& DE BANDT NEWSLETTER

EU LAW & DIGITAL ECONOMY

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& DE BANDT NEWSLETTER

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CONTENT

COMPETITION LAW

The Court of Justice clarifies the court with jurisdiction over cartel damages actions

Author: Chloé Binet

The number of follow-on cartel damages claims is increasing in the European Union. For consumers and/or companies adversely affected by competition law infringements, one of the main questions to be addressed relates to the identification of the Courts before which they can bring their actions for damages. In its judgment of 15 July 2021 (*Volvo and Others*, C-30/20), the Court of justice provides further guidance to answer that question.

In matters relating to tort, delict or quasi-delict, Regulation 1215/2012 (the Brussels I bis Regulation), provides that a person domiciled in a Member State may be sued in the courts of that Member State (article 4, paragraph 1) but also in the courts of the place where the harmful event occurred (article 7, paragraph 2). Pursuant to settled case-law, the concept of "the place where the harmful event occurred" covers both "the place where the damage occurred" and "the place of the event giving rise to it".

In the *Volvo* case, the Court was asked to clarify the concept of "the place where the harmful event occurred" under Article 7, paragraph 2 of the Brussels I bis Regulation.

First of all, the Court decides that Article 7, paragraph 2 confers directly and immediately both international and territorial jurisdiction on the courts of the place where the damage occurred. In other words, the notion of "the place where the harmful event occurred" is used to determine in which Member State(s) (a) court(s) has/have jurisdiction (from an international perspective) as well as to determine which specific court within a Member State has jurisdiction over a cartel damages claims (from a national perspective). However, the Court states that national laws may confer exclusive jurisdiction to one specific specialised court irrespective of where the damage occurred within that Member State. Such centralisation of jurisdiction may indeed be justified in the interests of the sound administration of justice.

In the absence of such a specialised court, the Court then identifies two possibilities to determine the place where the damage occurred within a Member State:

(1) Where the victim purchased goods affected by a collusive arrangement exclusively within the jurisdiction of a single court, that court has jurisdiction;

(2) Where cartelised products were purchased in several places within the jurisdiction of several courts in the same Member State, the victim may bring an action for damages before the court where it has its registered office.

According to the Court, those rules to identify the place where the damage occurred in order to ascertain the court having jurisdiction within the Member States are consistent with the objectives of proximity, predictability and the sound administration of justice.

The *Volvo* ruling undoubtedly contributes to providing guidance and predictability to victims of cartel infringements. This will help those victims bring their actions for damages before the competent court and thereby increase the effectiveness of the competition rules in the EU.

Please contact *Pierre de Bandt* or *Jeroen Dewispelaere* for further information about this case and/or for general legal advice relating to competition law.

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ENVIRONMENTAL LAW

The European Commission proposes a new set of legislative tools to reach the targets set in the European Green Deal

Author: Justine Boon

On 11 December 2019, the European Commission ("the Commission") presented the European Green Deal, setting the goal of making Europe the first climate-neutral continent by 2050. In this context, the European Climate Law providing the intermediate target of reducing net greenhouse gas emissions by at least 55% by 2030 (compared to 1990 levels) was adopted and entered into force in July 2021.

It is in the context of these objectives that the Commission, on 14 July 2021, adopted a new package of proposals *"to make the EU's climate, energy, land use, transport and taxation policies fit for reducing net greenhouse gas emissions by at least 55% by 2030"*. This package includes a comprehensive and interconnected set of proposals that are intended to enable the necessary acceleration of greenhouse gas emission reduction in the coming decade.

First, for the EU Emissions Trading System ("ETS"), the Commission is now proposing a revised version of the Directive to lower the overall emission cap further and increase its annual rate of reduction. Furthermore, it proposes that Member States should spend the entirety of their emissions trading revenues on climate and energy-related projects.

Second, the proposal regarding the Effort Sharing Regulation assigns strengthened emissions reduction targets to each Member State for buildings, road and domestic maritime transport, etc. This proposal recognises different starting points and capacities for each Member State, as the targets are based on their GDP per capita.

Third, the proposal regarding the Regulation on land use, forestry and agriculture sets an overall EU target for carbon removals by natural sinks and it recalls that Member States share responsibility for removing carbon from the atmosphere. Accordingly, the EU Forest Strategy aims to improve the quality, quantity and resilience of EU forests. It sets out a plan to plant 33 billion trees across Europe by 2030.

Fourth, the Energy Efficiency Directive will set up a more ambitious binding annual target for reducing energy use at EU level, which i.e. requires the public sector to renovate 3% of its buildings each year to reduce the energy use.

Fifth, another important measure provided by the set of proposals is that it aims to accelerate the transition to zero emissions of new cars to reduce by 55% from 2030 and 100% from 2035 compared to 2021 levels. In its set of proposals, the Commission also provides for reduction of emissions and an increase in the use of sustainable fuels for aircraft and ships.

Finally, a new Carbon Border Adjustment Mechanism will put a carbon price on imports of a selection of products *"to ensure that European emission reductions contribute to a global emissions decline instead of pushing carbon-intensive production outside Europe"*.

In addition, a new Social Climate Fund is proposed *"to provide dedicated funding to Member States to help citizens finance investments in energy efficiency, new heating and cooling systems and cleaner mobility"*.

Before its adoption, this new set of proposals will now undergo discussions within the Council of the EU and the European Parliament. In this context, in her State of the Union address on 15 September 2021, the president of the Commission Ursula Von der Leyen insisted on these environmental objectives and indicated that *"the COP26 in Glasgow will be a moment of truth for the global community"*.

Please contact *Pierre de Bandt*, *Jeroen Dewispelaere* or *Raluca Gherghinaru* for further information about this initiative and/or for general legal advice relating to environmental law.

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EU LITIGATION LAW

Third States can challenge the legality of acts of the EU institutions in the EU Courts: the principle of reciprocity does not apply

Author: Janek Nowak

The question of whether a third State has standing in the EU Courts to challenge EU acts has been the subject of a long-standing debate. In its Grand Chamber judgment of 22 June 2021 in *Bolivarian Republic of Venezuela v Council*, the Court has definitely settled the matter and held that third States have standing to bring an action for annulment of an EU measure in the EU Courts under the same conditions as legal persons. The judgment opens up access to the EU Courts for third States whose interests are affected by the global reach of EU acts and provides a clear alternative for traditional methods of inter-State dispute resolution.

Facts

The State of Venezuela brought an action for annulment in the EU General Court against the Council to have restrictive measures taken with regard to the situation in Venezuela annulled. These measures encompassed *inter alia* a prohibition on undertakings to provide the State of Venezuela with assistance or services related to goods and technology of a military nature and a prior authorisation procedure for the provision of financing and assistance related to material intended for crisis-management operations of regional and sub-regional organisations. The action was dismissed by the General Court because the State of Venezuela was not directly concerned by the restrictive measures.

Argument

Upon appeal, the question had arisen whether the State of Venezuela could be considered a "natural or legal person" within the meaning of Article 263 TFEU, which provides the conditions under which actions for annulment can be brought against EU acts.

The Council defended the position that relations between the EU and third States are governed by public international law, which is based on consent and excludes an automatic right for sovereign States to a judicial remedy before the courts of other States. In light of this, third States could not be allowed, by presenting themselves as individual applicants, to use the EU Courts as a backdoor for resolution of international disputes between subjects of public international law.

This line of defence was further developed by a number of Member States, which relied on the public international law principle of reciprocity to argue that third States could not be granted access to EU Courts where it was not certain that the European Union would be able to challenge the national measures of those States.

The majority of the intervening Member States, supported by the European Commission, disagreed with this position and submitted that a third State is covered by the concept of "legal person" within the meaning of Article 263 TFEU.

Decision

The Court sided with the latter position. It relied heavily on the principle of effective judicial protection and the rule of law in order to give a reading to the notion of "legal person" that encompasses third States. In particular, the Court held in para. 52 of its judgment that "the obligations of the European Union to ensure respect for the rule of law cannot in any way be made subject to a condition of reciprocity as regards relations between the European Union and third States".

After clearing this hurdle, the Court reversed the decision of the General Court that Venezuela was not directly concerned by the restrictive measures, held that the action for annulment was admissible and sent the case back to the General Court for final judgment on the substance.

Consequences for inter-State dispute resolution

The judgment is of great importance for third States seeking to challenge EU acts that harm their interests. While third States still have to meet the other conditions for standing (interest, direct and individual concern), the Court shows that it is prepared to hear disputes between the EU and third countries when the latter submit to its jurisdiction. By doing so, the Court has put itself forward as alternative forum for traditional methods of inter-State dispute resolution, which was also a reason for the European Commission to argue for a broad notion of "legal person".

Compared to traditional forms of inter-State dispute resolution, direct access to the EU Courts to challenge EU acts brings tremendous advantages for third States in terms of efficiency and effectiveness: procedures are multilingual, relatively swift and automatically enforceable in the European Union. These benefits might be more important than the formal loss of a complete impartial adjudicator.

Given that annulment proceedings in the EU Courts are politically less charged, third States should consider this route as a viable option to settle their disputes with the European Union.

Please contact *Pierre de Bandt* or *Raluca Gherghinaru* for further information about this case and/or for general legal advice relating to EU litigation.

INTELLECTUAL PROPERTY

The three-dimensional mark in the shape of a Guerlain lipstick may be registered as an EU trademark

Author: Céline Brauns

The cosmetic company Guerlain applied in 2018 to the European Intellectual Property Office (EUIPO) to register a three-dimensional EU trademark for its lipsticks. The application consisted of a three-dimensional sign consisting of the shape of a lipsticks.

The EUIPO Examiner in charge of the application decided that the sign lacked distinctive character in accordance with article 7 (1)(b) of the EU Trade Mark Regulation and the application was dismissed. Guerlain appealed this decision. The Board of Appeal also considered that the mark did not depart sufficiently from the norms and customs of the sector. The Board ruled that the sign was a mere variation from the shapes of lipstick cases that are available on the market.

Guerlain then referred the matter to the General Court of the European Union. The General Court issued its judgment on 14 July 2021 (case T-488/20).

The Court started by recalling that a three-dimensional mark consisting of the shape of the product must necessarily depart significantly from the norm or customs of the sector concerned. The novelty of the shape is not sufficient to conclude that the sign has a distinctive character. Furthermore, the fact that a sector is characterised by a wide variety of product shapes does not mean that a new possible shape will necessarily be perceived as one of them.

The attractiveness of the shape might serve to prove that such a shape indeed departs significantly from the norms or customs of the sector. In this regard, taking into account the aesthetic aspect of the mark applied does not amount to an assessment of the attractiveness of the product in question, which is always subjective, but has to be done with the aim of determining whether that product is capable of generating an objective and uncommon visual effect in the perception of the relevant public.

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After the examination of the images of shapes of lipsticks constituting the norm and customs in the sector, the General Court considered that Guerlain's sign is uncommon for a lipstick and differs from the norm or customs in the sector of lipsticks. The shape reminds one of a boat hull or a baby carriage and differs from the shapes in the market. Indeed, most of the shapes of lipsticks are cylindrical and parallelepiped which is not the case for the sign in question. The small oval embossed shape contributes to the uncommon appearance of the mark. Contrary to most lipsticks, this one cannot be placed upright.

The General Court concluded that the relevant public with a level of attention ranging from medium to high will be surprised by Guerlain's shape and will perceive it as significantly departing from the norms and customs of the sector. The General Court therefore annulled the Board of Appeal's decision.

This judgment is very interesting for applicants wishing to register shapes as a trademark. Most applications for shapes have been deemed to lack a distinctive character. Perhaps this judgement is the first of a new era for three-dimensional shapes.

Please contact *Karel Janssens* for further information about this topic and/or for general legal advice relating to intellectual property.

ONLINE PLATFORMS

The European Commission (finally) issues its guidance on Article 17 of the DSM Directive

Author: Céline Brauns

On 4 June 2021, the European Commission issued its guidance to EU Member States on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market (the "DSM Directive"). The deadline to transpose the DSM Directive (adopted in May 2019) into national law was 7 June 2021, just a few days after the publication of the guidance.

Article 17 of the DSM Directive is one of the most controversial articles of the DSM Directive. It provides that online content-sharing platforms such as YouTube perform an act of communication to the public when they give that public access to copyright-protected works uploaded by their users. As a result, these platforms have to obtain an authorisation from the rightsholders in order to communicate such content via their website. If no authorisation is granted, they can be liable for copyright infringements unless certain conditions are fulfilled, including proof that they made their best efforts to ensure the unavailability of specific content for which the rightsholders have provided them with the necessary information.

The Commission's guidance aims to ensure a "correct and coherent transposition of Article 17 across the Member States". The guidance is the result of discussion and negotiations between the Member States and stakeholders. The guidance includes further precisions on the definition of online content-sharing services providers, authorisation models with rightsholders, liability mechanisms, best efforts, etc. The published guidance clearly departs content-wise from the draft that was submitted by the Commission last year.

A few clarifications provided by the guidance deserve to be highlighted:

- The guidance clarifies that Article 17 is a *lex specialis* to

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Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive"). The guidance states that *"Article 17 does not affect the concept of communication to the public or of making content available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content"*. This clarification was long awaited as the status of Article 17 compared to the InfoSoc Directive was unsure. Furthermore, Article 17 does not introduce a specific *sui generis* right of communication to the public.

- The Commission also confirmed that Member States cannot develop their own notion of "online content-sharing service providers" and cannot set quantitative thresholds in connection with "large amount" of copyright-protected works in the definition of online content-sharing service providers. Also, the concept of "best efforts" is an autonomous concept of European law that must be applied uniformly.

- The Commission's guidance also recommends limiting automated *ex ante* blocking of content identified by rightsholders to "manifestly infringing uploads".

Regarding the transposition of the DSM Directive in Belgium, the Council of Ministers approved a draft law on Copyright and Related Rights in the Digital Single Market on 4 June 2021. With respect to the transposition of Article 17 of the DSM Directive, the text of the draft law remains fairly close to the text of the Directive.

In addition to the transposition of the DSM Directive, the draft law also provides for a new type of summary proceedings, the objective of which is to put a swift end to large-scale copyright infringements committed online. The draft law also provides for the creation of a new and specialised service within the FPS Economy: the "Service for the fight against infringements of copyright and related rights on the Internet". We will of course keep you updated on the further developments in this regard.

Please contact *Karel Janssens* for further information about this topic and/or for general legal advice relating to online platforms.

ONLINE PLATFORMS

Advocate General Saugmandsgaard Øe considers the filtering of content uploaded by users on content-sharing platforms compatible with the freedom of expression and information

Author: Alice Asselberghs

Another episode in the saga concerning Article 17 of the DSM Directive (Directive 2019/790 on Copyright in the Digital Single Market): on 15 July 2021, Advocate General Saugmandsgaard Øe delivered his opinion in Poland's annulment proceedings against Article 17(4) (b) and (c) of the DSM Directive, a few weeks after the European Commission issued its guidance on Article 17 to EU Member States (previously commented here) and the CJEU delivered its judgment in the case *Youtube* and *Cyando* (previously commented here).

Article 17 of the DSM Directive provides that content-sharing platforms such as YouTube perform an act of communication to the public when they give that public access to copyright-protected works illegally uploaded by their users. As a result, these platforms have to obtain an authorisation from the

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rightsholders in order to communicate such content via their website. In order to avoid liability, they have to monitor the content posted by the users of their services in order to prevent the uploading of protected works and subject matter which the rightsholders do not wish to make accessible on these platforms. This monitoring generally takes the form of filtering by automatic content recognition tools.

Preventive monitoring of uploaded content constitutes, for the Advocate General, an interference with the freedom of expression of platform users and with the public's freedom to receive information. It is clear, in the Advocate General's view, that this interference is attributable to the EU legislature (Article 17 of the DSM Directive) since the liability and exemption of liability regime established imposes an indirect obligation on platforms to filter their users' content.

In his opinion, the Advocate General sets out that interference with the freedom of expression and information enshrined in Article 11 of the EU Charter of Fundamental Rights ("EU Charter") and Article 10 of the European Convention on Human Rights ("ECHR") is permissible provided that it complies with the conditions laid down in Article 52(1) of the EU Charter, interpreted in accordance with Article 10(2) of the ECHR: the interference must (i) be "prescribed by law", (ii) respect the "essence" of the infringed right, and (iii) comply with the principle of proportionality.

In the present case, the Advocate General held that Article 17 of the DSM is compatible with the freedom of expression and information since it satisfies all of the above conditions.

With regard to the essence of the right to freedom of expression, the Advocate General held that content-sharing platforms must indeed monitor all of the content uploaded by their users. However, it is a matter of searching among that content for "specific works or other subject matter" for which the rightsholders will have already communicated to them the "relevant and necessary information" or a "sufficiently substantiated notice". In the Advocate General's view, this suffices to demonstrate that Article 17 lays down, indirectly, a "specific" monitoring obligation and to rule out an infringement of the essence of the right to freedom of expression.

In respect of proportionality, the Advocate General is of the view that the limitation on the exercise of the fundamental rights at stake, namely the freedom of expression and information, by Article 17 of the DSM Directive is appropriate, necessary and proportionate. The Advocate General finds the EU legislature's choice to favour the rightsholders and creative industries not to be disproportionate considering the safeguards provided in Article 17 to minimise the risks of excessive blocking of lawful information. These safeguards include:

(i) the recognition, in Article 17(7) of the DSM Directive, of the right of users to make legitimate use of protected subject matter (for example protected content covered by the exceptions and limitations to copyright). Article 17(7) provides for an obligation to achieve a certainresult: the platforms should not prevent legitimate content being uploaded. This obligation to obtain a certain result is stronger than the obligation of means consisting of the protection of the interests of therightsholders.

(ii) the fact that Article 17(8) of the DSM Directive excludes a general monitoring obligation for content-sharing platforms. Platforms should only be able to detect and block content that is "identical" or "equivalent" to the protected subject matter, i.e. content manifestly violating the rights of the rightsholder which does not require an "independent assessment" of its lawfulness by the platform. In this regard, the Advocate General also criticises the Guidance of the European Commission on the application of the DSM Directive, where it states that, in specific cases, content-sharing platforms should preventively block content on the basis of a mere assertion by the rightsholders "of a risk of significant economic harm", even if the copyright or related right infringement is not manifest.

The Advocate General's opinions are not binding on the Court of Justice. In most cases, however, and as is expected in the present case, the Court of Justice will follow the advice of the Advocate General.

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ONLINE PLATFORMS

The Court of Justice provides clarification as to whether online video-sharing platforms are liable for the posting of copyright-protected content by their users

Author: Alice Asselberghs

In a judgment rendered on 22 June 2021, the EU Court of Justice clarified that operators of online video-sharing or file-hosting and file-sharing platforms do not make a "communication to the public" in the meaning of article 3(1) of the InfoSoc Directive (Directive 2001/29) when merely making a platform available on which videos or files containing copyright-protected content are made publicly accessible by users without the consent of the rightsholders. The Court explained that for the platform to be held liable, the platform must contribute, beyond merely making that platform available, to giving access to such illegal content to the public.

The Court of Justice rendered this new ruling after referrals made by Germany's Bundesgerichtshof (Federal Court of Justice) in two different cases.

The protagonists of the first underlying case are, on the one hand, Frank Peterson, a music producer and, on the other, YouTube (and its legal representative Google). The protagonists of the second underlying case are the international publisher Elsevier and the file-hosting and file-sharing platform Uploaded, operated by Cyando. In these cases, the users of those platforms shared copyright-protected works owned by Mr Peterson and Elsevier without their permission. The referring courts asked the Court of Justice whether these platforms, enabling the online publication of the litigious works, could be held liable for copyright infringement.

It is important to note that the Court of Justice first emphasised that the interpretation provided by the Court does not concern Article 17 of the DSM Directive (Directive 2019/790). This legal regime came into force subsequent to the facts at hand and enshrines a new specific liability regime in respect of works illegally posted online by users of online content-sharing service providers such as YouTube.

The **first question** examined by the Court of Justice concerned the role of content-sharing platforms in the performance of copyright restricted acts: does the operator of an online sharing platform, on which users can illegally make protected content available to the public, itself make a "communication to the public" of that content?

The Court explained that, for the platform to be held liable for copyright infringement, both the indispensable role played by the platform *and* the deliberate nature of its intervention must be taken into account. The latter criterion, i.e. the intervention in full knowledge of the illegal nature of the content made available on its platform, is a key indicator that content sharing platform operators make a "communication to the public", infringing the rights of the rightsholder. The Court of Justice referred to the case *Stichting Brein* (C-610/15) in which it held that the making available and managing of the online file-sharing platform The Pirate Bay constituted a communication to the public, taking into account the fact that its operators *"had intervened in full knowledge of the consequences of their conduct, to provide access to protected works, that they had made explicit, on blogs and forums available on that platform, their purpose of making protected works available to users, and that they had encouraged the latter to make copies of those works"*.

The Court of Justice therefore concluded that a concrete analysis of the circumstances of the case needed to be undertaken in order to determine the deliberate nature of the intervention of the platform operators in the illegal communication of protected content. In that regard, relevant factors include the facts (i) that an operator refrains from putting in place appropriate

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technological measures, (ii) that that operator participates in selecting protected content illegally communicated to the public, and (iii) that it provides tools on its platform specifically intended for the illegal sharing of content or that it knowingly promotes such sharing.

The **second question** examined by the Court of Justice concerned the application of the "safe harbour" mechanism enshrined in Article 14 of the e-Commerce Directive (Directive 2000/31). The Court of Justice noted that the exemption of liability is only applicable to intermediary service providers, meaning that the nature of the activity provided is merely technical, automatic and passive. It necessarily implies that the service provider, in order to be qualified as a mere *intermediary*, cannot have any knowledge or control over the stored content.

Therefore, if the platform operator contributes, beyond merely providing its platform, to giving the public access to protected content in breach of copyright (and hereby performs an act of communication to the public), the operator concerned will be ineligible to rely on the exemption from liability provided for in Article 14 of the e-Commerce Directive. If, on the other hand, the operator does not play an active role of such a kind as to give it knowledge of or control over the content uploaded to its platform, its activity falls within the scope of Article 14. In that regard, the Court noted that the fact that the operator automatically indexes content uploaded to the platform, that that platform has a search function and that it recommends videos on the basis of users' profiles or preferences is not a sufficient ground for the conclusion that that operator has "specific" knowledge of illegal activities carried out on that platform or of illegal information stored on it.

Please contact *Karel Janssens* for further information and/or for general legal advice relating to online platforms.

PRIVACY AND DATA PROTECTION

Recent decisions of the Belgian Data Protection Authority

Author: Isaline d'Hoop

In this news article, we focus on some of the decisions of the Belgian Data Protection Authority ("DPA") issued in the last three months.

1. **Decision of 9 July 2021: qualification as controller, co-controller, processor, or person acting under the authority of the controller?**

In a decision of 9 July 2021 (text in NL/text in FR), the Belgian DPA stresses the importance of making a distinction between a controller, a co-controller, a processor and a person acting under the authority of the controller.

The facts of the case can be summarised as follows. In the context of the complainant's socio-professional rehabilitation, the advising doctor working for the health insurance fund X provided a medical opinion to the national institute for sickness and disability insurance (RIZIV-INAMI). The complainant accused the advising doctor of having forwarded this medical opinion without the former's prior consent and lodged a complaint with the DPA against the health insurance fund. The complainant also invoked a lack of transparency and a failure to respect the obligation of confidentiality.

In order to assess who is responsible/accountable for the data processing, the DPA analyses the qualification of the advising doctor and of the health insurance fund.

The DPA concluded that the health insurance fund qualifies as the sole data controller. The advising doctor of the health insurance fund should not be qualified as a separate data controller or co-controller, but must be qualified as a person acting under the authority of the controller/health insurance fund within the meaning of Article 29 or 32.4 of the GDPR.

To this end, the DPA considers that (i) the advising doctor's professional freedom and independence do not mean that he is

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a controller, since he does not have the power of decision regarding the purposes and means of the data processing, (ii) the doctor is not a co-controller either, as joint responsibility requires a joint determination of both purpose and means of the data processing, which is not the case here, and (iii) the doctor is not a processor either as he is an employee in a hierarchical relationship with the health insurance fund, which is not reconcilable with the qualification as a processor.

2. Decision of 14 July 2021: transfer of customer data within the organisation

The importance of a correct qualification of the parties involved in the data processing was also demonstrated in this case. The facts were as follows. Bank Y, defendant, works by means of a network of independent banking agents. After the cessation of the activities of banking agent A, the defendant decided to transfer the personal data of the complainant, a customer with banking agent A, to banking agent B in order to guarantee the continuity of the financial services. Since the complainant did not consent to such transfer, the latter filed a complaint with the DPA.

In its decision (text in NL/text in FR), the DPA considers that bank Y must be qualified as the data controller and that the independent banking agents must be qualified as data processors on behalf of bank Y. As a result, the transfer of the data took place within bank Y's network between two data processors and cannot be qualified as a transfer to a third party. The DPA further found that the transfer is done for the purposes described in bank Y's privacy policy and that the legal grounds for the processing (performance of contract, compliance with legal provisions, and legitimate interest) have not changed.

On these grounds, the DPA concludes that the consent of the complainant was not required for the transfer and that there was no breach of the GDPR.

3. Decision of 29 July 2021: electoral propaganda mailings and the principle of purpose limitation

In this decision (text in FR), the Belgian DPA once again recalls the importance of respecting the principle of purpose limitation, enshrined in Article 5.1.b) of the GDPR, in particular in the context of sending electoral propaganda mailings.

The complaint concerns the mailing of election propaganda letters by the defendant to senior citizens in the municipality of Z, in the context of the municipal elections of October 2018. The complainant, having been the target of these mails, suspects the defendant of having used the municipal senior citizens' files and of having used his capacity as alderman to divert this file from its intended purpose. The complainant considers this use to be contrary to the GDPR and in particular to the principle of purpose limitation, which imposes that data can only be collected for specific, explicit and legitimate purposes and cannot be further processed in a way that is incompatible with these purposes.

In its decision, the DPA referred to its previous publication "Elections", in which it applied the principle of purpose limitation to the example of electoral propaganda mailings: *"For example, citizens' personal data obtained in the course of exercising an aldermanic mandate may not be reused for the organisation of an election campaign. This is a misuse of information lawfully obtained in the exercise of an aldermanic mandate. Such use of personal data is not only prohibited by the purpose limitation principle, but also breaks the equality between political parties and the equality between candidates. The legislation aims to treat all candidates equally by giving them access to the same data, namely those on the voters' lists".*

Consequently, personal data of citizens obtained in the context of the exercise of an aldermanic mandate cannot be reused for the organisation of an election campaign, which constitutes a different purpose.

Please contact *Karel Janssens* for further information about this topic and/or for general legal advice relating to privacy and data protection.

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PUBLIC PROCUREMENT

The Court of Justice rules on the replacement of undertakings relied on by tenderers in the course of public procurement procedures

Author: Ludovic Panepinto

In the Italian case *Rad Service*, a tenderer intended to rely on the technical and professional capacities of another undertaking in order to demonstrate satisfaction of the selection criteria in a public procurement procedure. However, this undertaking had submitted a declaration to the contracting authority which did not mention a criminal offence committed by its owner and legal representative. Italian procurement legislation provides that, under such circumstances, the contracting authority must exclude the tenderer concerned from the procurement procedure, which is what happened in this case.

The case was brought before the Italian Council of State, which referred a question to the Court of Justice as to whether the Italian legislation was contrary to EU public procurement law, in that it deprived the excluded tenderer from the possibility of making a replacement of the undertaking concerned.

In this regard, Article 57 of EU Directive 2014/24 sets out the situations where contracting authorities may (or, as the case may be, must) exclude tenderers from participation in a procurement procedure: the so-called "grounds for exclusion". These grounds for exclusion apply equally to undertakings whose capacities tenderers rely on in order to fulfil the applicable selection criteria. Withholding information required for the verification of the absence of grounds for exclusion (such as information on criminal convictions) is itself considered a non-compulsory ground for exclusion.

In addition, under Article 63 of Directive 2014/24, the contracting authority *"shall require"* that the tenderer replaces an entity on whose capacities it intends to rely and in respect of which there are compulsory grounds for exclusion. This contracting authority *"may require or may be required by the Member State to require"* such a replacement where the entity is subject to non-compulsory grounds for exclusion.

In its judgment of 3 June 2021 in Rad Service, the Court of Justice started by clarifying the latter rule pertaining to non-compulsory grounds for exclusion. It ruled that, while Member States may lay down an obligation for the contracting authority to require the tenderer to make a replacement of the entity subject to grounds for exclusion, they cannot, by contrast, deprive that contracting authority of the option to require such a replacement on its own initiative. Member States may only replace that option with an obligation for the contracting authority to make such a replacement. In the Court's view, this is in line with the principle of proportionality.

The Court also recalled that, pursuant to Article 57, paragraph 6 of Directive 2014/24, operators may provide evidence of so-called "self-cleaning" measures in order to demonstrate their reliability despite the existence of relevant grounds for exclusion. In those circumstances, even before requiring a tenderer to replace an entity whose capacities it intends to use, on the ground that it is in one of the situations referred to in Article 57 of Directive 2014/24, the contracting authority must give that tenderer and/or that entity the opportunity to submit to it corrective measures in order to demonstrate that it may once again be considered a reliable entity. It is only if the entity against which there is a ground for exclusion failed to take corrective action or if the corrective action which it has taken has been deemed inadequate by the contracting authority, that the latter may or, if required by national law, must, require the tenderer to replace that entity.

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Moreover, the Court of Justice stressed that the contracting authority must have regard to the means available to the tenderer for establishing whether there was a failure on the part of the entity on whose capacities it intended to rely. In the case at hand, the tenderer claimed that it could not have been aware of the criminal conviction of the owner of the ancillary undertaking concerned, because that conviction was not public under Italian law. In the Court's view, should this claim be corroborated by the Italian Council of State, the tenderer could not be accused of having failed to exercise due care and attention. Accordingly, it would be contrary to the principle of proportionality to prevent the replacement of the entity covered by a ground for exclusion.

Finally, the Court of Justice underlined that a request by a contracting authority for the replacement of an entity on whose capacities a tenderer intends to rely must not result in the tenderer submitting what would in reality appear to be a new tender. This would materially amend the initial tender and, hence, be in contradiction with the principles of transparency and of equal treatment.

In the light of the above, the Court of Justice concluded that EU public procurement law precludes national legislation under which the contracting authority must automatically exclude a tenderer from a public procurement procedure in the case where an ancillary undertaking on whose capacities that tenderer intends to rely made an untruthful declaration as to the existence of criminal convictions that have become final, without being able to require or, at the very least, in such a case, permit that tenderer to replace that entity.

Please contact *Peter Teerlinck* or *Raluca Gherghinaru* for further information about this case and/or general legal advice relating to public procurement.

PUBLIC PROCUREMENT

Should the maximum value of a framework agreement be stated as from the launch of the tender procedure?

Author: Louise Galot

In the Weel A/S judgment of 17 June 2021 in case C-23/20, the Court of Justice of the European Union confirmed and clarified its previous case law (judgment of 19 December 2018 in case C- 216/17) regarding framework agreements.

The case concerns a framework agreement with one participant that was awarded by two Danish regions through an open procedure. The framework agreement was to be concluded with one region and the other region could participate "optionally".

However, the invitation to tender did not contain any information on:

- the estimated value of the contract (for either region);
- the maximum value of the framework contract;
- the estimated or maximum quantity of products which could be purchased under the framework agreement.

The Court first confirmed its previous case-law according to which the principles of equal treatment and transparency require that a contracting authority which is initially party to the framework agreement may commit itself only to a certain maximum quantity and/or value, both for its own account and for the account of those potential contracting authorities which are clearly identified in that agreement. Once the maximum quantity is reached, the agreement ceases to have

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any useful effect.

However, the Court of Justice made the following two observations in this regard:

- non-substantial modifications remain possible during implementation; and
- the maximum quantity or value of the services to be provided under a framework agreement can be included indiscriminately in the notice or in the contract documents. Indeed, contracting authorities are obliged to provide free, direct and full access to tender documents from the date of publication of a notice.

Next, the Court had to answer the question of whether the estimated and maximum value must be stated as a whole or per participating tenderer (or potentially participating tenderer).

The Court of Justice answered that the estimated and maximum quantity and/or value refer to the totality of the services to be provided under the framework agreement. However, there is nothing to prevent the contracting authority from laying down additional requirements in the contract documents. Thus, the contracting authority could, for example, subdivide the maximum quantities into the requirements of several contracting authorities concerned.

Finally, the Court stated that the sanction of ineffectiveness does not apply where a contract notice is published in the Official Journal of the European Union, even though, firstly, the estimated quantity and/or value of the supplies to be provided under the proposed framework agreement are not indicated in that contract notice but in the contract documents and, secondly, neither that contract notice nor those contract documents specify a maximum quantity and/or value for the supplies to be provided under that framework agreement.

Please contact *Peter Teerlinck* or *Raluca Gherghinaru* for further information about this case and/or general legal advice relating to public procurement.

STATE AID

Judgment of the General Court shows that it is difficult to challenge a European Commission's decision to initiate a formal investigation into the alleged State aid

Author: Sandrine Verstraete

On 14 July 2021, the General Court in case T-648/19 dismissed the appeal of Nike European Operations Netherlands BV ("Nike") and Converse Netherlands BV ("Converse"), against the decision of the European Commission to initiate a formal investigation into the alleged State aid granted by the Netherlands to Nike in the form of tax rulings and more specifically advance pricing agreements ("APA"). Although such a decision is a challengeable act as it is liable to entail independent legal effects, this judgment shows that the provisional nature of such a decision to open the formal investigation makes it very difficult to challenge its findings successfully.

Indeed, with regard to the obligation of the Commission to state reasons, the General Court noted that the Commission's assessment of the measures at issue is not definitive and may evolve during the formal procedure for obtaining additional information from the Netherlands and interested parties. Consequently, the Court concluded that the applicants cannot complain that the Commission's reasoning as regards the individual character of the measures at issue was incomplete. The contested decision contains a clear and unequivocal statement of reasons in that respect.

In the same spirit, the General Court also set aside criticism from Nike and Converse that the facts on which the contested decision is based should have led the Commission to investigate as a priority the existence of an aid scheme. The Court noted that the Commission is entitled to treat a measure as being individual aid without being obliged to verify beforehand and as a matter of priority whether that measure may have been derived from such a scheme.

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Also with regard to the criticism of the applicants that the Commission made the incorrect principal assumption that the measures at issue were selective, the General Court again emphasised that, given that at the preliminary stage of investigation the Commission cannot be certain that the criteria of Article 107(1) TFEU are satisfied, the Commission was entitled, in the contested decision, to presume, provisionally, that the measures at issue were selective. Not surprisingly, the General Court also concluded that the preliminary examination does not require the Commission to conduct a thorough examination, the latter being carried out with regard to measures for which the assessment raises serious difficulties, once the formal investigation procedure is initiated.

Another interesting argument raised by Nike and Converse was that the Commission should have compared their tax treatment with that of other companies subject to the same rules in order to check whether the applicants received special treatment. Here too, however, they failed to convince the General Court, which ruled that a comparison has to be made between the actual APA and a hypothetical one under market conditions, not between the APA and those of other companies receiving similar treatment.

In line with the above, Nike and Converse had also argued that the Commission breached the principles of good administration and equal treatment by arbitrarily choosing to investigate whether the measures at issue complied with State aid law and not extending its analysis to the general scheme on which the measures at issue were based and its potential beneficiaries. The General Court did not accept this argument. According to the Court, the fact that the Commission chose to review, as a priority, only the compliance of the measures at issue with State aid law, without extending its examination to include the possible existence of any aid scheme of which other undertakings might be beneficiaries, does not entail a breach of the principle of equal treatment. In other words, the Commission remains free to determine those State measures, whether individual or constituting an aid scheme, which it wishes to examine. With regard to other undertakings possibly benefiting from measures similar to those at issue in the present case, the Court noted that under Article 107 TFEU, a beneficiary of aid cannot have the right to maintain its advantage merely because other undertakings are also liable to benefit. The purpose of this is to preserve the practical effect of State aid law.

Please contact *Pierre de Bandt* or *Jeroen Dewispelaere* for further information about this case and/or for general legal advice relating to State aid law.

STATE AID

The Court of Justice clarifies which factors indicate doubts justifying the opening of a formal investigation in State aid matters

Author: Victoria Heinen

Where the Commission, after a preliminary examination, finds that serious doubts are raised as to the compatibility with the internal market of a notified measure, it must decide to initiate formal proceedings pursuant to Article 108(2) TFEU. In its judgment of 2 September 2021, the Court of Justice provides further guidance on the factors that indicate such "serious doubts" (C-57/19 P).

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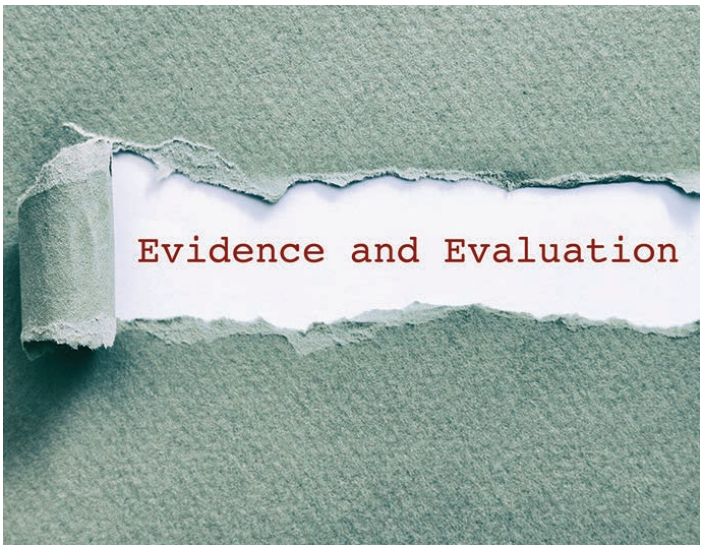
Following pre-notification contacts, the UK authorities notified to the Commission on 23 June 2014 a measure to support capacity providers in the electricity market in Great Britain (the UK Capacity Market scheme). The measure intends to ensure that sufficient electricity supply is available to cover consumption at peak times of stress. In July 2014, the European Commission decided that the UK scheme was compliant with EU State aid rules (SA.35980). However, the decision was challenged by Tempus Energy – a UK energy management technology business – which took the view that the Commission should have opened a formal investigation procedure before granting its approval.

On 15 November 2018, the General Court upheld the action of Tempus and ruled that the Commission should have had doubts about certain aspects of the planned UK Capacity Market scheme, and should therefore have initiated a formal investigation under Article 108(2) TFEU (T-793/14).

On 2 September 2021, the Court of Justice reversed the General Court's judgement and found that the Commission correctly verified the compliance of the UK scheme with internal market rules.



Firstly, the Court rebuts the findings of the General Court that it could rely on the evidence invoked by Tempus such as the number and sources of third parties' observations, the length of the pre-notification phase, and the complexity and novelty of the measure, to evidence the existence of serious difficulties for the Commission in determining the compatibility of the notified measure with EU State aid rules.

In that regard, the Court explains that the size of the aid, its complexity or its novelty are not sufficient to justify the opening of a formal investigation. As for the length and the circumstances of the Commission's analysis, the Court states that this can only constitute an indication that there are doubts when the preliminary examination exceeds the two-month period provided for under Article 4(5) of Regulation 659/1999, which was not the case in this instance.

In addition, the Court clarifies that the number, the multiplicity or the origin of the submissions made to the Commission by interested third parties are not in themselves an indicator of the existence of serious doubts. The Court noted that only if these observations refer to elements that could reveal the existence of serious difficulties in the assessment of the notified scheme (which was not demonstrated in this instance) the Commission must initiate a formal investigation.

Secondly, the Court finds that the General Court erred in law in considering that the assessment of the information and evidence which the Commission had at its disposal should have caused it to have serious doubts as to the compatibility of the scheme with EU State aid rules.

As a preliminary point, the Court states that the Commission is not under the obligation, during the preliminary examination procedure, to seek information from other sources to complement the information brought to its attention by the Member State seeking State aid clearance.

In the same vein, the Court underlines that it is for the party seeking annulment to indicate, based on a "body of consistent evidence", the specific points or elements from the evidence at the Commission's disposal which should have given rise to serious doubts as to the compatibility of the scheme. More precisely, it is for the applicant party to demonstrate that the Commission has neither researched nor examined diligently and impartially all of the relevant information. However, the Court points out that the mere fact that the Commission does not have all the information on a certain aspect of the scheme does not in itself necessarily lead to the conclusion that there were doubts which could have justified opening a formal investigation.

Please contact *Pierre de Bandt* or *Jeroen Dewispelaere* for further information about this case and/or for general legal advice relating to State aid law or energy law.

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