November 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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COMPETITION LAW

Federal Parliament Publishes Proposal to Merge Market Regulators into Single Entity

On 25 November 2022, four members of the federal Chamber of Representatives submitted a draft Resolution to merge three federal regulators, including the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***), into a single entity (Voorstel van Resolutie betreffende een fusie van *marktregulatoren voor een betere marktwerking / Proposition de Résolution relative à une fusion des régulateurs du marché en vue d'améliorer le fonctionnement du marché* – the ***Proposal***).

The Proposal focuses on the following regulators:

- the BCA, which prosecutes companies having engaged in anti-competitive agreements and practices, reviews mergers, acquisitions and "full function" joint ventures that exceed specific turnover thresholds and, since August 2020, prosecutes companies having abused a situation of economic dependency;

- the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications* - the ***BIPT***), which regulates and oversees the telecommunications and postal sectors; and

- the Commission for Electricity and Gas Regulation (*Commissie voor de Regulering van de Elektriciteit en het Gas / Commission de Régulation de l'Électricité et du Gaz* - the ***CREG***), which regulates and oversees the energy markets.

The Proposal rests on the premise that a multiplicity of authorities hinders the exchange of information between regulators that may at times require or possess similar intelligence for carrying out their duties. For instance, sectoral regulators such as the BIPT and the CREG may have information on possible competition law infringements allegedly committed by the companies which they oversee, but only the BCA can use this information to prosecute these companies on basis of the competition rules. According to the authors of the Proposal, merging the BCA, the BIPT and the CREG should increase the effectiveness of market supervision and enforcement by avoiding duplication of work, using human resources more efficiently, and sharing information, expertise and support more effectively. This, in turn, should also lead to cost savings.

The idea to merge these regulators draws inspiration from the regulatory landscape in neighbouring countries. In Germany, there has been a single federal agency for the electricity, gas, telecommunications, post and railway sectors since 2005 (*Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*). In the Netherlands, the Authority for Consumers and Markets (*Autoriteit Consument & Markt* - the ***ACM***) was created in 2013 and applies the competition rules, ensures the protection of consumers and oversees the energy, post, telecommunications and transport sectors. The ACM is the result of a merger between the former Consumer Authority (*Consumentenautoriteit*), the former Dutch Competition Authority (*Nederlandse Mededingingsautoriteit*) and the former Independent Postal and Telecommunications Authority (*Onafhankelijke Post en Telecommunicatie Autoriteit*). This merger supposedly resulted in immediate savings of EUR 7.4 million for the Dutch state.

The authors of the Proposal thus request the Belgian federal government (i) to work towards an increased and improved supervision of market operations by enabling the market regulators to make recommendations to this effect and to intervene if necessary; (ii) to update the cooperation protocols between the market regulators; (iii) to assess and compare the powers of the market regulators to achieve synergies and improve their functioning; and (iv) to draw up a plan to merge the market regulators, at least the BCA, the BIPT and the CREG, into a single body.

The text of the Proposal can be found here.

COMPETITION LAW

Federal Parliament Publishes Report on Belgian Supermarket Prices

On 16 November 2022, the federal Chamber of Representatives (the ***Chamber***) published a report on price increases in supermarkets and differences in prices and margins between Belgium and its neighbouring countries in the retail sector (*Verslag uitgebracht namens de commissie voor economie, consumentenbescherming en digitale agenda over de gestegen supermarktprijzen en de prijs- en margeverschillen tussen België en de buurlanden in de sector van de grote distributie / Rapport fait au nom de la commission de l'économie, de la protection des consommateurs et de l'agenda numérique sur les augmentations de prix dans les supermarchés et les différences de prix et des marges entre la Belgique et les pays voisins dans la grande distribution* – the ***Report***).

This Report offers an account of several hearings on the subject that took place on 4 October 2022. These hearings involved several stakeholders, including representatives of (i) the Federal Public Service Economy, SMEs, Middle Classes and Energy; (ii) the Walloon Federation of Agriculture; (iii) Fevia, the federation of the Belgian food industry; and (iv) Comeos, the Belgian Federation for Commerce and Services.

First, the Report provides information on the recent development of inflation. In the third quarter of 2022, total inflation reached 10.4% in Belgium, while it reached 2.6% in the Netherlands, 8.7% in Germany and 6.7% in France. Energy inflation reached a peak, with an increase of 55.2% in Belgium and 26.1% in France. The difference between Belgium and France in this regard can be explained by the price cap set by the French government in 2021. Energy inflation was significantly higher in the Netherlands, reaching 78.4%. In the food sector, inflation reached 9.2% in Belgium, 10.5% in the Netherlands, 12.2% in Germany and 6.5% in France.

Furthermore, the Report refers to a study of the Pricing Observatory (*Prijzenobservatorium / Observatoire des prix*) entitled "*Comparison of the consumer price level of products in Belgium, Germany, France and the Netherlands*" (the ***2017 Study***). The 2017 Study shows that almost two thirds of the products monitored are more expensive in Belgium than in the neighbouring countries, a situation that has not changed since 2007. Prices are 12.9% higher in Belgium than in the Netherlands for all monitored products (food and non-food). Belgian prices are also 13.4% and 9.1% higher than German prices and French prices respectively.

The 2017 Study outlines several factors explaining these price differences, including (i) the reportedly less favourable purchasing conditions offered by suppliers to Belgian retailers compared to conditions offered in neighbouring countries, (ii) the taxes applicable to food and non-food products in Belgium, (iii) the strategy of one of the main retailers in Belgium to align its prices with those of its competitors, which leads other supermarkets to focus more on quality than on prices, and (iv) the higher degree of regulation applicable in Belgium. Labour costs are also cited by some stakeholders as a factor causing high prices in Belgium.

The Report also discusses the agricultural sector, which is said to be affected more severely by the crisis and which supposedly lacks negotiation power vis-à-vis buyers of agricultural products. Stakeholders referred to the Law of 28 November 2021 on unfair commercial practices in business-to-business relations within the agricultural and food supply chain (*Wet tot omzetting van Richtlijn (EU) 2019/633 van het Europees Parlement en de Raad van 17 april 2019 inzake oneerlijke handelspraktijken in de relaties tussen ondernemingen in de landbouw- en voedselvoorzieningsketen en tot wijziging van het Wetboek van economisch recht /*

COMPETITION LAW

Loi transposant la directive (UE) 2019/633 du Parlement européen et du Conseil du 17 avril 2019 sur les pratiques commerciales déloyales dans les relations interentreprises au sein de la chaîne d'approvisionnement agricole et alimentaire et modifiant le Code de droit économique). The aim of this law is to ensure that small and medium-sized suppliers are better protected against large buyers. If buyers do not observe the rules, food suppliers or producer organisations can complain to the Economic Inspectorate (*Economische Inspectie / Inspection économique*).

Finally, the Report explains that the Pricing Observatory will publish a study on the functioning of the market for all sectors of the Belgian economy and a further study on the evolution of prices in the food chain.

The Report is available here.

Belgian Competition Authority Carries Out Inspections in Press Distribution Sector

On 29 November 2022, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) revealed that it carried out unannounced inspections at the premises of both a company active in the press distribution sector and a press publisher. The BCA believes that these firms may have indulged in anticompetitive arrangements regarding a tender for the delivery of newspapers and magazines from 2023 to 2027. The BCA also suspects them of having exchanged commercially sensitive information on the distribution of newspapers and magazines.

According to press reports, the inspections follow a leniency application of Bpost, the state-controlled postal operator, which is the current distributor of newspapers and magazines pursuant to a previous tender procedure. Bpost and other firms may have engaged in bid rigging for several tenders. The case has given rise to extensive parliamentary discussions and reportedly also prompted a criminal investigation.

The press release of the BCA is available here.

CORPORATE LAW

Federal Parliament Adopts Law of 30 October 2022 Protecting Energy-Intensive Companies against Bankruptcy and Other Coercive Measures

On 30 October 2022, a temporary insolvency law, introducing measures protecting energy-intensive companies, was adopted (*Wet van 30 oktober 2022 houdende tijdelijke ondersteuningsmaatregelen ten gevolge van de energiecrisis/ Loi du 30 octobre 2022 portant des mesures de soutien temporaires suite à la crise de l'énergie* - the ***Law***). The Law introduces a set of protective measures for energy-intensive companies facing financial difficulties, including a temporary moratorium that applies between 3 November 2022 and 31 December 2022 (the ***Temporary Moratorium***).

The Temporary Moratorium only benefits energy-intensive companies in difficulty whose risk of insolvency is mainly due to the increase in energy prices between 24 February 2022 and 31 December 2022. A firm is only eligible for the protective measures if the following cumulative conditions are satisfied:

1. the company was not in a situation of cessation of payments on 24 February 2022;

2. the company's purchase of energy products and electricity represented at least 3% of the added value for calendar year 2021;

3. in the three months prior to 3 November 2022, the company has had to pay an energy price that is (at least) double the energy price averaged between 1 January 2021 and 30 September 2021;

4. the company has no outstanding and due tax or social security debts (with the exception of debts that are subject to a payment plan) when it applies for the protective measures; and

5. the company was incorporated prior to 24 February 2022.

The Temporary Moratorium protects eligible companies against the seizures of movable assets, bankruptcy and judicial dissolution. Eligible companies cannot be declared bankrupt or be judicially dissolved, except at the request of the public prosecutor or a court-appointed provisional administrator or with the company's consent. A company in distress can also not be made subject to a forced transfer of its business as part of judicial reorganisation proceedings (*gerechtelijke reorganisatie door overdracht onder gerechtelijk gezag / réorganisation judiciaire par transfert d'entreprise sous autorité judiciaire*).

If a company is summoned in bankruptcy or dissolution proceedings by a party other than the public prosecutor or a provisional administrator, the company will have a period of 15 days to provide evidence that the company satisfies the above conditions to benefit from the Temporary Moratorium.

Additionally, the statutory obligation for companies to file for bankruptcy is suspended if the company is eligible for the Temporary Moratorium.

The Law can be found here.

DATA PROTECTION

Digital Services Act Enters Into Force

On 16 November 2022, the Digital Services Act (***DSA***) entered into force. The DSA is an extensive set of rules aimed at establishing a "safer digital space" that upholds the fundamental rights of users and intends to create a "level playing field for businesses". The DSA has a broad scope and applies to all digital services that connect consumers to goods, services, or content, namely intermediary services (such as Internet access providers, domain name registrars), hosting services (cloud and webhosting services), online platforms (online marketplaces, app stores, social media) and online search engines. This is regardless of whether these service providers are established in the EU, as soon as they offer services to recipients located in the EU.

While the DSA does not impose an obligation of general monitoring of users or active fact-finding, it creates several obligations for digital service providers to act against "illegal content" on their digital spaces. "Illegal content" is defined very broadly and includes any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with any EU or national law. The DSA regulates the conditions under which national authorities can impose orders on digital service providers to disclose information or to act against illegal content, provides for a mechanism for users to flag such content and for platforms to cooperate with "trusted flaggers", and creates new obligations on traceability of business users in online market places to identify sellers of illegal goods.

The DSA also offers possibilities for users to challenge content moderation decisions, including internal complaint-handling systems and out-of-court dispute settlement mechanisms.

Digital service providers have additional reporting and transparency obligations, such as:

- an obligation for intermediary services to report regarding content moderation activities on a yearly basis;
- an obligation for hosting services to notify law enforcement or judicial authorities any information that a criminal offence involving a threat to the life or safety of a person is likely to take place;
- an obligation for online platforms to report at least once every six months, in a publicly available section of their online interface, information on the average monthly active recipients of their services in the European Union.

The DSA also bans "dark patterns" (*i.e.*, practices that materially distort or impair, either on purpose or in effect, the ability of recipients of the service to make autonomous and informed choices or decisions) and lays down several rules regarding advertising on online platforms, including a prohibition on targeted advertising based on profiling of personal data of children or special categories of personal data (ethnicity, political views, sexual orientation, etc.). Furthermore, the DSA requires online platforms to provide in their terms and conditions, in plain and intelligible language, the main parameters used in their recommending systems, and to explain to users how to modify or influence those parameters.

The DSA contains additional obligations for very large online platforms (***VLOPs***) and very large online search engines (***VLOSEs***), mainly pertaining to risk management, the requirement for external audits and data sharing with authorities and researchers.

Following the DSA's entry into force, online platforms have until 17 February 2023 to report the number of active end users on their websites. The European Commission will then take these numbers into consideration and assess whether the platform in question is a VLOP or a VLOSE. Afterwards, the platform will be given four months to comply with the rules under the DSA. As of 17 February 2024, the DSA will fully apply to all entities falling under its scope.

DATA PROTECTION

Belgian Data Protection Authority Settles Cases with Media Companies on Use of Cookies on Websites

In January 2019, the Direction Committee of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) requested the Inspection Service to investigate the ten most visited/ popular Belgian media about the use of cookies on their websites. The investigation was completed in October 2020.

Earlier this year in May and June 2022, the DPA imposed two fines of EUR 50,000 on Rossel Media Group and Roularta Media Group (*See*, our article on these cases here) due to several infringements of the data protection rules in the use of cookies. These include:

- The storage of not strictly necessary cookies on the hard disk of the readers without their consent.
- The fact that the transfer of personal data to more than 500 external partners was marked as "accepted" by default.
- The use of further browsing, *i.e.*, readers who continued using the website without making any choice were deemed to have accepted all cookies.
- The clauses in the cookie policy waived any liability of the owner of the website for the use of cookies by third parties.

Considering that the infringements observed by the Inspection Service were similar for the eight other media firms, the DPA, instead of pursuing the procedure before the Litigation Chamber, proposed a settlement based on Section 100, §1, 4° of the Act establishing the DPA. The parties under investigation accepted the proposed settlement and agreed to pay EUR 10,000.00 as an administrative fine.

The decisions confirming the settlement can be found on the website of the DPA (in Dutch and in French).

Belgian Data Protection Authority Defines Priorities for 2023

In a general statement which it posted on its website on 15 November 2022, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) gave an overview of its policy for 2023, both with regard to its prevention and awareness raising tasks as well as with regard to its controlling and sanctioning powers. The DPA's priorities for 2023 are as follows:

- **Cookies**: the DPA wishes to clarify its expectations as regards the use of cookies on websites.
- **Data Protection Officers** (***DPO***): the DPA, and especially the Inspection Service, will pay greater attention to the role of the DPO in businesses and other organisations.
- **Data brokers**: the DPA announces that data brokers, as they usually process personal data on a very large scale, will come more often under the scrutiny of the Inspection Service and the Litigation Chamber.
- **Smart cities**: The DPA also wishes to establish a dialogue with, and undertake preventive measures aimed at, the actors of smart cities.
- **Youth**: The DPA also plans to take awareness raising measures aimed at young people, their parents and teachers.

The DPA's policy can be consulted in Dutch and in French.

DATA PROTECTION

Court of Justice of European Union Holds That Withdrawing Consent to Be Included in Public Telephone Directories Forms Part Of "Right to Erasure"

In a judgment of 27 October 2022, the Court of Justice of the European Union (***CJEU***) ruled in case C-129/21 *Proximus NV v Gegevensbeschermingsautoriteit* on the withdrawal of the consent given for including contact details in public telephone directories. The CJEU clarified that data subjects (*i.e.*, in this case subscribers) must be able to withdraw their personal data from such telephone directories. This falls under the "right to erasure" (also known as the "right to be forgotten") of Article 17 of General Data Protection Regulation (EU) 2016/679 (the ***GDPR***).

The CJEU thus confirmed the decision of 30 July 2020 of the Litigation Chamber (*Geschillenkamer / Chambre Contentieuse* – the ***Litigation Chamber***) of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) and specified that the subscriber can request the withdrawal of his/her personal data from one directory provider only. The latter will then be under an obligation to take appropriate measures to inform the other data controllers (who have provided it with the subscriber data or to whom it transmitted the data) of the subscriber's request to have the personal data removed from the directories.

Background

In 2019, the DPA received a complaint from a subscriber to a telecommunications service operated by Telenet, a telecommunications operator which had forwarded the contact details of this subscriber to all the directories' publishers, including Proximus, another telecommunications operator. The subscriber had previously contacted Proximus to request that his data no longer be included in public directory enquiry services and no longer appear in telephone directories operated by Proximus and other directories to which Proximus had provided his data. Those directories contain the name, address and telephone number of the subscribers of the various providers of public telephone services. The subscriber had also asked Proximus to communicate the withdrawal request to other directory publishers.

Proximus initially complied with the subscriber's request. However, an update of these subscriber directories based on data from operator Telenet – which had not been informed of the subscriber's request– resulted in the subscriber's data again being made available to the public. The DPA imposed a fine of 20,000 EUR on Proximus for breaching several provisions of the GDPR.

CJEU Judgment

The CJEU followed the approach of the DPA and held that:

- informed consent is required to include a subscriber's personal data in public directories/ information services. Proximus had put forward the argument that consent was not required for the inclusion of subscriber data in public directories. It relied on Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the ***e-Privacy Directive***). According to Proximus, it was up to the subscribers to request not to be included in these directories pursuant to an 'opt-out' system. The CJEU disagreed. It held that the consent to include contact details in public telephone directories had to be expressly given but extends to any subsequent processing of data by third parties active in the markets for publicly available directory enquiry services and directories, as long as such processing pursues the same purpose. The necessity to have 'freely given, specific, informed and unambiguous' consent does not require that

DATA PROTECTION

the data subject is aware of the identity of all the providers of directories which will process their personal data on the data on which the consent is given;

- a subscriber requesting to remove his/her data from directories is exercising the "right to erasure" within the meaning of the GDPR;

- the data controller may be required to take appropriate technical and organisational measures to inform third parties (*i.e.*, the subscriber's telecommunications operator, and other directory providers to whom it transmitted the subscriber's data or from which it obtained such data) of the withdrawal of the subscriber's consent. Thus, the data subject is only required to contact one data controller, even if several data controllers relied on the same consent;

- the directory provider may be required to take reasonable steps to notify internet search engines of the request for erasure of the subscriber's data.

The judgment can be consulted here (in Dutch) and here (in French).

INTELLECTUAL PROPERTY

Court of Justice of European Union Rules on Rebranding of Generic Medicines as Originator Medicines and on Application of Falsified Medicines Directive

On 17 November 2022, two years after the Brussels Court of Appeal (the ***Brussels Court***) referred questions for a preliminary ruling to the Court of Justice of the European Union (the ***CJEU***), the CJEU delivered four judgments that clarify the rules governing parallel imports of medicinal products. The judgments examine whether and, if so, under what circumstances, a parallel importer can lawfully: (i) import a generic medicinal product and repackage and rebrand it with the brand name of the pioneering substance; and (ii) repackage in new outer packaging, rather than relabel, products imported in parallel with a view to affixing a new anti-tampering device (ATD) and/or unique identifier as provided for under the Falsified Medicines Directive1 (FMD). They are discussed in Van Bael & Bellis Life Sciences News and Insights of 8 December 2022.

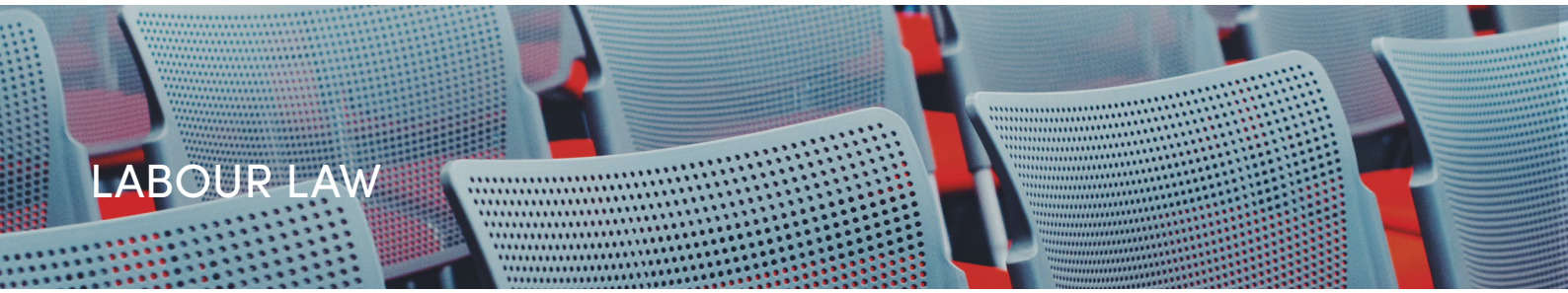
European Commission Proposes Revised Regulation and Directive on Designs

On 29 November 2022, the European Commission published two proposals for a revised Regulation and a revised Directive on designs. The proposals follow the Intellectual Property Action Plan which the Commission adopted in November 2020. The Plan sets out a revision of the EU legislative framework on design protection following the reform of the EU trademark legislation which revealed that EU design protection systems are generally operating effectively, but that there are nonetheless limitations that must be addressed.

Noteworthy proposed changes are as follows:

- According to new definitions, the term "design" will encompass movement, transition, or any type of animation of features that impacts the appearance of a design, while the term "product" will cover "any industrial or handicraft item other than computer programs, regardless of whether it is embodied in a physical object or materialises in a digital form." Files required for 3D printing or virtual designs in the metaverse will benefit from design protection.
- The two proposals will make it easier to present designs in an application for registration (e.g., by submitting a video). It will also be possible to combine more than one design in a single application.
- The revised Directive and the revised Regulation remove the general requirement of visibility. This means that design features do not have to be visible to qualify for design protection. By contrast, in applications for registration, visibility will still be required.
- The revised Directive and revised Regulation will include a repair clause for spare parts and will thus help to open up and increase competition in the spare parts market. This is particularly important in the car repair sector, where it should become legally possible in all EU countries to reproduce identical "must match" car body parts for repair to restore their original appearance.

The revised Directive and revised Regulation are now set to be adopted by the European Parliament and the Council. EU Member States will then have two years to transpose the new rules of the revised Directive into domestic law. As for the revised Regulation, most of the amendments to the Community Design Regulation will be applicable three months after its entry into force. The rest of the amendments will apply 18 months after the revised Regulation's entry into force.



LABOUR LAW

European Directive on Transparent and Predictable Working Conditions is Finally Fully Transposed

On 20 June 2019, the European Union (the ***EU***) adopted Directive 2019/1152 on transparent and predictable working conditions (the ***Directive***). The Directive aims to improve working conditions by promoting more transparent and predictable employment terms while ensuring labour-market adaptability. It introduces specific minimum rights for employees and updates the information to be provided to employees concerning their working conditions.

Implementation

Belgium failed to transpose the Directive into national law by the deadline of 1 August 2022. However, the Directive was transposed, in part, on 27 September 2022 by the conclusion of Collective Bargaining Agreement No. 161 on the right to demand a form of work with more predictable and secure working conditions (*Collectieve arbeidsovereenkomst nr. 161 betreffende het recht om een vorm van werk met meer voorspelbare en zekere arbeidsvoorwaarden te vragen / Convention collective de travail n° 161 concernant le droit de demander une forme d'emploi comportant des conditions de travail plus prévisibles et plus sûres* - ***CBA 161***).

Belgium subsequently transposed the remainder of the Directive in Law of 7 October 2022 concerning the partial transposal of the Directive (*Wet van 7 oktober 2022 houdende gedeeltelijke omzetting van Richtlijn (EU) 2019/1152 van het Europees Parlement en de Raad van 20 juni 2019 betreffende transparante en voorspelbare arbeidsvoorwaarden in de Europese Unie / Loi de 7 octobre 2022 transposant la directive (UE) 2019/1152 du Parlement européen et du Conseil du 20 juin 2019 relative à des conditions de travail transparentes et prévisibles dans l'Union européenne* - the ***Law***). The Law was published in the Belgian Official Journal of 31 October 2022.

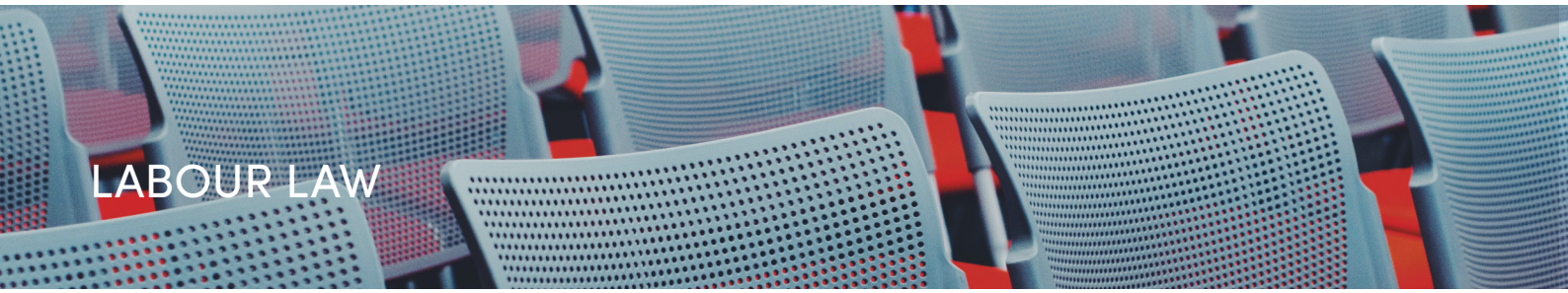
CBA 161: Right to Demand More Predictable and Secure Working Conditions

CBA 161 creates the right of employees to request a form of work with more predictable and secure working conditions and contains safeguards for the exercise of that right. CBA 161 entered into force on 1 October 2022. It applies to employees (i) with at least six months' uninterrupted seniority, (ii) who work on average more than three hours per week during a four-week reference period.

What is regarded as work with more predictable and secure working conditions will always be subject to subjective assessment and therefore falls within the discretion of the employee.

Nevertheless, CBA 161 offers examples of predictable and secure working conditions:

- an indefinite employment agreement instead of a fixed-term employment agreement;
- a full-time employment agreement instead of a part-time employment agreement;
- a part-time employment agreement with a greater number of hours;
- an employment agreement with a fixed working schedule instead of an employment agreement with a variable working schedule;
- a weekly or monthly temporary employment agreement instead of a daily temporary employment agreement.



LABOUR LAW

An employee can qualify for a form of employment with more predictable and secure working conditions only to the extent that this form of employment is available within the organisation and provided the employee meets the qualifications and competences required for this purpose.

Employees wishing to obtain a form of work with more predictable and secure working conditions should address a request in writing to their employer at least three months before the envisaged commencement date. Such a request can only be made once per year. The employer examines the employee's request and must reply in writing within one month. For organisations employing less than 20 employees, the employer has a response period of two months. The employer may choose to accept the request. After that, the concrete terms should be determined in consultation between employer and employee. The resulting agreement regarding working hours and payment conditions will be attached as an addendum to the employment contract.

The employer can also refuse the request in writing, offering reasons, or can submit a counterproposal. The employee, in turn, can make a reasoned counterproposal which the employer can choose to accept or refuse.

In addition, CBA 161 offers the employer the possibility to postpone the employee's request for concrete and justified reasons linked to the functioning of the organisation. In such a case, the employer must inform the employee of the reasoned postponement in writing. The postponement cannot cause the employee's request to become impossible.

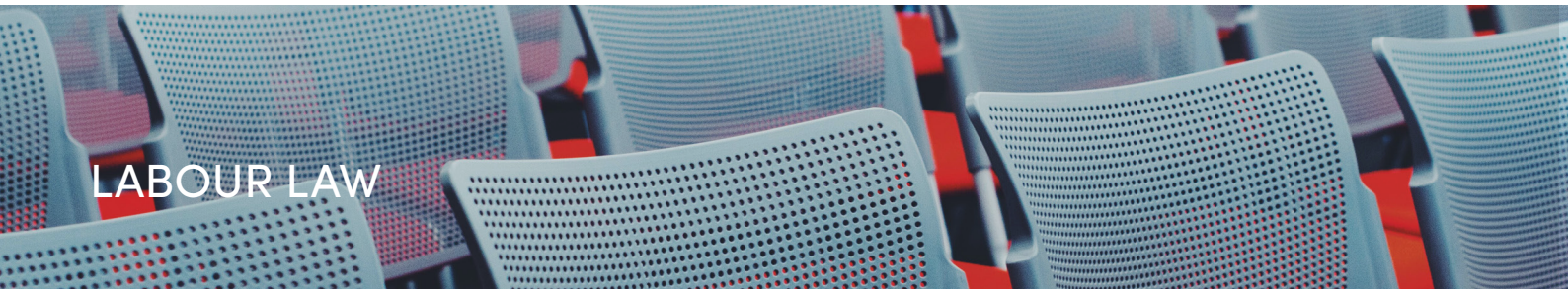
CBA 161 grants employees protection against adverse treatment and dismissal for using the right to request more predictable and secure employment. An employee adversely treated by his employer following a request for more predictable and secure working conditions may be granted compensation of two to three months' gross salary, while dismissal may lead to a compensation of four to six months' gross salary. The protection applies from the date of the employee's written application and ends two months after the employer's refusal or after the employee starts exercising work with more predictable and secure working conditions. This protection will not protect the employee from dismissal or adverse treatment for reasons that are not connected to the request for more predictable and secure working conditions (*e.g.*, economic reasons or poor performance). However, the employer bears the burden of proving the existence of other adequate reasons.

Law: Information on Essential Elements of Employment Relationship and New Rights

The Law offers the employee the right to receive information on essential elements of the employment relationship and contains specific rights in this respect. The Law entered into force on 10 November 2022.

The employer must give his employees a timely and individual notice of the most essential elements of their employment relationship. The notice must not be given later than on the first day of employment and can be given in writing or via electronic means. The information may be brought to the attention of the employee in multiple documents or in a single document. This is likely to have little impact on the practice of most employers, as these elements are often already included in the employment agreement. The most essential elements include the:

- identity of the parties;
- place of work;
- position that the employee primarily holds with the employer;
- start date;
- end date or the expected duration (if the employment relationship is for a fixed term);
- salary, fringe benefits, other components, method of payment and their frequency; and
- information on the fixed or variable working hours.



LABOUR LAW

The employer must also give his employees a timely and collective notice regarding information on the employment relationship that is common to all employees. This new information has to be incorporated in the work rules. Consequently, this requires an amendment of the work rules for which the procedure on amending the work rules should be followed, but only for the last two points of the following list:

- the termination procedure, including formal requirements and notice periods, as well as the statute of limitations for an appeal against the termination of the employment contract;
- a list of the collective bargaining agreements at company level that govern the working conditions and, in case of collective bargaining agreements concluded outside the company, the indication of the competent joint committee in which these were entered into;
- the right to training for employees or a reference to the relevant rules; and
- the social security institution that receives the social security contributions.

The employer must also provide free of charge training necessary for the employee to perform his employment contract. The training must take place during working hours and qualifies as working time.

Finally, the Law offers general protection against adverse treatment and dismissal for employees who file a complaint for the employer's failure to comply with the above information rights. If the employer takes adverse action against the employee concerned within twelve months after the complaint was filed, the employer will bear the burden of proof that the adverse action was taken for reasons not linked to the complaint. The penalty for such adverse treatment is equal to either a lump sum of six months' gross salary or the actual damages suffered. However, employees alleging unfair dismissal can only claim the lump sum.

New Rules Regarding Incapacity to Work

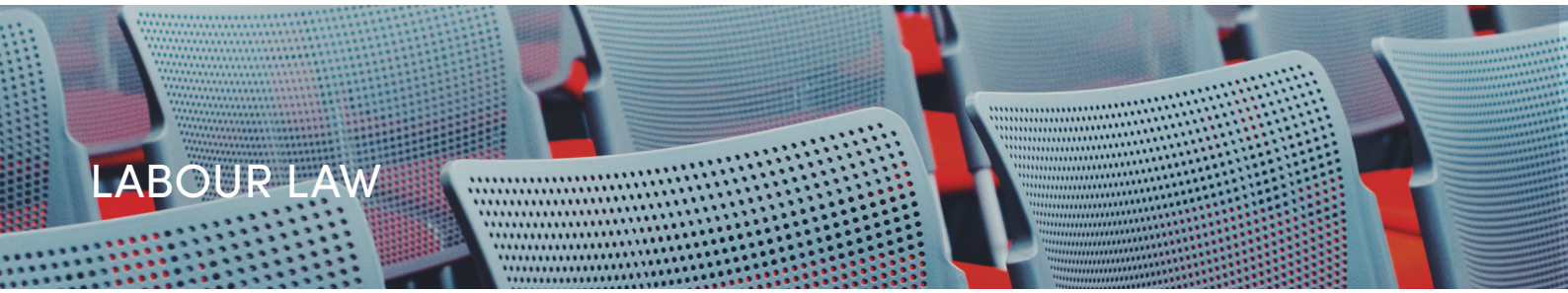
On 28 November 2022, the Law of 30 October 2022 containing various provisions concerning the incapacity to work (*Wet van 30 oktober 2022 houdende diverse bepalingen betreffende arbeidsongeschiktheid / Loi du 30 octobre 2022 portant des dispositions diverses relatives à l'incapacité de travail* – the ***Law***) entered into force. The Law introduces (i) the abolishment of a sick note for the first day of sick leave; (ii) a new procedure on medical force majeure; and (iii) amendments to the rules concerning guaranteed salary in the event of a gradual return to work.

Abolishment of Sick Note for First Day of Sick Leave

Prior to the entry into force of the Law, an employer was entitled to request the employee to submit a sick note as from the first day of sick leave. Now however, an employee is no longer required to submit a sick note for the first day of sick leave. This applies up to three times per calendar year. This exemption applies to both the one-day incapacity to work and the first day of a longer period of sick leave.

However, the employee is still obliged to inform the employer about his sick leave. In addition, the employee should also communicate the address where he will reside during his sick leave, unless this address corresponds with his usual place of residence known to the employer. Hence, the employer still has the possibility to request a medical check-up from an examining doctor, even on a sick day for which the employee is not required to provide the employer with a sick note.

As an exception to the above rule, small businesses that employ fewer than 50 employees can still require employees to provide a sick note from the first day of sick leave, provided that this possibility was provided for in the work rules or in a collective labour agreement at company level.



LABOUR LAW

New Procedure for Medical Force Majeure

The termination of an employment agreement because of medical *force majeure* (without notice period or the payment of a severance pay) or a permanent incapacity to work will be subject to a new procedure which is distinct from the current reintegration procedure for long-term sick employees.

It is only possible to initiate the medical *force majeure* procedure after at least nine months of incapacity to work and provided there is no reintegration procedure for the benefit of the employee.

Both the employee and the employer may initiate this procedure.

The prevention advisor-employment physician will examine the employee to ascertain whether it is impossible for the employee to perform the agreed work and to verify the possibilities for adapted or different work within the employing organisation. The prevention advisor-employment physician must communicate his/her findings to the employee and the employer by registered mail. These findings are subject to an appeal by the employee.

The employment agreement can be terminated for medical *force majeure* if the prevention advisor-employment physician decided that it is permanently impossible for the employee to perform the agreed work, provided that :

- the employee did not request the employer to explore the possibilities for adapted or other work; or
- the employee requested such adapted or other work, but the employer is unable to meet that request; or
- the employee requested adapted or other work but refused the work offered by the employer.

If the employee is not considered to be permanently incapacitated to work, the procedure will automatically end and can only be restarted after a new period of nine months' incapacity to work has lapsed.

New Rules Concerning Guaranteed Salary

Lastly, the Law also contains a new rule for employees who partially resume work following an incapacity to work but later become again incapacitated. Currently, an employee loses his/her right to guaranteed salary in such an event. This will change as the Law provides that the loss of the right to a guaranteed salary will be limited to 20 weeks from the start of the partial resumption of work. After this 20-week period, the normal rules on guaranteed pay will apply again.

LITIGATION

Court of Justice of European Union Rules on Principle of Effective Judicial Protection in National Procedural Law

On 24 November 2022, the Court of Justice of the European Union (***CJEU***) delivered a judgment applying the principle of effective judicial protection (Case C-289/21, *IG v Varhoven administrativen sad*, the ***judgment***). This principle precludes national procedural rules that provide that a dispute is deemed to have become devoid of purpose if a national provision, whose annulment was sought on the ground that it is contrary to EU law, is repealed and therefore ceases to exist.

Background

In 2020, a Bulgarian national, IG, sought compensation before national courts for the harm he allegedly sustained due to a decision of the Bulgarian Supreme Administrative Court. That body had held that, pursuant to Bulgarian procedural law, the action for annulment seeking to dispute the compatibility of a national provision with EU law had become devoid of purpose following that provision's repeal in the course of proceedings (the ***Decision***). IG argued that the Decision deprived him of his right to effective judicial protection and denied him the right to benefit from the principle of effectiveness and equivalence.

In this context, the national court referred the dispute to the CJEU for a preliminary ruling on the interpretation of Article 47 of the Charter of Fundamental Rights of the European Union (the ***Charter***), which guarantees the right to effective judicial protection.

CJEU Judgment

In the judgment, the CJEU first discussed the principle of procedural autonomy according to which, in the absence of EU rules on a matter, it is for the Member States to establish procedural rules to safeguard the rights of individuals. However, the scope of Member State autonomy is limited by the principles of equivalence (*i.e.*, national rules should not be less favourable than those governing similar domestic situations) and of effectiveness (*i.e.*, national rules should not make it excessively difficult or impossible to exercise EU rights). The CJEU found that the Decision was consistent with these principles.

The CJEU then focused on the principle of effective judicial protection, which ensures that applicants should be able to choose the best suited domestic legal remedy. First, the CJEU found that by introducing an action for annulment on the ground that a national provision is contrary to EU law, the applicant may also wish to obtain the annulment of the legal effects arising from the application of that provision. In this case, the mere repealing of that provision (without consideration of the legal effects arising from it), with the consequence that the dispute is ended on the ground that it became devoid of purpose, is liable to deprive the applicant of effective judicial protection.

The CJEU further stressed that in the light of the same principle, applicants must be allowed to introduce an action for the annulment of a national provision contrary to EU law. If available under domestic law, such an action will also entail the retroactive elimination of the legal effects arising from the challenged national provision.

However, the principle of effective judicial protection is not guaranteed if it is found, at an advanced stage of the proceedings, that the action for annulment became devoid of purpose because the challenged national provision was repealed.

According to the CJEU, this finding cannot be called into question by the fact that the applicant may bring an action for damages to seek compensation, since such an action will not be sufficient to guarantee his/her right to effective judicial protection.

LITIGATION

On this basis, the CJEU held that the principle of effective judicial protection precludes proceedings from being closed on the ground that an action became devoid of purpose, because the national provision challenged by that action was repealed. The CJEU stressed that the applicant had not been given the opportunity to assert his or her interest in the proceedings being continued and that the Decision had therefore failed to consider any such interests.

The full judgment is available here.

Council of Ministers Approves Draft Bill on Taking of Evidence and Notification of Documents in Civil or Commercial Matters

On 25 November 2022, the Council of Ministers (*Ministerraad / Conseil des ministres*) approved a draft bill implementing two European Regulations on the taking of evidence and the service of documents in civil or commercial matters (the ***Draft Bill***).

The Draft Bill aims to implement – and complement where necessary – Regulation (EU) 2020/1783 of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (the ***Evidence Regulation***) and Regulation (EU) 2020/1784 of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (the ***Service of Documents Regulation***). The Belgian Government is late since both Regulations began to apply on 1 July 2022.

The Evidence Regulation aims to modernise cross-border cooperation between courts of different Member States with the aim to obtain evidence in civil and commercial matters. It is a revision of Council Regulation (EC) No 1206/2001 of 28 May 2001 on the taking of evidence. The Evidence Regulation determines that requests and notifications for the taking of evidence will take place electronically through secure and reliable decentralised IT systems, such as e-CODEX.

The Service of Documents Regulation seeks to improve the effectiveness and speed of judicial procedures for the cross-border service of judicial and extrajudicial documents by simplifying and streamlining those procedures. It provides that the transfer and exchange of documents between agencies and bodies should be carried out through secure and reliable decentralised IT systems, such as e-CODEX.

The Draft Bill has now been submitted for advice to the Council of State (*Raad van State / Conseil d'Etat*) and the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données*).

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