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April 2019

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Highlights

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COMMERCIAL LAW

Law Establishes Stricter Payment Periods for Commercial Transactions with Small and Medium-sized Enterprises

On 25 April 2019, the Chamber of Representatives adopted a Law modifying the Law of 2 August 2002 on combating late payment in commercial transactions in an attempt to provide greater financial security to small and medium-sized enterprises ("SMEs") (*Wet tot wijziging van de Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties/Loi modifiant la Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales* – the "Law").

Under the current regime, the legal payment period for a commercial transaction between enterprises is, as a rule, 30 calendar days. However, parties to a commercial transaction may agree on a payment period that is longer. This conventional payment period may even exceed 60 calendar days, except if this were to amount to a manifest abuse of the creditor's rights. Additionally, the maximum duration for a procedure of acceptance and verification of goods or services purchased must not exceed 30 days, unless expressly provided for otherwise by contract.

Yet, since the implementation into Belgian law of Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions (the "Directive"), which sought to harmonise payment periods in business-to-business relationships throughout the European Union, research has shown that two-thirds of Belgian companies are faced with late payments. These late payments result in a lack of liquidities for SMEs, which in turn delay their own payments and generate a chain of delays affecting the economy as a whole.

Therefore, the Law takes advantage of the option in the Directive to have provisions that are more favourable to the creditor than the provisions necessary to comply with the Directive. The Law thus limits the conventional payment period applicable to transactions between an SME creditor and a debtor company that does not qualify as an SME to a maximum of 60 calendar days. Any contractual provision to the contrary will be considered invalid. The payment period is counted as of (i) the receipt of an invoice by the debtor; (ii) the receipt of the goods or services, if the invoice is received before the goods or services; or (iii) the acceptance and verification procedure, if the invoice is received before such a procedure takes place.

Further, and again for transactions between SME creditors and debtor companies that do not qualify as SMEs, the Law limits the maximum duration of the acceptance and verification procedure to 30 calendar days.

For purposes of the Law, SMEs are defined by reference to Article 1:24, §1 of the new Belgian Companies and Associations Code. Accordingly, an SME is a company which, at the closure of the last financial period, does not exceed any of the following thresholds: (i) 50 full-time workers per year on average; (ii) a turnover of EUR 9 million per year; or (iii) a balance-sheet total of EUR 4.5 million. These criteria must be assessed at the time of conclusion of the contract.

The Law will apply to contracts concluded as of the day of its entry into force, which is scheduled six months after its publication in the Belgian Official Journal.

COMPETITION LAW

Federal Parliament Adopts Bill Reforming Belgian Competition Law

On 25 April 2019, the Chamber of Representatives of the federal Parliament approved in plenary session a bill reforming Book IV of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) ("CEL") (*See, this Newsletter, Volume 2018, No. 11, p. 3; Volume 2019, No. 2, p. 4; and Volume 2019, No. 3, p. 4*).

This bill (bill 3621 – *Wetsvoorstel houdende wijzigingen aan boek I "Definities", boek XV "Rechtshandhaving" alsmede vervanging van boek IV "Bescherming van de mededinging" in het Wetboek van Economisch Recht / Proposition de loi portant modifications au livre Ier "Définitions", au livre XV "Application de la loi" ainsi que le remplacement du livre IV "Protection de la concurrence" dans le Code de droit économique"*) will not bring about major substantive or procedural changes to the current competition regime and will also maintain the prevailing institutional architecture. However, it replaces in full Book IV of the CEL entitled "Protection of Competition". New definitions will also be added to Book I of the CEL. Finally, the bill will modify Book XV of the CEL which governs the enforcement of laws.

The following novelties are noteworthy:

- *Increased cap on fines* – The maximum amount of fines that the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") is allowed to impose will be increased from 10% of the Belgian turnover of the company concerned to 10% of its worldwide turnover. This is in line with a requirement imposed by the "ECN+ Directive" recently adopted by the European Commission (and which has to be implemented by the Member States by February 2021). The new ceiling for fines will only apply to competition law infringements that started after the date of entry into force of the bill. Conversely, infringements that ended before the entry into force of the bill will remain subject to the old ceiling. A specific transitory regime applies to infringements that started before the entry into force of the bill but end after this date: the old (Belgian) turnover will apply to the part of the infringement that took place before the entry into force of the new law, and the new (worldwide) turnover will apply after this date, the total being subject to a ceiling of 10% of the worldwide turnover.

- *Competition infringements by individuals* – Unless the individual should be regarded as a firm, an individual will only be found in breach of the competition rules if there is also a finding of infringement against the firm (or association of firms) on behalf of which the individual acted. An exception applies if that firm no longer exists. Additionally, the competition rules applying to individuals only extend to cartel-like conduct. These rules expressly cover cartel negotiations, including aborted cartel discussions.

- *Commitments in behavioural cases* – The competition prosecutor (*auditeur / auditeur*) will have the power to terminate formally proceedings in response to commitments offered by the party under investigation (this is currently the exclusive right of the Competition College (*Mededingingscollege / Collège de la concurrence*)).

- *Amended notion of turnover for the calculation of merger thresholds* – The definition of turnover used to calculate the merger thresholds will change. Instead of the turnover realised during the previous year as defined in the Company Code (*Wetboek van vennootschappen / Code des sociétés*), the turnover will include the amount derived from the sale of products by the firms concerned during the preceding financial year, after deduction of sales rebates, of value added tax and of other taxes directly related to turnover and without including transactions between entities belonging to the same group or between a joint venture and its parent companies. This new definition is in line with the definition of aggregate turnover under the EU Merger Control Regulation.

- *Extended deadline and stop-the-clock mechanism in merger control procedure* – The competition prosecutor will have the power to stop the clock when it requests additional information until the information is actually provided (currently, it can only stop the clock until the expiry of the deadline mentioned in the request for information). Also, the time-period of 25 business days within which the competition prosecutor has to submit its draft decision (in phase I) will be extended by 10 business days when the notifying parties offer commitments (instead of 5 business days currently). Further, when the notifying parties submit to the Competition College an exhibit that is not included in the investigation file, the Competition College can stop the clock to give the competition prosecutor enough time to file written observations on this new exhibit and to allow the notifying parties to reply to such observations.

- *New rules governing requests for interim measures* – The Competition College will be expressly required to balance all interests at stake when assessing the merits of a request for interim measures. The new rules also address lacunae in the existing rules, such as a ban on the plaintiff to submit further arguments and exhibits except if expressly authorised to do so in order to respond to specific arguments of the defendant. In that case, the defendant will be granted the same amount of time to respond to the claimant's arguments.

- *Dawn raids* – The investigating magistrate for Brussels (the Dutch- or French-language Court of first instance (*Nederlandstalige rechtbank van eerste aanleg / Tribunal de première instance francophone*)) will be exclusively competent to authorise on-site inspections on the entire Belgian territory.

- *Extended time-period to reply to statements of objections* – Defendants in antitrust proceedings will be granted two months to reply to the statement of objections (instead of one month). This time-period can be extended at the reasoned request of the targeted party.

- *New rules governing confidentiality before the Brussels Court of Appeal (Markets Court)* – The Markets Court (*Marktenhof / Cour des marchés*) will be given the express task to protect confidential information.

- *Detailed new rules on the use of languages in competition proceedings*.

Subject to narrow exceptions, the new law will enter into force 10 days following its publication in the Belgian Official Journal.

Belgian Competition Authority Rejects Request for Interim Measures against Royal Meteorological Institute of Belgium

On 15 February 2019, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") rejected a request for interim measures against the Royal Meteorological Institute of Belgium (*Koninklijk Meteorologisch Instituut van België / Institut Royal Météorologique de Belgique*) ("RMI"). The request had been lodged by The Great Circle, a company offering meteorological navigation software.

According to The Great Circle, RMI allegedly abused its dominant position on the market for the supply of raw meteorological data and/or entered into an anticompetitive agreement with other national meteorological services and intergovernmental organisation ECMWF (European Centre for Medium-Range Weather Forecasts) in order to prevent The Great Circle from obtaining raw meteorological data generated by ECMWF, in breach of Articles IV.1 and/or IV.2 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) and Articles 101 and 102 of the Treaty on the Functioning of the European Union. The Great Circle thus requested the Competition College to order RMI to provide it with raw meteorological data originating with ECMWF.

The Competition College carried out a preliminary assessment of the case in order to determine whether interim measures should be granted. It found that RMI could not have been guilty of abusively refusing to supply the mete-

orological data since RMI had stopped being active on the market on 11 May 2017. As a result, the Competition College found that the complainant had not established a *prima facie* infringement of the competition rules and therefore dismissed its request for interim measures.

The Great Circle appealed this decision to the Markets Court (Brussels Court of Appeal) but, in a judgment of 8 May 2019, that court found the appeal to be inadmissible. That judgment will be reviewed in Volume 2019, No. 5 of this Newsletter.

Belgian Competition Authority Clears Merger in Energy and Chemicals Sector

On 15 February 2019, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") unconditionally cleared the acquisition of RWE Generation Belgium NV by INEOS Oxide Limited.

Both parties to the transaction are active on the market for the production and wholesale of electricity. On the Zwijndrecht chemical site, the activities of the parties are vertically related and include (i) the production, the wholesale, the transport, the distribution and the retail sale of electricity; (ii) the production, the wholesale, the retail sale and the distribution of steam; (iii) the production, the retail sale and the distribution of demineralised water; and (iv) the production, the retail sale and the distribution of water for boilers. INEOS Oxide also produces several chemical products on the Zwijndrecht site, including low-density polyethylene (LDPE).

As regards the electricity markets, the Competition College noted that some comments received during the market investigation raised the possibility that the parties would foreclose inputs. However, the College found that the regulatory obligations imposed on the parties by the regulator of the Flemish energy market (VREG) would limit their capacity to foreclose inputs. The Competition College also found that the transaction will have no horizontal effects on any of the other affected markets and will not worsen any pre-existing competition concerns. As a result, the Competition College decided to clear the transaction.

Belgian Competition Authority Investigates Automotive Repair and Insurance Sector

On 28 March 2019, the Investigation and Prosecution Service (*Auditoraat / Auditorat*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") announced the start of an investigation in the automotive repair and insurance industry. This investigation follows a complaint filed by non-profit organisation *Carrossiers Réunis* against Informex (which provides IT services for motor vehicles inspections) and several automotive insurance companies in Belgium.

The BCA indicated that it sent a formal request for information to several automotive experts.

DATA PROTECTION

European Data Protection Board Publishes Draft Guidelines on Processing of Personal Data Based on 'Performance of Contract'

On 9 April 2019, the European Data Protection Board ("EDPB"), an independent European body which contributes to the consistent application of data protection rules throughout the European Union, published draft guidelines on the interpretation of 'contractual necessity' as grounds for processing personal data (the "Guidelines").

The Guidelines relate to Article 6(1)(b) of the General Data Protection Regulation ("GDPR") as applied to contracts for online services provided by online retail shops, news aggregation service providers, hotel search engines and the like. While some of these online services are financed by user payments, the services are often for free but funded by advertising which targets data subjects. One of the reasons for the EDPB to adopt these guidelines is that users are not always aware that their behaviour is tracked by the service providers for the purposes of advertising.

Article 6 of the GPDR sets out the lawful bases for processing personal data. Article 6(1)(b) of the GDPR specifically relates to the processing '*necessary for the performance of a contract*'. This covers both situations in which a contract was concluded with the data subject and those in which specific information is needed before it is possible to enter into a contract.

Contract

If a contract was concluded, the EDPB interprets this 'necessity' narrowly and finds that merely referencing or mentioning data processing in a contract is not enough to bring that processing within the scope of Article 6(1)(b). The 'necessity' requirement points to something more than a contractual condition. Regard should be given to the particular aim, purpose and objective of the service.

The Guidelines refer to a '*fundamental and mutually understood contractual purpose*' in order to justify this necessity. The data controller should examine carefully the perspective of an average data subject in order to ensure that there is such a genuine mutual understanding on the contractual purpose.

For instance, an online retailer will be able to rely on Article 6(1)(b) of the GDPR to process credit card information and the home address if the data subject (*i.e.,* the customer) opted for payment by credit card and delivery at home. By contrast, processing the data subject's home address will not be necessary for the performance of the purchase contract if the customer opted for shipment to a pick-up point. If the online retailer still wishes to receive the customer's home address, this would require a different legal basis than Article 6(1)(b) of the GDPR. For instance, the retailer may have to request the data subject's freely given consent (Article 6(1)(a) of the GDPR). However, the EDPB clarifies that the legal basis must be identified at the outset of the processing, and, in line with Articles 13 and 14 of the GDPR, information given to data subjects must specify the legal basis.

Pre-Contractual Phase

As mentioned, Article 6(1)(b) of the GDPR also permits processing personal data in a pre-contractual phase. This will apply when the personal data are necessary in order to facilitate the actual conclusion of that contract. This may be the case if a data subject provides his or her postal code to permit verification if a particular service provider operates in that area. By contrast, unsolicited marketing or other processing which is carried out solely on the initiative of the data controller, or at the request of a third party, is not covered by Article 6(1)(b) of the GDPR.

Specific Situations

Finally, the Guidelines assess some specific situations, such as: (i) processing to improve a service; or (ii) for online behavioural advertising. When it comes to the first situation, the EDPB considers that this can usually not be regarded as objectively necessary for the performance of the contract with the user, even though the possibility of improvements and modifications to a service may routinely be included in contractual terms. As to the second situation, the EDPB refers to the general rule that behavioural

advertising does not constitute a necessary element of online services. This is supported by Article 21 of the GDPR, which gives data subjects an absolute right to object to processing of their data for direct marketing purposes.

Comments on the Guidelines can be submitted until 24 May 2019. The text of the Guidelines can be consulted here.

Advocate General Szpunar Delivers Opinion on Cookie Consent

On 21 March 2019, Advocate General ("AG") Maciej Szpunar issued an opinion in case C-673/17 (*Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.*) concerning consent to the use of cookies and other pertinent questions of EU data protection law. In particular, the AG addressed the issues of "valid consent"; the scope of the obligation to provide clear and comprehensive information to users; and consent bundling.

Background

The case concerned an online lottery organised by the defendant Planet49. Participants to the lottery were shown two checkboxes on the screen where they needed to click a "participation button". The first checkbox required consent for marketing e-mails from a range of firms and had to be ticked for the purposes of participation in the lottery. The second asked for the user's consent to the installation and storage of cookies, *i.e.*, small pieces of data or text files allowing the website to "remember" the user's actions or preferences over time. The latter was not mandatory, but the checkbox was pre-ticked so that the user had to take an active step to object to the cookies (opt-out). The claimant – the Federation of German Consumer Organisations (Bundesverband der Verbraucherzentralen) - argued before the German courts that this form of obtaining consent was in breach of German law. After lengthy proceedings, the Court of Justice of the European Union ("ECJ") was asked to rule upon the conformity of the conduct of Planet 49 with EU law by way of a preliminary ruling under Article 267 of the TFEU. The questions related (i) to the conditions for valid consent; and (ii) which information users should receive regarding the use of cookies.

Active and Separate Consent

In his opinion, the AG discussed the notion of valid consent within the meaning of the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council, hereafter the "GDPR") and Directive 95/46/EC which was repealed by the GDPR, as well as under the ePrivacy Directive (Directive 2002/58/EC). After recalling the need for an *active* and *separate* consent of the data subject which has to be freely given on the basis of clear and comprehensive information, the AG inferred that permission for the installation of cookies by way of a pre-ticked checkbox does not constitute valid consent under EU law.

On the one hand, the requirement to refuse explicitly cookies by unticking a box did not, in his view, entail active approval due to the impossibility to "*determine objectively whether or not a user has given his consent on the basis of a freely given and informed decision*". According to the AG, a positive expression of acceptance would thus have been a far better guarantee as compared to mere inaction.

On the other hand, consent must be 'separate' and, as a result, the act that a user pursues (*i.e.*, participation to the lottery), and the permission of cookies should not form part of the same act, (*i.e.*, hitting the "participation" button). Rather, two distinct expressions of intent must be made without one being ancillary to the other.

Turning to the checkbox dealing with the processing of personal data for the purposes of marketing communication, the AG observed that a separate click button would have better guaranteed the existence of a separate consent. Furthermore, he discussed the "prohibition on bundling" under Article 7(4) of the GDPR. This rule requires any assessment as to whether permission is freely given to take into account whether the performance of a contract is made conditional on consent to the processing of personal data not necessary for the purposes of contract performance. In the case at hand, it was not clear whether a user had to consent to receiving marketing materials in order to participate in the lottery. In the AG's view, the "marketing checkbox" appeared to be a necessary condition for participation in the lottery.

Clear and Comprehensive Information

With respect to the question concerning the scope of the obligation of providers to give clear and comprehensive information to the data subject, the AG indicated that the user should be put in a position to learn easily about the consequences of any consent he or she might give. The information provided must therefore be "*clearly comprehensible and not be subject to ambiguity or interpretation*". Moreover, it has to "*enable the user to comprehend the functioning of the cookies actually resorted to*". Consequently, clarity about the time period for storage and whether or not third parties have access to the data should exist as ingredients of the informed consent. In the event that third parties may access the information, their identity must be disclosed. In addition, users must be aware of the types of processed data and the purposes for which this is done.

Implications

While not binding on the Court, the ECJ usually follows the AG's opinion. Its judgment is expected to be handed down still in 2019.

In addition, the AG's opinion may have implications on the discussions concerning the proposed ePrivacy Regulation which will update the ePrivacy Directive and complement the GDPR with specific rules on cookies.

European Parliament Approves New Rules to Protect Whistle-Blowers

On 16 April 2019, the European Parliament approved new rules on the protection of whistle-blowers (the "Directive"). The European Commission proposed such EU-wide rules last year, in the aftermath of scandals such as "Luxleaks" and "Panama Papers" (S*ee, this Newsletter, Volume 2018, No. 4, p. 6*). These scandals showed the importance of revelations made by whistle-blowers in order to detect and prevent breaches of EU law that are harmful to the public interest.

The Directive aims to better protect those disclosing information on illegal conduct or abuses of law in the workplace. The protection for reporting breaches of EU law covers a wide range of areas, including competition, public procurement, financial services, money laundering, product and transport safety and public health as well as consumer and data protection.

The new rules establish safe reporting channels for reporting both within an organisation and to public authorities. For example, the Directive provides that companies with more than 50 employees are obliged to set up channels and procedures to report safely. The new rules explicitly prohibit reprisals and introduce safeguards to prevent the whistle-blower from retaliation, such as suspension, dismissal or demotion. In addition, persons assisting whistle-blowers, such as facilitators, colleagues or relatives, are protected.

During the whistleblowing procedure, sensitive personal information will be processed. This applies, for example, to personal information of the whistle-blowers, alleged wrongdoers, witnesses and other persons appearing in the report. Therefore, the Directive explicitly refers to the General Data Protection Regulation ("GDPR") and stipulates that "*any processing of personal data carried out pursuant to this Directive, including the exchange of personal data by the competent authorities, shall be made in accordance with Regulation (EU) 2016/679 and Directive (EU) 2016/680*". Furthermore, in line with the principle of data minimisation, personal data which are "*manifestly not relevant for the handling of a specific case*" should not be collected or, if accidentally collected, deleted without undue delay.

Explicit reference is also made to a duty of confidentiality requiring Member States to ensure that the identity of the reporting person is not disclosed without the explicit consent of this person to anyone beyond the authorised staff members competent to receive and/or follow up on reports. Only if a necessary and proportionate obligation is imposed by Union or national law in the context of investigations by national authorities or judicial proceedings, the identity of the reporting person may be disclosed (including with a view to safeguarding the rights of defence of the person concerned).

The new rules still have to be approved by the Council of Ministers. The Member States will then have two years to implement the rules.

INTELLECTUAL PROPERTY

Distinction between Colour and Figurative Marks is Crucial for Registration Purposes

On 27 March 2019, the Court of Justice of the European Union (the "ECJ") clarified the conditions required for registering a colour trade mark under Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (the "Trade Mark Directive") in case C-578/17, *Oy Hartwall Ab v Patentti- ja rekisterihallitus*.

Oy Hartwall Ab, a Finnish company had applied to the Patentti- ja rekisterihallitus (the Intellectual Property Office ("IPO") of Finland) to register a trade mark for a sign described as: "*The colours of the sign are blue (PMS 2748, PMS CYAN) and grey (PMS 877)*" in class 32: "Mineral waters", and depicted by the following representation:

The Finnish IPO rejected the application for lack of distinctive character since the market study relied upon by Oy Hartwall Ab showed that the reputation through use of the sign actually concerned the figurative aspect and not its colour.

On appeal, the Markkinaoikeus (the Market Court of Finland) held that the graphic representation of the sign in respect of which protection was sought did not include a systematic arrangement associating the colours concerned in a predetermined and uniform way.

Oy Hartwall Ab further appealed to the Korkein hallinto-oikeus (the Supreme Administrative Court of Finland) which referred various questions to the ECJ for clarification. The central question was whether a sign represented as a colour drawing (as above) can be registered as a colour mark.

The first specific question was whether Articles 2 and 3(1)(b) of the Trade Mark Directive meant that the classification as a "colour mark" or "figurative mark" given to a sign by the applicant on registration is a relevant factor in determining whether (i) that sign can constitute a trade mark and, if so, (ii) whether it has a distinctive character within the meaning of Article 3(1)(b) of that Directive.

The ECJ held at the outset that the Trade Mark Directive does not establish categories of marks. Member States remain free to adopt rules governing the registration and invalidity procedures.

The ECJ then found that the fact that the registration of a sign is sought as a "colour mark" or "figurative mark" is relevant in order to determine the subject matter and scope of the protection conferred by trade mark law for the purpose of applying Article 2 of the Trade Mark Directive, in particular because it specifies whether the contours are part of the subject matter of the application for registration.

The ECJ added that while the criteria of assessment of the distinctive character of colour marks are the same as those applying to the other categories of marks, there may be "*potential difficulties in establishing the distinctive character of certain categories of marks [colour marks] because of their nature*". The ECJ reached that conclusion having regard to the perception of the relevant public which is "*not necessarily the same in the case of a sign of colour per se as it is in the case of a word of figurative mark.*" The ECJ was of the opinion that the public is not normally inherently capable of distinguishing the goods of a particular firm solely based on a colour mark. This led the ECJ to refer to its *Libertel* case-law that "*distinctiveness without any prior use is inconceivable save in exceptional circumstances and, even if a colour per se does not initially have distinctive character, it may require such character in relation to the goods or services in respect of which registration of the mark is sought.*"

Lastly, the ECJ warned that regard must be had to the "*general interest*" to ensure that the "*availability of colours for the other traders who offer for sale goods or services of the same type*" is not unduly restricted.

The second question was whether Article 2 of the Trade Mark Directive must be interpreted as precluding the registration of a mark in the application for registration in the form of a drawing of a colour mark.

The ECJ held that the subject matter and scope of the protection sought must be clearly and precisely determined. To this end, the verbal description of the sign serves to clarify the subject matter and scope of the protection sought under trade mark law.

However, in the case at hand, the Court found an inconsistency between the sign (depicted above) of which registration is sought which is a colour drawing with defined contours and the verbal description provided by Oy Hartwall in its registration application which referred to the sign as a colour combination without contours.

In the light of this discrepancy in the application, the ECJ held that the national competent authority was entitled to refuse registration.

Court of Justice of European Union on Trade Mark Protection of Quality Labels

On 11 April 2019, the Court of Justice of the European Union (the "ECJ") gave judgment in the ÖKO-Test Verlag case (C-690/17) on the interpretation of Regulation 207/2009 on the European Union trade mark (the "Trade Mark Regulation") and Directive 2008/95 on the approximation of the laws of the Member States relating to trade marks (the "Trade Mark Directive") in relation to quality labels. In its judgment, the ECJ answered two questions, namely, (i) whether putting a sign identical with, or similar to, a trade mark consisting of a quality label on products which are different from those for which the trade mark is registered constitutes a trade mark infringement; and (ii) whether the proprietor of a reputed trade mark consisting of a quality label can prevent such use.

ÖKO-Test Verlag publishes and sells a magazine in Germany that provides general consumer information and contains the results of performance and compliance tests carried out by the firm on various products. ÖKO-Test Verlag is proprietor of an EU trade mark, registered for printed matter and for services that consist in conducting tests and providing consumer information and consultancy (the "ÖKO-TEST mark"). Sometimes, ÖKO-Test Verlag grants the right to third parties whose products have been tested to affix its label on those products under a trade mark licence agreement.

The defendant in this case, Dr. Liebe, was granted a trade mark licence in 2005 for its toothpaste. In 2014, ÖKO-Test Verlag learned that Dr. Liebe kept affixing the ÖKO-TEST mark on its toothpaste even though the licence had likely ended (the toothpaste on which the label was affixed was different from that tested in 2005). Hence, ÖKO-Test Verlag brought proceedings before the German courts for trade mark infringement. The Higher Regional Court sought guidance from the ECJ.

As regards the first question, the ECJ recalled that, pursuant to Article 9 of the Trade Mark Regulation and Article 5 of the Trade Mark Directive, the holder of a trade mark does not have the right to prohibit third party use of an identical or similar sign on products that are not identical or similar to the products or services for which the trade mark is registered, unless that trade mark has a reputation. The ECJ added that the above rules do not differ when the trade mark at issue is a quality label, especially since the EU trade mark regime provides for the possibility of registering as an EU certification mark specific signs, including those that are capable of distinguishing the goods or services that are certified by the proprietor of the mark in respect of quality from goods and services that are not so certified.

As regards the second question, the ECJ held that ÖKO-Test Verlag could object to the use of its trade mark by a third party for products that are not identical or similar to the products or services for which the trade mark was registered, if it could show that (i) the trade mark at issue has a reputation; (ii) the use infringes or takes unfair advantage of the reputation or distinctive character of the trade mark; and (iii) the third party cannot prove that its use of the trade mark occurs with due cause.

New Directive on Copyright in Radio and Television Programmes

On 15 April 2019, the Council of the European Union (the "Council") approved a Directive on the exercise of copyright and related rights applicable to certain online transmissions by broadcasting organisations and retransmissions of television and radio programmes (the "Radio and TV Directive"). This Directive forms part of a broader initiative to adapt EU copyright rules to the digital age, which includes the new Copyright Directive adopted by the Council on the same day (*See, this Newsletter, Volume 2019, No. 03, pp. 8-9*)

The aim of the Radio and TV Directive is to enhance cross-border access to a greater number of television and radio programmes. To that end, the Radio and TV Directive facilitates the licensing of copyright and related rights (i) for the provision of online services that are ancillary to the broadcast of certain types of television and radio programmes and (ii) for the retransmission of television and radio programmes. The Radio and TV Directive complements the existing Satellite and Cable Directive (Directive 93/83/EEC), which governs cross-border satellite broadcasting and retransmission by cable.

First, the Radio and TV Directive establishes the country-of-origin principle for ancillary online services, i.e., online services consisting in the provision to the public of television or radio programmes simultaneously with or for a defined period of time after their broadcast by the broadcasting organisation, as well as any material which is ancillary to such broadcast. While the country-of-origin principle extends to all radio programmes, it will only apply to television programmes that are (i) news and current affairs programmes; or (ii) fully financed own productions of the broadcasting organisation (with the exception of broadcasts of sports events and works and other protected subject matter included in them). The Radio and TV Directive provides that rights required to make certain programmes available on broadcasters' online services (for instance, their simulcasting or catch-up services) are to be cleared only for the broadcaster's country of principal establishment (instead of all Member States in which the broadcaster wishes to make its programmes available). However, the licence fee will have to take into account all aspects of the ancillary online services such as the duration of online availability, the audience and the language versions provided.

Second, the Radio and TV Directive extends the system of mandatory collective management, which is currently applicable to cable retransmissions only, to retransmission services provided by other means (such as Internet Protocol television (IPTV), and satellite, digital terrestrial or online technologies). This will make it easier for retransmission operators to obtain the authorisations required to retransmit radio and television channels originating from other Member States. However, the rules on mandatory collective management do not apply to rights in retransmissions that are held by broadcasters.

The Radio and TV Directive also provides that, if broadcasters transmit their programme-carrying signals by direct injection exclusively to distributors (and not to the public) and these, in turn, transmit the signals to the public, both the broadcaster and the distributor participate in a single act of communication to the public in respect of which they must obtain authorisation from rightholders. This new provision should help to ensure that rightholders are adequately compensated when their works are used in programmes transmitted through direct injection.

Following its publication in the Official Journal of the EU, Member States will have two years to implement the Radio and TV Directive into national legislation.

LABOUR LAW

Law of 4 April 2019 on Social Elections in 2020 Aims to Simplify Organisation of Such Elections

A new law of 4 April 2019 aims to regulate and simplify the organisation of the 2020 social elections (the "Law"). It was published in the Belgian Official Journal of 30 April 2019 (*Wet van 4 april 2019 tot wijziging van de wet van 4 december 2007 betreffende de sociale verkiezingen, van de wet van 20 september 1948 houdende organisatie van het bedrijfsleven en van de wet van 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk/ Loi du 4 avril 2019 modifiant la loi du 4 décembre 2007 relative aux élections sociales, la loi du 20 septembre 1948 portant organisation de l'économie et la loi du 4 août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail*).

The Law contains the following noteworthy features:

- *Threshold for organising elections*: The threshold of employees required for the establishment of a works council remains at 100, despite previous recommendations from the social stakeholders to lower this threshold to 50 employees. The threshold of 50 employees still applies to the establishment of a Committee for Prevention and Protection at Work (the "CPPW").

- *Reference period*: The Law amends the reference period for calculating the average number of employees. For the 2020 elections, this period started on 1 October 2018 and will end on 30 September 2019. The usual average employment can therefore still be viewed over four quarters, but this period is brought forward by one quarter. In this way, every employer knows by 1 October 2019 at the latest whether or not it must start the election procedure in December 2019.

- *Election date (day Y)*: The social elections must be held between 11 and 24 May 2020. It is recommended to verify well in advance which day will be most suitable for both employer and employees.

- *Voting rights of temporary employees*: Temporary employees who are employed via a temporary staffing agency are granted the same voting rights as permanent employees, provided that they satisfy the following cumulative conditions:

  1. Between 1 August 2019 and day X (which normally falls in February 2020): they must be employed for either three continuous months or 65 working days if interrupted; and

  2. Between day X and day X+77: they must be employed for at least 26 working days.

  However, such employees cannot be appointed as employee representative candidates.

- *Special personnel register no longer required*: Employers should normally keep a special personnel register which includes the average employment of temporary employees. From now on, the employer may be exempted from keeping such a register, provided that the works council unanimously declares in formal minutes that the employer employs more than 100 employees on average, during the reference period. For the social elections of 2020, a meeting with the works council should take place in this respect at the latest by 30 May 2019 (*i.e.,* within 30 days following the date of publication of the Law). Employers who wish to rely on this administrative simplification should therefore put this point on the agenda of the upcoming meeting of the works council and formally enact the employee representatives' statement in the formal minutes of the works council.

- *Electronic information*: The list of information that can be made available by electronic means instead of being displayed on the employer's premises has been substantially expanded.

- *Voter lists*: Considering privacy legislation, the employer who wishes to make electoral lists available electronically, should do this on a closed platform or on a secured intranet page that is only accessible to the employees. Sending electoral lists by e-mail will not be acceptable.

- *Candidate lists*: Trade unions must ensure that female and male candidates are proportionally represented in relation to their respective interests within the organisation. Statistics should also be drawn up for this purpose and should be shared with the works council (or, in the absence thereof, with the trade union delegation) within six months of the announcement of the election results.

  In addition, for the sake of transparency and to take into account the latest changes, the employer must now in each case proceed to a third display of the candidate lists at the latest on day X+77, regardless of whether or not replacements have been notified to him. In this way, all parties concerned are clearly informed about the final lists of candidates.

- *Electronic voting*: The decision to proceed with electronic voting should no longer be taken unanimously by the works council, the CPPW or the trade union delegation. A simple majority is now sufficient.

  Moreover, electronic voting can now also be organised from the regular workstation, as soon as the necessary terms will have been implemented (*e.g.*, to ensure the secrecy of the vote).

LITIGATION

Parliament Adopts Law Establishing New Civil Code and Inserting Book on Evidence

On 4 April 2019, the federal Chamber of Representatives adopted a law establishing a new Civil Code and inserting Book 8 "Evidence" in this Code (*Wet tot invoering van een Burgerlijk Wetboek en tot invoeging van boek 8 "Bewijs" in dat Wetboek/Loi portant création d'un Code civil et y insérant un livre 8 "La preuve"* - the "Law") (*See, this Newsletter, Volume 2018, No. 11, p. 19*).

The new civil code will comprise 9 "books": (i) General rules; (ii) Rules on individual private rights, families and matrimonial relationships; (iii) Goods; (iv) Estates, donations and wills; (v) Duties and obligations (vi) Special contracts; (vii) Securities; (viii) Evidence; and (ix) Limitation periods.

The Book on Evidence is the first such book to be adopted.

Subject to exceptions, the Law will enter into force on 1 November 2020.

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