& DE BANDT NEWSLETTER

EU LAW & DIGITAL ECONOMY

Newsletter 15 I November 2022

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& DE BANDT NEWSLETTER

EU LAW & DIGITAL ECONOMY

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CONTENT

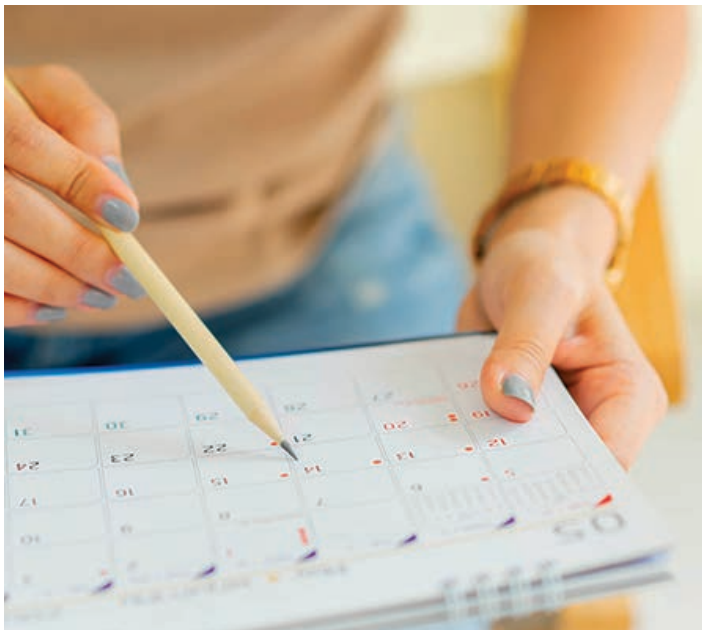
COMPETITION LAW

The Court of Justice clarifies the temporal application of certain provisions of the EU Damages Directive

Author: Victoria Heinen

In its judgment of 22 June 2022 in Case C-267/20 – Volvo and DAF Trucks, the Court of Justice (the Court) clarified the temporal application of Directive 2014/104/EU (the Directive) in cartel cases.

This action for damages follows the Commission's decision of 19 July 2016 (AT.39824) to fine several truck manufacturers for participating in an EEA-wide cartel between 1997 and 2011. One of the truck purchasers, a victim of the cartel, obtained compensation for his damages before the Spanish courts, arguing that the five-year limitation period provided for in Spanish law, transposing the relevant provisions of the Directive, was in force at the time that the action was brought and therefore applied to this case. However, Volvo and DAF Trucks argued that the Directive did not apply to the case, as it was not in force at the time of the infringement.



Through three preliminary questions, the Court sought to clarify the temporal application of the provisions of the Directive relating to the limitation period for actions for damages (Article 10) and the assessment of the damage caused by an infringement of competition law (Article 17).

In a preliminary note, the Court points out that the Directive prohibits (i) the retroactive application of any national legislation transposing the substantive provisions laid down therein and (ii) the application of any national legislation transposing the non-substantive provisions of the Directive to actions for damages brought before 26 December 2014. In this regard, the Court makes clear that: *"the question as to which provisions of that directive are substantive and which are not must, in the absence of a reference to national law in Article 22 of Directive 2014/104, be assessed in the light of EU law and not in the light of the applicable national law"* (§ 39).

- ***The five-year limitation period is applicable when claims for damages are not yet time-barred at the time of the transposition of the Directive***

On the question of the statute of limitations, the Court first notes that it is a matter of **substantive law**, which excludes the retroactive application of national provisions transposing Article 10 of the Directive. In this regard, the Court notes that the Directive was transposed into Spanish law five months after the time limit for its transposition had expired. Therefore, in order to determine the temporal applicability of Article 10, the Court examines whether, on the date when the time limit for the transposition of the Directive expired, namely 27 December 2016, the limitation period applicable to the situation at issue in the main proceedings (one year in Spanish law) had elapsed. In this regard, the Court states that the starting point of the limitation period (i.e. the moment when the circumstances giving rise to liability became known to the injured party) was to be set, *in casu*, on the date of the publication of the summary of the Commission's decision in the *Official Journal* (6 April 2017), which alone provided sufficient details about the infringement (identity of the perpetrators, duration and products concerned). Insofar as the one-year period had, in this case, not elapsed before 27 December 2016, the Court held that the action falls within the temporal scope of Article 10 of the Directive.

- ***The national courts' power to quantify damages applies to legal actions brought after the entry into force of the provisions transposing the Directive into national law***

With regard to the temporal applicability of Article 17(1) of the Directive, the Court finds that that provision pursues the objective of relaxing the standard of proof required for the purpose of quantifying the exact amount of damage suffered as a result of an infringement of competition law, and thus constitutes a **procedural provision** which is intended to be applied on the date on which it enters into force in national law. It is therefore applicable to actions brought after the entry into force of the provisions transposing it into national law, as in this case.

- ***The rebuttable presumption of damage applies to legal actions related to infringements of competition law which have not yet ceased at the time of entry into force of the provisions transposing the Directive into national law***

Conversely, Article 17(2) of the Directive, which establishes a rebuttable presumption of damage caused by a cartel, must be interpreted as constituting a **substantive rule**. Therefore, this provision cannot be applied to an action for damages which, although brought after the entry into force of the provisions transposing the Directive into Spanish law, pertains to an infringement of competition law that ceased before the time limit for transposing the Directive had expired (26 December 2016), as in this case.

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

COMPETITION LAW

"Google and Alphabet v. Commission" saga continues – the General Court largely confirms the Commission's decision on Google's practices to consolidate its dominant position

Author: Zuriñe Irusta Ortega

On 18 July 2018, the Commission fined Google for having abused its dominant position by imposing anticompetitive contractual restrictions on manufacturers of Android mobile devices and mobile network operators.

Three types of restrictions were identified. Firstly, those contained in distribution agreements requiring manufacturers of mobile devices to pre-install the general search (Google Search) and browser (Chrome) apps in order to be able to obtain a licence from Google to use its app store (Play Store). Secondly, those contained in *antifragmentation agreements*, under which the operating licences needed to pre-install the Google Search and Play Store apps could only be obtained by mobile device manufacturers if they undertook not to sell devices running versions of the Android operating system not approved by Google. Thirdly, those contained in revenue share agreements, under which the granting of a share of Google's advertising revenue to the manufacturers of mobile devices and the mobile network operators concerned was subject to them undertaking not to pre-install a competing general search service on a pre-defined portfolio of devices.

According to the Commission, Google's practices consolidated

its dominant position in relation to general search services and strengthened the revenue it obtained from search advertisements. Therefore, the Commission classified these restrictions as a single and continuous infringement of Article 102 TFEU and imposed a fine of almost 4,343 billion euros on Google. Google challenged the Commission's decisions. Consequently, the General Court handed down its judgment in the case on 14 September 2022 (Case T-604/18).

As a first step, the General Court examined whether Google's exercise of its power on the relevant markets enabled it to act independently of the various factors likely to constrain its behaviour. The General Court noted that the Commission went on to find that, of the four interconnected markets identified, Google held a dominant position on three of them, namely (i) the worldwide market (excluding China) for the licensing of smart mobile devices operating systems; (ii) the worldwide market (excluding China) for Android app stores and (iii) the various national markets within the EEA for the provision of general search services. In this regard, the General Court observed that the Commission correctly found that the 'non-licensable' operating systems exclusively used by vertically integrated developers, such as Apple's iOS or Blackberry, are not part of the same market, given that third-party manufacturers of mobile devices cannot obtain licences for them. The General Court also ruled that nor did the Commission err in finding that Google's dominant position on that market was not called into question by the indirect competitive constraint exerted on that market byApple's non-licensable operating system.

As a second step, the General Court examined whether the restrictions at issue were abusive. Firstly, the General Court rejected in its entirety the plea whereby Google alleged that the pre-installation conditions were not abusive. Indeed, the Commission found that such pre-installation could give rise to a *status quo* bias as a result of the tendency exhibited by users to use the search and browser apps available to them, such as to increase significantly and on a lasting basis the usage of the service concerned – an advantage which could not be offset by Google's rivals. The General Court found that none of the criticisms put forward by Google could be levelled against the Commission's analysis in that respect.

Secondly, regarding the assessment of the sole pre-installation condition included in the portfolio-based revenue share agreements, the General Court found that the Commission was justified in considering the agreements at issue to constitute exclusivity agreements, insofar as the payments provided for were subject to there being no pre-installation of competing general search services on the portfolio of products concerned.

Nevertheless, the General Court identified a number of deficiencies in the Commission's assessment. Indeed, in finding them to be abusive, the Commission considered that those agreements were such as to encourage the manufacturers of mobile devices and the mobile network operators concerned not to pre-install such competing services. However, according to the case law, the Commission was required to carry out an analysis of their capacity to restrict competition on the merits in the light of all the relevant circumstances, including the share of the market covered by the contested practice and its intrinsic capacity to foreclose competitors at least as efficient as the dominant undertaking (AEC test). The General Court considered that the statement whereby the Commission found that the agreements in question covered a "significant part" of the national markets for general search services, irrespective of the type of device used, was not supported by the evidence set out in the contested decision. Therefore, the General Court found that the AEC test did not support the finding of abuse resulting from the portfolio-based revenue share agreements in themselves.

Thirdly, regarding the assessment of the restrictions contained in the anti-fragmentation agreements, the General Court observed that the Commission considered such a practice to be abusive insofar as it seeks to prevent the development and market presence of devices running a non-compatible Android fork. Therefore, the General Court upheld the Commission's finding that the practice in question had led to the strengthening of Google's dominant position on the market for general search services, while deterring innovation, insofar as it had limited the diversity of the offers available to users.

Google also sought, before the General Court, a declaration that its right of access to the file was infringed and that its right to be heard was not respected. Concerning the latter, given that the Commission refused Google a hearing on the AEC test, even though it had sent Google two letters of facts substantially supplementing the substance and scope of the approach initially set out in the statement of objections in that respect, but without adopting, as it ought to have done, a supplementary statement of objections followed by a hearing, the General Court considered that the Commission had infringed Google's rights of defence. Thus, it had deprived Google of the opportunity to better ensure its defence by developing its arguments in a hearing. Given the deficiencies previously identified in the Commission's application of the AEC test, the General Court also observed that the value of a hearing was all the more apparent in this case. Consequently, the General Court decided that the finding regarding the abusive nature of the portfolio-based revenue share agreements must be annulled on that basis too.

Finally, making use of its unlimited jurisdiction, the General Court carried out an autonomous assessment of the amount of the fine and concluded that the amount of the fine to be imposed on Google for the infringement committed was to be 4,125 billion euros. Indeed, the General Court observed that, while the contested decision should accordingly be annulled in part, insofar as it concludes that the portfolio-based revenue share agreements are in themselves abusive, this partial annulment did not affect the overall validity of the finding of an infringement, in the light of the exclusionary effects arising from the other abusive practices implemented by Google.

The case in hand can be considered one of the most significant competition decisions of the year. In addition to following up on a competition authority's decision to impose the largest fine ever imposed in Europe, the decision comes in the wake of the "Google and Alphabet v. Commission" saga, which seeks to counter Google's abusive practices consolidating its dominant position.

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

EU LITIGATION

Nord Stream 2 can challenge the extension of the obligations imposed by the EU Gas Directive to gas lines to and from third countries, according to the Court of Justice

Author: Ludovic Panepinto

Directive 2009/73 concerning common rules for the internal market in natural gas lays down various obligations which EU Member States have to transpose into national law, and with which undertakings active in the gas sector have to comply. This directive has recently been amended by Directive 2019/692, notably in order to extend its scope of application to gas transmission lines "between a Member State and a third country".

This prompted Nord Stream 2, a company responsible for the planning, construction and operation of the offshore gas pipeline of the same name, to file annulment proceedings against Directive 2019/692 before the General Court of the EU. Indeed, the Nord Stream 2 pipeline consists of two gas transmission lines which will ensure the flow of gas between Vyborg (Russia) and Lubmin (Germany). Therefore, the extension by Directive 2019/692 of the scope of application of Directive 2009/73 results in additional obligations for Nord Stream 2.

In its order of 20 May 2020, the General Court dismissed Nord Stream 2's action as inadmissible on the grounds that this company had failed to demonstrate that it was "directly" concerned by Directive 2019/692, as required by Article 263 TFEU. Indeed, in the General Court's view, the concrete obligations to be imposed on Nord Stream 2 instead depend on the transposition measures to be adopted at national level. In addition, the national authorities have a wide margin of discretion in granting derogations from the imposition of certain obligations laid down in Directive 2009/73.

Nord Stream 2 appealed against this order. On 12 July 2022, the Court of Justice of the EU, sitting in Grand Chamber, overruled the General Court's decision.

In its judgment, the Court of Justice underlined, in substance, that the General Court's reasoning amounts to excluding directives from the scope of acts likely to be challenged in annulment proceedings in accordance with Article 263 TFEU, which is contrary to the Court's case law.

In the Court's view, the contested directive has the consequence of subjecting the operation of Nord Stream 2 to the rules provided for in Directive 2009/73, thus rendering applicable the specific obligations that it lays down. The fact that transposition measures are required in the light of the type of act at issue (a directive) is irrelevant in this respect, only to the extent that the Member State concerned has no discretion capable of preventing such obligations from being imposed on Nord Stream 2 and, therefore, of calling into question the direct nature of the link between the directive at issue and the imposition of such obligations.

In this regard, the Court of Justice considered that the General Court had failed to examine whether the derogations and exemptions laid down in the directive were capable of applying to Nord Stream 2 and whether the directive at issue allowed the Member State concerned a margin of discretion in its implementation as regards Nord Stream 2. Therefore, the Court of Justice carried out this verification and concluded that Nord Stream 2 did not satisfy the conditions laid down in Directive 2009/73 allowing the national authorities to grant it a derogation or exemption. Since national authorities do not have any discretion as regards the possibility of granting such exemptions or derogations in violation of this directive, there is a direct link between the entry into force of Directive 2019/692 and the imposition on Nord Stream 2 of the obligations laid down by Directive 2009/73.

As a consequence, the Court decided that the General Court had erroneously ruled that Nord Stream 2 was not directly concerned by the provisions of Directive 2019/692.

Furthermore, the Court of Justice observed that, since

Nord Stream 2 was the only undertaking likely to be concerned by the extension of the scope of application of Directive 2009/73 without being eligible for a derogation or exemption under the provisions of this directive, it was also individually concerned by the derogation rules laid down in Directive 2009/73 as amended by Directive 2019/692.

Therefore, the Court of Justice declared Nord Stream 2's appeal admissible to that extent and referred the case to the General Court.

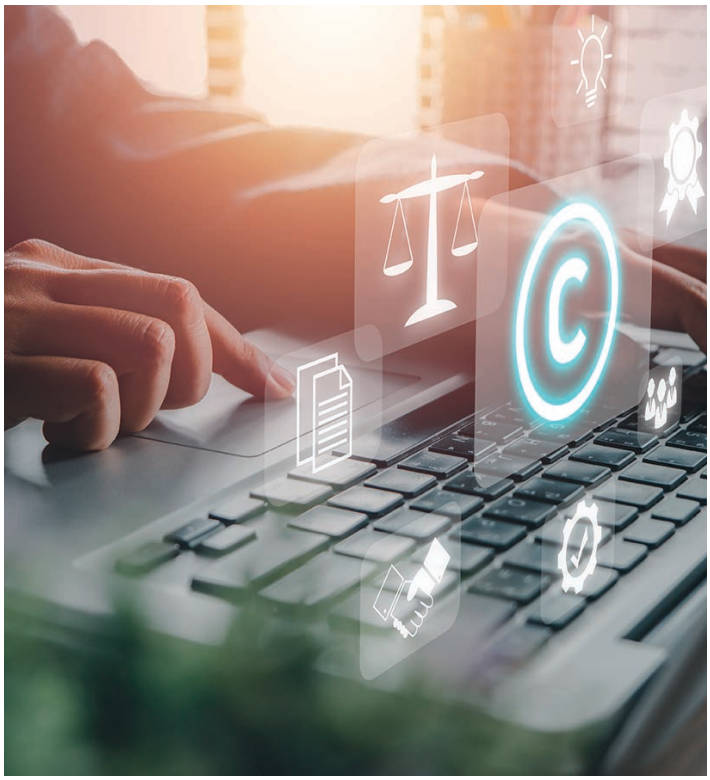
This case shows that the fact that national authorities have a certain freedom in the implementation of the obligations laid down in a directive does not necessarily lead to the absence of "direct concern" of litigants by the provisions of said directive. It is only when the question of *whether* (and not *how exactly*) the legal situation of these litigants will be adversely affected depends on decisions to be adopted by national authorities that such litigants may be found to be without locus standi to challenge the directive at issue in the General Court.

When it is clear that, regardless of the manner in which national authorities will exercise their powers, additional obligations will be imposed on a person as a result of the adoption of an act of the Union, that person should not be forced to challenge the (most certainly adverse) decisions to be taken by Member States' authorities in the national courts, in the hope that these courts will refer questions to the Court of Justice for a preliminary ruling. As Advocate General Michal Bobek pertinently pointed out in his opinion, the "complete system of legal remedies and procedures" designed to ensure judicial review of European Union acts "is not meant to be a lengthy obstacle race for applicants".

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

INTELLECTUAL PROPERTY

Belgium transposes the Copyright in the Digital Single Market Directive into national law



Author: Isaline d'Hoop

By the Law of 19 June 2022, Belgium transposed European Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, also known as the "DSM Directive".

Adopted on 17 April 2019, the DSM Directive aims to modernize existing copyright laws and to adapt them to today's digital society. As explained in a previous news text, the key innovations of the DSM Directive are:

- The adoption of additional limitations to the exclusive rights of rights holders;
- The introduction of a new licensing mechanism for out-of-commerce works;
- The creation of a new press publishers right;
- The introduction of a new liability regime for online content-sharing service providers;
- The adoption of new rules to ensure a fair remuneration in exploitation contracts of authors and performers.

Member States had to transpose the Directive into their national legislation by 7 June 2021, which means that the Belgian transposition took place with more than a year of delay.

Most of the provisions were transposed into the Belgian Code of Economic Law (hereinafter "CEL"), and more precisely in Books I, XI and XVII. However, some provisions were introduced into the Belgian Judicial Code, in the Law of 17 January 2003 on the status of the regulator of the Belgian postal and telecommunications sectors and in the Law of 17 January 2003 concerning appeals and the handling of disputes in connection with the aforementioned Law of 17 January 2003.

The Law of 19 June 2022 states:

- four new mandatory exceptions to copyright and related rights: text and data mining for scientific research purposes (Articles XI.191/1, XI.191/2, XI.217/1 and XI.310 CEL, transposing Article 3 of the DSM Directive), text and data mining for other purposes (Articles XI.190, XI.191, XI.217, XI.299 and XI.310 CEL, transposing Article 4 of the Directive), the digital use of works for teaching purposes (Articles XI.191/1, XI.191/2, XI.217/1, XI.240, XI.299 and XI.310 CEL, transposing Article 5 of the Directive) and reproductions for the purpose of the preservation of cultural heritage (Articles XI.191/1, XI.191/2, XI.217/1, XI.240, XI.299 and XI.310 CEL, transposing Article 6 of the Directive);
- a new licensing mechanism for out-of-commerce works, making it easier for cultural heritage institutions to make such works available to the public (Articles XI.218/2 and XI.245/7/2 to XI.245/7/6 CEL, transposing articles 8 to 10 of the Directive);
- a new neighbouring right for press publishers for the online use of their publications by information society service providers (Articles XI.216/2, XI.216/3, XI.217, XI.217/1, XI.218/1 and XI.245/7 CEL, transposing article 15 of the Directive);
- new rules for sharing protected content by online content-sharing service providers such as YouTube (Articles XI.228/3 and XI.228/5 to XI.228/9 CEL, transposing article 17 of the Directive);
- and measures ensuring an appropriate and fair remuneration for authors and performers in exploitation contracts, including a transparency obligation and contract adjustment mechanism (XI.167/2 to XI.167/5, XI.205/2 to XI.205/5 and XI.228/10 to XI.228/11 CEL, transposing articles 19 to 22 of the Directive).

In addition, the Belgian legislator adopted a new procedure to strengthen the fight against mass online infringements on copyrights, related rights or database rights. It concerns a specific summary proceeding before the president of the Brussels Enterprise Court, which can impose preliminary measures in the event of clear and substantial infringements committed online (Articles XVII.34/1, XVII.34/2, XVII.34/4 and XVII.34/5 CEL).

To conclude, the creation of a specific service within the FPS Economy is introduced in the Code of Economic Law. Once instituted, this "service for the fight against online infringements of copyright and related rights" will be competent, among other things, to advise on and further specify the preliminary measures imposed in the context of the aforementioned summary proceedings in order to ensure the effectiveness of these measures, or to request the president of the Enterprise Court to withdraw or modify them. The service will also establish a list of websites that are subject to preliminary measures and can establish an indicative list of websites that lawfully make protected works available to the public (Article XVII.34/3 CEL).

The Law of 19 June 2022 was published in the Belgian Official Gazette on 1 August 2022 and (for the most part) entered into force on that date.

Please contact *Karel Janssens* for further information on the above and/or for general legal advice relating to copyright law and intellectual property.

PRIVACY AND DATA PROTECTION

Advocate General Athanasios Rantos delivers his opinion on the competence of national competition authorities to assess compliance of data protection rules

Author: Alice Asselberghs

On 20 September 2022, Advocate General Athanasios Rantos delivered his opinion in case C-252/21 referred to the Court of Justice by the Higher Regional Court of Düsseldorf in Germany. The preliminary questions relate, among other things, to the competence of national competition authorities to assess the compliance of data processing with the GDPR.

In 2019, the Bundeskartellamt, the German competition authority, found that Facebook (currently Meta Platforms) abused its dominant position and imposed far-reaching restrictions on the processing of users' data. The anticompetitive practice consisted of the fact that Meta Platforms collected data from its other services, such as Instagram and WhatsApp, as well as from third-party websites and apps, and then linked those data with the user's Facebook account and used them to sell tailored online advertising. Meta Platforms filed an appeal against the Bundeskartellamt's decision before the referring court.

The first question asked by the referring court pertains to the competence of a national competition authority to rule **primarily** on the infringement of GDPR rules and to issue an order to end possible breaches. The Advocate General, however, is of the view that the Bundeskartellamt did not sanction Meta Platforms for breach of the GDPR but reviewed, for the sole purpose of applying competition rules, an alleged abuse of its dominant position while taking account, *inter alia*, of that undertaking's non-compliance with the provisions of the GDPR. The Advocate General therefore considers the first question to be irrelevant.

The Advocate General then turns to the question concerning the power of a competition authority to establish **as an incidental**

question, i.e. when prosecuting infringements of competition rules, whether data processing activities comply with the GDPR. The Advocate General is of the view that the GDPR does not preclude competition authorities from being able, in exercising their own powers, to take account of the compatibility of a certain conduct with the provisions of the GDPR. The compliance or non-compliance with the GDPR of an undertaking's conduct may constitute a vital clue to establish whether that conduct amounts to a breach of competition rules.

However, the Advocate General clarifies that this must be without prejudice to the competent supervisory authority's powers under the GDPR so as not to undermine the uniform interpretation of the GDPR.

To that end, national competition authorities should inform and cooperate in good faith with the data protection authorities. Where the data protection authority has ruled on the application of certain provisions of the GDPR in respect of the same or similar practices, the competition authority cannot, in principle, deviate from the interpretation of that authority and should comply with any decisions adopted by that authority concerning the same conduct. In the event of doubts as to the interpretation given by the data protection authority, the competition authority should consult that authority.

Furthermore, even without a decision by the competent data protection authority, it is still the competition authority's duty to inform and cooperate with the data protection authority where that authority has begun an investigation of the same practice or has indicated its intention to do so, and possibly to await the outcome of that authority's investigation before commencing its own assessment.

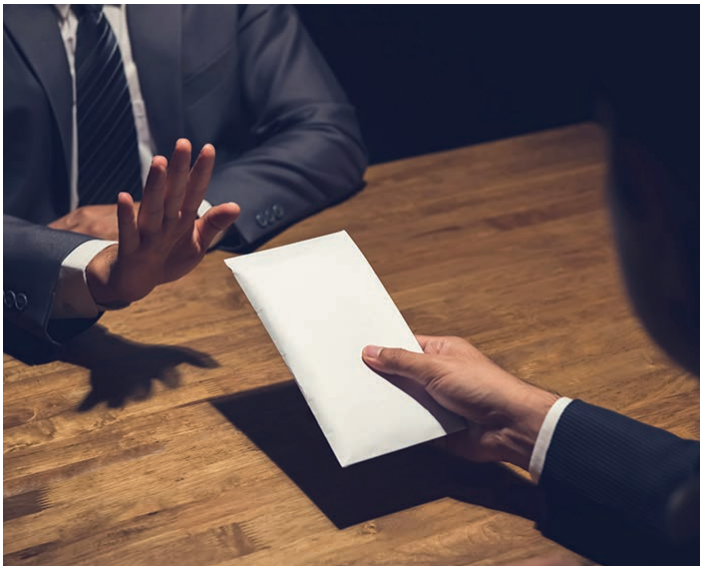
Please contact *Karel Janssens* for further information about this topic and/or for general advice relating to privacy and data protection.

PRIVACY AND DATA PROTECTION

The Court of Justice of the EU interprets the notion of special categories of personal data in a broad manner

Author: Alice Asselberghs

In its ruling of 1 August 2022, the Court of Justice of the EU answered two preliminary questions raised by the Regional Administrative Court of Vilnius (the referring court). These questions concerned the balance between the right to protection of personal data on the one hand and the prevention of corruption in the public service on the other (case C-184/20).



The case began when a director of a Lithuanian establishment receiving public funds refused to lodge a declaration of private interests in accordance with Lithuanian law. The aim of such a declaration by public officials is to ensure that the public interest takes precedence when decisions are taken, to guarantee the impartiality of decisions taken and to prevent corruption. The Chief Official Ethics Commission, the public authority responsible for collecting and checking these declarations of private interests, found that the director's failure to lodge such declaration was in breach of the law. The director appealed that decision before the referring court, stating that the legal obligation was clearly in breach with the right to privacy and protection of personal data enshrined in the GDPR.

The referring court questioned the lawfulness of the processing of personal data and the publication on the website of the Chief Official Ethics Commission of the declaration of private interests (or a part of the latter). Such publication contains personal information not only about the public official but also about his or her family, such as the name of his or her partner.

Firstly, the Court of Justice considered whether the online publication of the personal data by the Chief Official Ethics Commission could be regarded as lawful under Article 6(1)(c) of the GDPR (processing is necessary for compliance with a legal obligation to which the controller is subject) and Article 6(3) of the GDPR (requirement to meet an objective of public interest and to be proportionate to the legitimate aim pursued).

Despite the fact that the processing by the Chief Official Ethics Commission is necessary in view of the relevant Lithuanian law and complies with Article 6(1)(c) of the GDPR, the Court held that the publication of personal data such as the name of the partner of public officials or data relating to all transactions, the value of which is greater than EUR 3,000, was not proportionate/strictly necessary to meet the public interest pursued. The Court ascertained that the objective of preventing conflicts of interest and corruption in the public sector by reinforcing the probity and impartiality of public officials could be achieved just as effectively by other measures less restrictive of the rights to privacy and to the protection of personal data. The Court also pointed out that a lack of resources allocated to the public authorities (the Chief Official Ethics Commission stated that it published the declarations because it does not have sufficient resources to check effectively all the declarations that are submitted to it) cannot constitute a legitimate ground justifying an interference with the fundamental rights guaranteed by the EU Charter of Fundamental Rights.

Secondly, the Court of Justice held, referring to the context and the objectives of the GDPR, that "sensitive data" - the

processing of which is subject to stricter rules - also comprise personal data that are liable to disclose indirectly the political opinions, trade union membership or sexual orientation of a natural person. In the present case, the requirement to include the name of the public official's partner indirectly revealed his sexual orientation.

By this decision, and in particular by the broad interpretation of special categories of personal data, the Court of Justice again highlights its ambition to ensure a high level of protection of the right to privacy and protection of personal data.

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

PRIVACY AND DATA PROTECTION

Recent decisions on data protection

Author: Marie Manhaeve

In this news article, we will focus on a decision by the Irish Data Protection Commission ("DPC"), a request for a preliminary ruling referred by the Belgian Market Court and a decision by the Belgian Data Protection Authority ("DPA").

1. Monster €405 million fine for Instagram for inadequately securing minors' personal data

On 2 September 2022, the Irish Data Protection Commission (DPC) fined Meta Platforms Ireland Limited ("Meta") the sum of €405 million for breaching the privacy rights of children under the GDPR when using Instagram.

Many of the big tech companies, such as Meta, are based in Ireland for tax reasons, which gives the Irish DPC an important supervisory role.

The Irish DPC had opened its investigation in 2020 in order to determine whether Meta had put in place the necessary safeguards to protect users' data. The investigation focused on how the Instagram service retained and processed the personal data of minors between the ages of 13 and 17, and on how the platform allowed these underaged users to operate 'professional' accounts. This type of account required users – by default – to make their contact details public, meaning that they were visible to everyone on the social network without any active authorisation having been given.

On the basis of its investigation, the DPC concluded that Meta did not have the necessary safeguards in place to protect user data, especially the data of minors.

The DPC first decided that Meta could not rely on Article 6.1 (b) nor on Article 6.1 (f) GDPR as a legal basis for the processing of minors' data, and had therefore infringed Article 6.1 GDPR.

Secondly, the DPC found that Meta processed more data than necessary and thereby infringed its obligations in relation to data protection by design and default (Article 25 GDPR) and data minimisation (Article 5.1(c) GDPR).

Thirdly, the DPC ruled that Meta did not provide sufficient transparency as required by Articles 5 and 12 GDPR regarding both the by default public disclosure of minors' profiles and the public availability of their contact details. Meta, as a data controller, has a duty to provide transparent information in this regard which, particularly when minors are involved, should be unambiguous and clear, leaving no room for nuance.

The decision of the Irish DPC is an historic decision. Not only is this the first cross-border data processing case under the GDPR where all EU/EEA data protection authorities were

involved in the Article 60 co-decision-making process, it also involves the second-highest fine imposed since the GDPR came into effect and is the first EU-wide judgement on children's data protection rights. The DPC has made it abundantly clear that businesses that market to children must exercise extreme caution.

Meta has announced its intention to appeal the decision.

2. The IAB Europe saga continues: the Belgian Market Court refers preliminary questions to the Court of Justice of the European Union

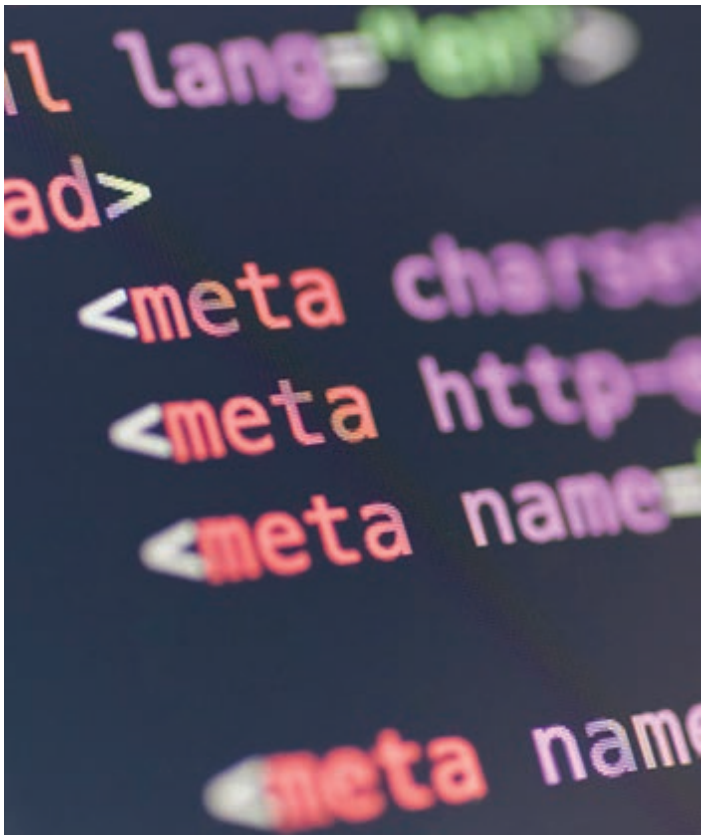
In its decision of 2 February 2022, the Belgian DPA found IAB Europe to be a "joint data controller" for processing personal data under the Transparency and Consent Framework (TCF), a widespread mechanism that enables websites, advertisers and ad agencies to efficiently manage consumer consent, objections and preferences for online personalised advertising. As a result, the DPA held IAB Europe responsible for the GDPR violations associated with the use of the TCF and imposed a fine of €250,000.

IAB Europe appealed the decision before the Belgian Market Court. IAB Europe firstly contests that the TC String, a series of numbers and letters representing user preferences that is key to the functioning of the TC, constitutes personal data. IAB Europe secondly contests that it is acting as a joint data controller and that it violated its obligations under the GDPR.

The Market Court decided to refer the following preliminary questions to the EU Court of Justice:

"1) Is the TC String personal data (with or without a combination with an IP address) for the alleged controller and/or with regard to companies that use the TC String? (Article 4(1) GDPR)?

2) a) Is IAB a (joint) controller (Article 4(7) GDPR and Article 24(1) GDPR)?
b) Does it matter whether or not IAB has access to the personal data which are processed by companies that use the standards of IAB?
c) If IAB is indeed a (joint) controller, does this also entail responsibility for further processing by third parties regarding the preferences of data subjects, such as targeted online advertising?"



The EU Court's ruling will have a major impact across the EU, not only because the TCF is a widespread mechanism that facilitates the management of users' preferences for online personalised advertising, but also because the Court will further clarify key concepts of the GDPR, such as the definition of the term "(joint) data controller" and its applicability to framework developers.

3. Recent ruling of the Belgian Data Protection Authority on direct marketing

In the case that led to the decision of 26 July 2022, a data subject had filed a complaint against a company for sending unsolicited advertising for telecom services. The complainant had exercised his right to object and had requested access to his personal data. He had also requested information about the legal basis for the processing of his personal data.

The company responded that the personal data were processed on the legal basis of "legitimate interest" (Article 6.1(f) GDPR). However, since the complainant had not been a customer of the company for more than two years, he was of the opinion that the company could not invoke legitimate interest for the processing of his e-mail address for direct

marketing purposes.

With reference to recital 47 of the GDPR, the DPA firstly confirmed that legitimate interest can be a legal basis for the processing of e-mail addresses for direct marketing purposes.

Secondly, the DPA confirmed that this lawful basis can also be invoked for sending direct marketing to former customers, and not only to existing customers. The DPA pointed out that it had stated in its Recommendation No 01/2020 of 17 January 2020 on the processing of personal data for direct marketing purposes, that if the controller has never had any relationship with a data subject, or if this relationship goes back a long time without being followed up in the meantime, the legitimate interest basis cannot be invoked. In that case, the receipt of direct marketing is not part of the data subject's reasonable expectations. However, the DPA noted that in this case, the complainant had cancelled his subscription in 2019 but the facts dated from 2021. According to the DPA, the complainant could reasonably expect that his data could still be used for direct marketing purposes during that two-year period. Moreover, the controller had informed the complainant that once the contract was terminated, former customers' data would be processed for marketing activities for a maximum period of two years.

Thirdly, the DPA considered that the company had, within the one-month period after receiving the complainant's request not to receive further direct marketing communications (Article 12.3 GDPR), complied with the request by confirming that the complainant's personal data had been deleted.

Under these circumstances, the DPA decided to dismiss the case.

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

PUBLIC PROCUREMENT

Point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, on the optional grounds for exclusion related to agreements between economic operators aimed at distorting competition, has a broader scope than Article 101 TFEU

Author: Louise Galot

J is a trader operating under his company name, and K. Reisen is a bus transport company with limited liability of which J is the managing director and sole shareholder. Both J and K. Reisen submitted tenders relating to a contract notice for the award, by open procedure, of a public contract for public transport bus services through the same person, namely J.

J and K. Reisen were informed that their tenders had been excluded for breach of competition rules insofar as they had been drafted by the same person.

After unsuccessfully lodging a complaint, J and K. Reisen brought an action before the *Vergabekammer Südbayern*, which upheld that action and ordered the public authority to reinstate the tenders submitted by the two tenderers in the procedure for the award of the contract in question.

The public authority brought an appeal against that decision before the *Bayerisches Oberstes Landesgericht*, which decided to refer three questions to the Court of Justice for a preliminary ruling.

According to point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, contracting authorities may exclude or may be required by Member States to exclude

any economic operator from participating in a procurement procedure where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.

By means of its first question, the referring court is asking, in essence, whether the aforementioned article only covers cases where there are sufficiently plausible indications to conclude that economic operators have infringed Article 101 TFEU.

In its judgment of 15 September 2022 in Case C-416/21, the Court of Justice concluded that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 has a broader scope than Article 101 TFEU. The first provision also covers economic operators which have entered into anticompetitive agreements that do not fall within Article 101 TFEU. Therefore, the mere fact that such an agreement between two economic operators does not fall within Article 101 TFEU does not prevent it from being covered by point (d) of the first subparagraph of Article 57(4) of Directive 2014/24.

The Court of Justice emphasised that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 necessarily presupposes that there is a common intention on the part of at least two different economic operators.

By means of its second and third questions, the referring court is asking, in essence, whether Article 57(4) of Directive 2014/24 should be interpreted as meaning that Article 57(4) exhaustively regulates the optional grounds for exclusion, which prevents the principle of equal treatment from precluding the award of the contract in question to economic operators which constitute a separate economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.

Firstly, the Court of Justice states that Article 57(4) of Directive 2014/24 exhaustively lists the optional grounds for exclusion capable of justifying the exclusion of an economic operator from participating in a procurement procedure for reasons based on objective factors relating to its professional qualities, a conflict of interest or a distortion of competition that might arise from its involvement in the preparation of such procedure.

Furthermore, the Court of Justice states that the exhaustive listing of optional grounds for exclusion does not, however, prevent the principle of equal treatment, provided for in Article 36(1) of Directive 2014/25, from precluding the award of the contract in question to economic operators which constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.

The Court of Justice leaves it to the national court to determine whether the tenders at issue have been submitted autonomously and independently.

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

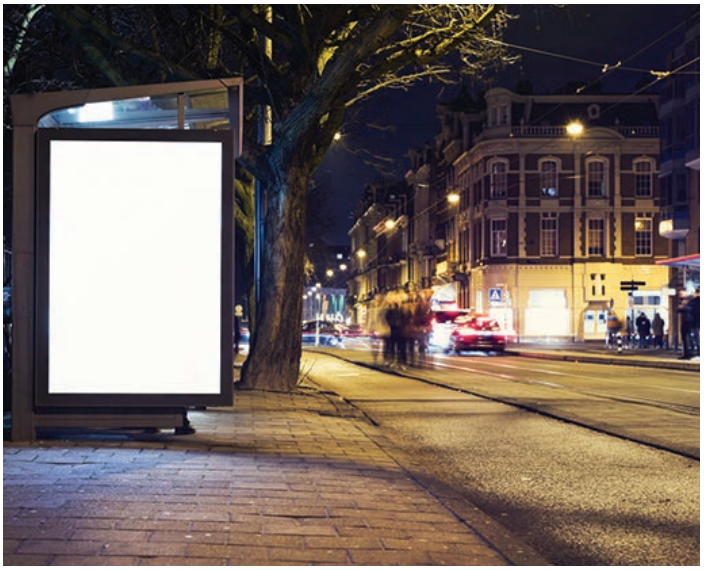
STATE AID

The General Court upholds the Commission's decision on the State aid granted by Belgium to JCDecaux Belgium Publicité

Author: Zuriñe Irusta Ortega

The General Court dismissed JCDecaux's action against a Commission decision finding that JCDecaux's exemption from payment of rent and taxes on advertising displays is State aid incompatible with the internal market (Case T-642/19).

The City of Brussels and JCDecaux (the applicant) entered into a first public contract in 1984, whereby the applicant made available to the City of Brussels and operated advertising bus shelters and street furniture of which it remained the owner. Moreover, JCDecaux was required to



provide the City of Brussels with a number of benefits in kind. In return for its services, the applicant did not pay any rent or occupancy fees for the street furniture. In 1995, the City of Brussels terminated the 1984 contract.

In 1998, the City of Brussels issued a call for tenders for, among other things, the manufacture, supply and installation of street furniture, passenger shelters and display stands. In order to comply with its contractual obligations under the 1984 contract, the City of Brussels included an annex to the special tender specifications, listing a number of bus shelters and items of street furniture covered by the 1984 contract where the applicant's right to operate had not yet expired under the terms of said contract.

JCDecaux won the tender procedure and, as a result, a second public contract was entered into between JCDecaux and the City of Brussels in 1999, for a 15-year period. The City of Brussels became the owner of the street furniture in return for payment of a net fixed price for each device. In exchange, the applicant had to pay a monthly rent for the use of the street furniture covered by the contract for advertising purposes. During the implementation of the 1999 contract, some of the devices listed in the aforementioned annex to the special tender specifications were removed before their specified expiry date, while others were maintained beyond those dates. For the latter devices, the applicant paid neither rent nor taxes to the City of Brussels.

In 2011, Clear Channel Belgium (JCDecaux's main competitor in Belgium) lodged a complaint with the European Commission denouncing the illegality and incompatibility of the State aid received by JCDecaux from the City of Brussels. On 24 June 2019, after the formal investigation procedure had closed, the Commission adopted the contested decision establishing that, by continuing to operate certain devices listed in the annex beyond their scheduled expiry date ('the phantom billboards') without paying any rent or tax to the City of Brussels, JCDecaux had benefited from State aid which was incompatible with the internal market.

JCDecaux's main argument was that, as some of the devices listed in the annex to the 1999 tender procedure were removed in advance, it was allowed to "compensate for" the loss resulting therefrom by maintaining and operating the devices listed in that annex beyond their expiry date. Consequently, because of this alleged compensation mechanism, the benefits derived from this late operation of phantom billboards did not qualify as State aid.

Firstly, regarding the 1984 contract compensation mechanism (based on the obligation of the City of Brussels to preserve the economic balance of the 1984 contract), the General Court pointed out that State aid is an objective legal concept defined directly by Article 107(1) TFEU, which does

not distinguish between the causes or objectives of State interventions, but rather considers them in terms of their effects. Consequently, the fact that the objective of the State measure was to preserve the economic balance of the 1984 contract or that this objective was in accordance with the principles of national law does not *ab initio* preclude such a measure qualifying as State aid.

Therefore, continuing to operate some of the devices listed in the annex beyond their expiry date enabled the applicant to avoid installing and operating new devices under the 1999 contract. Consequently, the applicant avoided paying rent and taxes to the City of Brussels that it would have had to pay under the latter contract and that would have been detrimental to its budget.

Furthermore, the General Court pointed out that, in order to determine whether a State measure constitutes aid, it is necessary to assess whether, in similar circumstances, a market economy operator of a size comparable to that of public sector bodies could have taken a similar decision, namely, in this case, to compensate in a similar way for damage allegedly caused to a co-contractor in the performance of its contractual obligations. The General Court concluded that, in the case in hand, the City of Brussels was not acting as a market operator.

The General Court also held that the City of Brussels was not exempted from carrying out an analysis of the existence and extent of any loss which JCDecaux might have suffered as a result of the early removal of certain devices provided for in the annex and for which an alleged compensation mechanism was intended to preserve the economic balance of the 1984 contract, before putting that mechanism in place. Indeed, such an analysis was necessary in order to verify whether the measure complied with the requirements of European Union law, in particular those arising from Article 107(1) TFEU.

Moreover, the General Court confirmed the Commission's assessment that the 1984 contract was a purely commercial contract. Indeed, the Belgian authorities did not define the installation and operation of street furniture as a service of general economic interest, and no act of public authority mandated JCDecaux to carry out the removal of certain street furniture devices in performance of a public service obligation. Hence the first Altmark condition was not met.

In light of the abovementioned reasoning, the Court found that the Commission did not commit an error of assessment in considering that the maintenance and operation of certain devices listed in the annex beyond their expiry date provided for in that annex constituted an advantage through State resources within the meaning of Article 107(1) TFEU.

This judgment illustrates once again that the concept of aid not only includes positive benefits, such as transfers of State resources, but also measures whereby public authorities grant an exemption from economic charges that place the beneficiaries in a more favourable financial situation than other taxpayers and that, without being subsidies in the strict sense of the term, are of the same nature and have the same effects. This is all the more important in a case such as this one, where the economic advantage was to some extent 'hidden' by entering into a subsequent contract.

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

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