office (***EUIPO***) and the European Patent Office (***EPO***) jointly published a study that analyses the relationship between intellectual property rights and the access to finance by European startups (the ***Study***). The main goal of the Study was to examine whether there is a link between the filing of patent and trade mark applications by startup firms and their access to finance as well as successful exit strategies. For that purpose, the Study combined data on patent and trade mark applications with data on startup financing, both at an early stage and in later funding stages.

The Study's main findings are as follows:

- On average 29% of European startups filed for IP rights. Belgium reflects this average, as approximately 28% of startups in Belgium file for some form of IP protection. Startups in Finland and France are most likely to file for IP rights. In both countries 42% of startups file for IP rights.

- By far the most IP intensive sector is biotechnology in which almost 50% of startups rely on patents and trade mark rights.

- Startups that filed for both trade mark and patent applications in the seed or early growth stage are more likely to receive funding. Specifically, a startup that pursued trademark registration alone is 4.3 times more likely to attract investment, while a firm that focused solely on patent applications enjoys a 6.4 times higher probability of receiving funding.

- As regards the relationship between trade mark/patent applications and the likelihood of successful exit for investors, the Study found that startups that register IP rights are also more likely to reward the early investors through a successful exit via an IPO or a sale to another company. Startups which apply for both patents and trade marks have the best chance of success.

# INTELLECTUAL PROPERTY

The Study reveals how registering IP rights helps startups to raise finance. The chances of securing seed funding and achieving a successful exit increase even further for startups that pursue European-level intellectual property rights and for those that combine both patent and trademark applications.

The Study is available here.

# LITIGATION

***According to Supreme Court, Provisions Governing Appeal of Bankruptcy Judgments Are Lex Specialis***

On 28 September 2023, the Belgian Supreme Court (*Hof van Cassatie / Cour de cassation* - the ***Supreme Court***) confirmed that the lex specialis applicable to the time period to appeal from bankruptcy judgments, as laid down in Article XX.108, §3 of the Code of Economic Law (the ***CEL***) prevails over lex generalis. Accordingly, an appeal against a bankruptcy judgment must be lodged within two weeks following the publication of the judgment in the Belgian Official Journal (the ***OJ***).

*Background*

The claimant, a holding company, was declared bankrupt in a default judgment dated 8 March 2021 delivered by the Enterprise Court of Ghent. On 19 March 2021, the claimant lodged an opposition, which was declared unfounded on 1 July 2021 (the ***opposition judgment***). The opposition judgment was notified to the claimant on 16 August 2021 and only published in the OJ on 13 December 2021.

On 27 December 2021, the claimant lodged an appeal against the opposition judgment before the Court of Appeal of Ghent. On 5 September 2022, that court ruled that the appeal was late and inadmissible because the time limit for lodging an appeal is one month after the notification of the opposition judgment, as generally applicable pursuant to Article 1051 of the Judicial Code (the ***appeal judgment***). According to the Court of Appeal, the appeal should have been lodged by 16 September 2021.

*Supreme Court Judgment*

The claimant then filed a further appeal to the Supreme Court. The claimant argued that the Court of Appeal of Ghent erred in law and should have considered the appeal period laid down in Article XX.108, §3, 4th indent, CEL, which is applicable as *lex specialis* to bankruptcy judgments, instead of the general period for appeal of Article 1051, Judicial Code.

The Supreme Court confirmed that Article XX.108, §3, 4th indent of the CEL is the apposite provision and that the appeal period should not have started following the notification of the bankruptcy judgment but only after its publication in the Official Journal. As a result, the Supreme Court annulled the appeal judgment and referred the case to the Court of Appeal of Antwerp.

The full judgment is available here (in Dutch only).

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