& DE BANDT NEWSLETTER

EU LAW & DIGITAL ECONOMY

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EU LAW & DIGITAL ECONOMY

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COMPETITION LAW

The EU Digital Markets Act: new rules to ensure free and fair online markets

Author: Chloé Binet

The EU Digital Markets Act (DMA) came into force on 1 November 2022 and will begin to apply from 2 May 2023. The new Regulation (2022/1925) introduces rules for platforms that act as "gatekeepers" in the digital sector, to prevent them from imposing unfair conditions on businesses and end users and to ensure the openness of important digital services.

The DMA introduces a number of prohibitions and obligations on certain large online platforms (designated as "gatekeepers") that serve as important gateways for business users to reach their end users. The DMA has been developed in close alignment with the Digital Services Act (DSA), together forming the "Digital Services Package". This new set of rules aims to create a safer digital space in which the fundamental rights of all users of digital services are protected and to establish a level playing field to foster innovation.

What is a gatekeeper?

The DMA will only apply to companies designated as gatekeepers based on objective criteria set out in the Regulation.

In order to be designated as a gatekeeper, an undertaking needs to provide at least one "core platform service" (CPS) from among those listed in the DMA. This list includes online search engines, social networking services, app stores, certain messaging services, video sharing platform services, web browsers, virtual assistants, cloud computing services, operating systems, online marketplaces and advertising services. The same company can be designated as a gatekeeper for several CPSs.

In addition, the provider of a CPS needs to meet three

cumulative criteria in order to fall within the scope of the DMA:

- Significant impact on the internal market: the provider achieves a certain annual turnover in the European Economic Area (above €7.5 billion in each of the last three financial years, or market capitalisation or equivalent fair market value above €75 billion in the last financial year) and provides a CPS in at least three EU Member States

- Important gateway for business users in respect of final consumers: the provider links a large user base (more than 45 million active end users per month) to a large number of businesses (more than 10,000 active business users per year)

- Entrenched and durable position: the provider has met the second criterion for the last three years.

An undertaking is presumed to satisfy these qualitative criteria if the quantitative thresholds are met. However, the undertaking can rebut this presumption by presenting sufficiently substantiated arguments to demonstrate that, exceptionally, due to the circumstances in which the CPS operates, the qualitative criteria are not met.

In practice, within two months of the date on which the DMA becomes applicable (i.e. 2 May 2023), potential

gatekeepers will have to notify their CPS to the Commission if they meet the thresholds established by the DMA. The Commission will then have 45 working days in which to make an assessment as to whether the undertaking in question meets the thresholds and to designate it as a gatekeeper.

What obligations are imposed on gatekeepers?

The DMA provides a list of "dos" and "don'ts" that gatekeepers will need to implement in their daily operations in order to ensure fair and open digital markets.

By way of illustration, gatekeepers will have to:

- Allow end users to install third-party apps or app stores that use or interoperate with the gatekeeper's operating system
- Allow end users to unsubscribe from the gatekeeper's core platform services as easily as they subscribe to them
- Allow third parties to interoperate with the gatekeeper's own services
- Provide the companies advertising on their platform with access to the gatekeeper's performance measuring tools and the information needed for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper
- Allow business users to promote their offers and enter into contracts with their customers outside the gatekeeper's platform
- Provide business users with access to the data generated by their activities on the gatekeeper's platform.

Among the "don'ts", gatekeepers are prohibited from:

- Using business users' data when gatekeepers compete with them on their own platform
- Ranking the gatekeeper's own products or services in a more favourable manner than those of third parties
- Requiring app developers to use certain services provided by the gatekeeper (such as payment systems or identity providers) in order to appear in the gatekeeper's app store
- Tracking end users outside the gatekeeper's core platform service for the purpose of targeted advertising, without effective consent from such users.

These obligations and prohibitions will apply to the provider of a CPS six months after it has been designated as a gatekeeper.

If a gatekeeper does not comply with the rules, the DMA allows the Commission to impose fines of up to 10% of the company's total annual worldwide turnover. The fine may reach up to 20% in the event of repeated infringements. In addition, the Commission can impose periodic penalty payments of up to 5% of the company's total daily worldwide turnover.

In the event of systematic infringements, the Commission can impose additional remedies. These may include structural remedies, such as obliging a gatekeeper to sell a business, or parts of it, or banning a gatekeeper from acquiring any company that provides services in the digital sector.

How does the DMA interact with the competition rules ?

The objective to ensure contestability and fairness on the digital markets is closely linked to the objective of competition law, namely undistorted competition.

In addition, the obligations and prohibitions provided for in the Regulation are inspired by past and current competition law cases in the digital sector.

However, the DMA will not replace but will instead complement the enforcement of competition rules at EU and national levels.

The *ex-post* enforcement of competition law may indeed be burdensome (requiring the definition of a relevant market, proof of the existence of a dominant position and a restrictive impact on competition), take years and therefore be ineffective when it comes to preventing harm to SMEs and innovators in the digital sector. The DMA's *ex-ante* approach will therefore constitute a useful complementary tool to help curb undesirable practices by online platforms.

For further information about the DMA and/or for general legal advice relating to Belgian and EU Competition, please contact *Pierre de Bandt* or *Jeroen Dewispelaere*.

COMPETITION LAW

FIFA/UEFA 1 – 0 ESLC : according to Advocate General Rantos, FIFA/UEFA rules requiring prior approval and sanctions are not per se incompatible with EU law

Author: Zuriñe Irusta Ortega

On 15 December 2022, Advocate General Rantos delivered his opinion in case C-333/21. This case pertains to whether certain provisions of the FIFA and UEFA Statutes comply with EU competition law and the fundamental freedoms.

The present case concerns three major actors in the field of football competitions. On the one hand, International Association Football Federation ("FIFA") and Union of European Football Associations ("UEFA") are both governing bodies established in Switzerland holding a monopoly in respect of the authorisation and the organisation of international professional football competitions in Europe. On the other hand, the European Super League Company ("ESLC") is a company founded by elite European football clubs to set up the first closed annual pan-European football competition named the "European Super League" ("ESL"). Although the ESL would exist independently of UEFA, its clubs would continue to participate in the football competitions organised by UEFA and FIFA.

The FIFA and UEFA Statutes provide, *inter alia*, for a prior authorisation regime for the establishment of a rival tournament. Failure to comply with this requirement would result in the imposition of sanctions such as disciplinary measures (e.g. exclusion of clubs and players participating in the ESL). Furthermore, under these rules, all the rights connected with the exploitation of international football competitions belong to FIFA and UEFA.

Following FIFA and UEFA's refusal to recognise the ESL, ESLC brought proceedings before a Spanish court which requested the Court of Justice ("Court") to rule on the compatibility of FIFA/UEFA rules with EU law.

As a preliminary remark, AG Rantos stresses that article 165 of the Treaty on the Functioning of the EU ("TFEU") gives expression of the recognition of the "European Sports Model". This model is characterised by a *pyramid structure* whose primary objective is the promotion of *open competitions* and is based on *financial solidarity*. Moreover, sports are an area of significant economic activity with a special social character which, in some respects, may justify a difference in treatment. Indeed, the social and educational function of sport, intrinsically linked to article 165 TFEU, may be relevant in the analysis of any objective justification for restrictions on competition or fundamental freedoms.

In addition, AG Rantos considers that the sports federations, such as UEFA, play a key role in this model from an organisational perspective as they guarantee respect for and uniform application of the rules. He states that the fact that UEFA is both the regulator and a commercial actor organising international competitions raises a risk of conflict of interests, but that alone does not suffice to establish a violation of competition law.

AG Rantos then proceeds to examine the compatibility of the FIFA/UEFA rules (i.e. the *ex-ante* approval scheme and related sanctions) with EU law.

Compatibility with Article 101(1) TFEU

Firstly, AG Rantos observes that, even if FIFA/UEFA rules relating to the prior approval scheme are liable to have the effect of restricting the access of UEFA's competitors to the market of the organisation of football competitions in Europe, such a finding does not manifestly mean that those rules have the object of restricting competition within the meaning of article 101(1) TFEU.

Secondly, AG Rantos recalls that, where a restriction by object is not evidently established, a complete analysis of its

effects must be carried out for the purposes of Article 101(1) TFEU. To that end, according to AG Rantos it is necessary to study the potential impact of the above-mentioned sanctions.

In that same vein, AG Rantos points out that, to fall outside the scope of Article 101(1) TFEU, the restrictions caused by the UEFA/FIFA rules must pursuit legitimate objectives and be proportionate to those objectives, without going beyond what is necessary for their achievement. In that context, he finds support for his analysis on the *ancillary restraints doctrine.*

With regard to the legitimacy of the objective pursued by the UEFA rules, AG Rantos finds that, because most of the objectives invoked by UEFA/FIFA derive from the "European Sports Model", their legitimacy cannot be contested (i). Additionally, he considers that both the *ex-ante* approval mechanism and the sanctions can be regarded as inherent to the pursuit of FIFA/UEFA legitimate objectives. Indeed, the aim of the approval mechanism is to maintain the principles of participation based on sporting results, equal opportunities and solidarity, characterising the above-mentioned pyramid structure, and to avoid dual membership scenarios (ii). Finally, AG Rantos observes that the sanctions UEFA/FIFA threatened to impose to the football clubs aiming to be part of the ESL may appear proportionate given the incompatibility of such new competition with the fundamental principles structuring the functioning of European football (iii).

For all these reasons, in AG Rantos' opinion, Article 101(1) TFEU must be interpreted as not precluding UEFA/FIFA rules to provide a prior approval scheme since the restrictive effects which stem from this scheme seem to be inherent in, and proportionate for achieving, the aforementioned legitimate objectives.

Compatibility with Article 102 TFEU

Given its dominant position as the sole organiser at the European level of major football competitions, the particular responsibility borne by UEFA materialises in its obligation to ensure, when examining new competition requests, that third parties are not unduly denied access to the market. AG Rantos considers that the analysis developed regarding the application of the case-law on "ancillary restraints" can be transposed when examining the measures at issue in the light of Article 102 TFEU.

Compatibility with the fundamental freedoms

According to AG Rantos, even though the *ex-ante* approval system set up by FIFA/UEFA rules may be regarded as being liable to restrict the fundamental economic freedoms, such restriction may be justified by legitimate objectives related to the specific nature of sport.

The present opinion reflects the "constitutional" importance given to the "European Sports Model" in the European Union. Given the special nature of sport, the legitimate objectives embedded in that model can justify the compatibility of certain rules with EU law, even though, at first sight, the concerned practice appears to be restrictive of both competition and fundamental freedoms provisions.

The final ruling of the Court in this case is expected in the course of 2023. By way of reminder, the Court is not obliged to follow the opinion of the advocate general in its final decision.

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

EU LITIGATION

The Court of Justice considerably expands the standing of approved environmental associations in relation to "dieselgate" defeat devices before the national courts

Author: Charlotte Reyns

Approved environmental associations must be allowed to bring legal action before the national courts against EC type-approval of vehicles fitted with "dieselgate" software, following a combined reading of the Aarhus Convention and the right to an effective remedy (case C-873/19).

On 8 November 2022, the Court of Justice (the "Court") held that, following a combined reading of the Aarhus Convention

and the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the EU ("CFR"), approved environmental associations must be able to challenge EC type-approvals of vehicles fitted with defeat devices before the national courts (case C-873/19).

Background: a national decision granting approval of "dieselgate" software

In the case at hand, the Deutsche Umwelthilfe (the "DUH"), an environmental association recognised under German law, brought a claim before the Administrative Court of Schleswig-Holstein (the "referring court") against the Kraftfahrt Bundesamt (the Federal Motor Transport Authority, or "KBA") for approving a particular type of software used in diesel vehicles. According to the DUH, this type of software should be considered a "defeat device" prohibited under Article 5(2) of Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information ("Regulation No 715/2007"). Such defeat devices, which *"reduce the effectiveness of emission control systems"*, attracted attention in the context of the Volkswagen "dieselgate" scandal. Through its action, the DUH was seeking to have the authorisation granted by the KBA overturned.

However, the Federal Republic of Germany, which was the defendant in the main proceedings, held that the DUH did not have the standing to bring such proceedings and called on the referring court to declare the action inadmissible. Furthermore, it argued that the software was compatible with EU law. Faced with uncertainty regarding both points, the referring court referred two questions to the Court. This contribution will focus on the question of the standing of environmental associations before the national courts.

Nationally approved environmental associations must have standing before the national courts to challenge decisions concerning defeat devices

The Court commenced its reasoning with a reminder that it is able to interpret the Aarhus Convention and that the case at hand falls within the scope of that convention. Article 9(3) of the Aarhus Convention requires that "*members of the public*" have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities that contravene provisions of their national law relating to the environment. The Court held that (i) Regulation No 715/2007, by virtue of its direct applicability, must be viewed as national environmental law, and that (ii) the DUH should not only be considered as a member of the public, but also as "*the public concerned*" within the meaning of Article 2(5) of the Aarhus Convention. Under the latter provision, nationally approved NGOs promoting environmental protection must be deemed to have an interest in bringing proceedings.

Secondly, the Court reiterated that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. Consequently, the provision itself cannot confer standing on environmental associations if they do not have this under national law. However, national provisions must be interpreted to the fullest extent possible in accordance with the requirements of international agreements concluded by the EU, such as the Aarhus Convention. In that regard, Article 9(3) of the Aarhus Convention would be deprived of all useful effect and even of its very substance if environmental associations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention were to be denied any right to bring proceedings against acts and omissions that contravene national environmental law provisions.

Furthermore, the Court reminded the referring court that the procedural rules that prevent the DUH from bringing legal proceedings under national law, concern the exercise of the rights that an environmental organisation derives from Article 5(2) of Regulation No 715/2007. Consequently, when laying down such procedural rules, Member States are implementing

EU law for the purposes of Article 51(1) CFR and must ensure compliance with the right to an effective remedy as laid down in Article 47 CFR. While Article 9(3) of the Aarhus Convention does not have direct effect and is confined to a duty of conform interpretation, Article 47 CFR does have direct effect. The Court held that the right to an effective remedy is hampered when an environmental association, although authorised for the purposes of having access to the judicial procedures referred to in Article 9(3) of the Aarhus Convention, cannot challenge an EC type-approval that may be contrary to Article 5(2) of Regulation No 715/2007.

Following a combined reading of the Aarhus Convention and the right to an effective remedy, the Court reverted to the principles of primacy of EU law, and stated that it falls to the national court to interpret national law so as to allow environmental associations to challenge EC type-approvals of vehicles fitted with "dieselgate" software. Should such interpretation be impossible, the referring court must set aside the conflicting national provisions. By means of this ruling, the Court has again considerably expanded the rights of environmental associations to bring legal action and has paved the way for more intense and broader climate litigation.

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

PRIVACY AND DATA PROTECTION

The Court of Justice invalidates a provision of the Anti-Money Laundering Directive that guaranteed public access to information on the beneficial ownership of companies

Author: Isaline d'Hoop de Synghem

On 22 November 2022, the Court of justice of the EU ruled on the compatibility of a provision relating to the Register of Beneficial Ownership with the right to respect for private life and the right to protection of personal data. The Court held that the provision, which prescribes public accessibility to the information on the beneficial ownership of companies, is invalid on the grounds that the interference with the above-mentioned rights is neither limited to what is strictly necessary nor proportionate to the objective pursued (joined cases C-37/20 and C-601/20).

The Anti-Money Laundering Directive and the Register of Beneficial Ownership

The European Union has legislated on money laundering by adopting, on 20 May 2015, Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("the Anti-Money Laundering Directive").

Amended by Directive 2018/843 of 30 May 2018, the Anti-Money Laundering Directive provides that Member States must

ensure that information on the beneficial ownership of companies and of other legal entities incorporated within their territory is accessible in all cases to any member of the general public.

Consequently, certain countries, including Luxembourg, have adopted laws establishing a Register of Beneficial Ownership ("the RBO"), which the general public can consult on the internet.

The judgment of 22 November 2022

This ruling was issued in response to preliminary questions raised by a Luxembourg court, which had received two actions brought by a Luxembourg company and its beneficial owner, unsuccessfully requesting, on the basis of the 2019 Luxembourg law establishing a RBO, that the general public's access to information concerning them should be restricted.

Following the preliminary questions referred by the Luxembourg judge, the Grand Chamber of the Court of justice ("the Court") interpreted certain provisions of the Anti-Money Laundering Directive and ruled on the validity of those provisions in light of the Charter of Fundamental Rights of the EU ("the Charter").

- On the serious interference with fundamental rights

According to the Court, the general public's access to information on beneficial ownership constitutes serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, which respectively guarantee the right to respect for private and family life, home and communications, and the right to the protection of personal data.

Indeed, the general public's access to data containing information about identified natural persons constitutes processing of personal data and therefore interferes with the two above-mentioned fundamental rights. Furthermore, this interference should be considered serious given that the information made available enables a profile to be established concerning the material and financial situation of a beneficial owner. This information would be accessible to a potentially unlimited number of people and could be freely retained and disseminated.

- On the examination of the interference with fundamental rights

In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights protected by the Charter must meet the following criteria in order to be lawful:

- It must be provided for by law;
- It must respect the essence of the rights;
- It must genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others;
- It must be necessary;
- It must be proportionate.

However, after establishing that the first three criteria were met, the Court held that the interference is neither limited to what is necessary nor proportionate to the objective pursued.

Indeed, the Court found that the justification provided by Directive 2018/843, which consists of asserting that the general public's access to information on beneficial ownership "can contribute" to combatting the misuse of corporate legal entities and that it "would also help" criminal investigations, cannot lead to the assumption that the measure is limited to what is strictly necessary.

Moreover, the Court found that the interference with the relevant fundamental rights is also disproportionate given that the Anti-Money Laundering Directive provides for access by any member of the general public "at least" to the data referred to therein. As those data are not sufficiently defined and identifiable, the rules governing interference do not meet the requirements of clarity and precision.

The Court therefore concluded that the relevant provisions of the Anti-Money Laundering Directive are invalid insofar as they create an obligation for Member States to ensure that information on the beneficial ownership of companies and of other legal entities incorporated within their territory is accessible in all cases to any member of the general public.

Review of the judgment

A few days after its ruling, the Court provided clarifications on

its judgment of 22 November 2022. In particular, it explained that: "*The effect of this declaration of invalidity is that the 2018 amendment should be regarded as never having taken place*". Therefore, following this judgment, "*information on beneficial owners must be accessible in all cases to any person or organisation able to demonstrate a legitimate interest*".

The Court further explained that consequently, the Anti-Money Laundering Directive "*still allows access to beneficial owner information for persons and organisations with a legitimate interest, including the press and certain organisations in society*".

What are the consequences of this ruling for national RBOs?

Following this judgment of 22 November 2022, Luxembourg and other countries, including Belgium and the Netherlands, have already announced the temporary suspension of their RBOs. However, access is maintained for competent authorities and reporting entities.

Please contact *Karel Janssens* for further information on the above and/or for general legal advice relating to privacy and data protection.

PRIVACY AND DATA PROTECTION

EU General Court rules WhatsApp's appeal against the EDPB's decision inadmissible

Author: Marie Manhaeve

On 20 August 2021, the Irish Data Protection Commission ordered WhatsApp Ireland Limited to pay a monster fine of EUR 225 million. WhatsApp appealed the decision of the European Data Protection Board that led to the Irish supervisory authority's decision, but on 7 December 2022, the General Court declared the appeal inadmissible (T-709/21).

To refresh your memory

In December 2018, the Irish Data Protection Commission (DPC) launched an investigation into WhatsApp Ireland Limited – now a subsidiary of Meta Platforms Ireland Limited. The Irish DPC examined whether WhatsApp complied with the transparency and information obligations laid down in Articles 12, 13 and 14 of the General Data Protection Regulation (GDPR) as regards both users and non-users of the application. As WhatsApp has its main establishment in Ireland, the Irish supervisory authority acted as the lead watchdog.

In September 2020, the Irish DPC submitted its investigation report and draft decision to the other supervisory authorities of the EU Member States in accordance with Article 60 GDPR. Eight of those authorities objected to the draft decision. Since the authorities failed to reach a consensus, the Irish DPC triggered the dispute resolution mechanism of Article 65 GDPR and referred the matter to the European Data Protection Board (EDPB). The EDPB issued a binding decision on 28 July 2021, ordering the Irish DPC to review its draft decision. The EDPB considered that the Irish DPC should amend the decision regarding WhatsApp's breaches of the GDPR, the calculation of the fine and the deadline for

WhatsApp's compliance. WhatsApp submitted its comments in 2021, which were taken into account by the Irish DPC in formulating its final decision.

In its final decision of 20 August 2021, the Irish DPC found that WhatsApp (*inter alia*) failed to provide users with information laid down by Articles 13 and 14 GDPR, making it impossible for them to adequately consider and exercise their rights. The Irish DPC fined WhatsApp a total of EUR 225 million. The EDPB's decision was attached to the Irish DPC's final decision.

WhatsApp marches to the General Court

WhatsApp challenged the Irish DPC's decision before an Irish court and sought the annulment of the EPDB's binding decision before the EU General Court. The General Court therefore had to rule, for the first time, on an application for annulment of a decision of the EDPB under Article 65 GDPR.

In line with Article 263 of the Treaty on the Functioning of the European Union (TFEU), the General Court first noted that the contested decision adopted by the EDPB is an act of a body of the Union and is intended to produce legal effects vis-à-vis third parties, since it is a 'binding decision' with respect to the supervisory authorities concerned. However, in order to constitute an act open to challenge by WhatsApp, the act must have binding legal effects capable of affecting the interests of WhatsApp by bringing about a distinct change in WhatsApp's legal position.

In this regard, the General Court held that WhatsApp is individually concerned by the decision of the EDPB, since this decision relates to certain aspects of a draft final decision of the Irish supervisory authority concerning it specifically. However, the General Court found that the EPDB's decision does not in itself change WhatsApp's legal position. The decision is a preparatory act in a procedure which must end with the adoption of a final decision of the Irish DPC, and is therefore not directly enforceable against WhatsApp. In addition, WhatsApp is afforded effective judicial protection in respect of the contested decision by means of the remedy available to it before the national court against the final decision of the Irish supervisory authority, making it possible to assess the validity of the contested decision.

The General Court also noted that the EDPB's decision is not enforceable against WhatsApp in a way that would allow it, without further procedural steps, to be a source of obligations for WhatsApp. In addition, the General Court found that, even though the contested decision was binding on the Irish supervisory authority as regards the aspects to which it related, it left a measure of discretion to the Irish DPC as to the content of its final decision.

In conclusion, the General Court considered that accepting that WhatsApp's action against the contested decision was admissible would mean that two parallel judicial proceedings would be ongoing, with significant overlap: one before the General Court challenging the EDPB's decision and the other before an Irish court challenging the final decision, part of the grounds of which are based on the EDPB's decision.

For the above reasons, the General Court, ruling in extended composition, dismissed the action brought by WhatsApp as being **inadmissible**.

What's next?

In its ruling, the General Court reiterated the principles of the system of judicial remedies established by the Treaty on European Union (TEU) and the TFEU. The TFEU ensures judicial review of the legality of acts of the European Union, in which the national courts also participate. Under this system, WhatsApp cannot, by reason of the conditions for admissibility, directly challenge the decision of the EDPB before the General Court, but it can indirectly plea the invalidity of this act before the national court by introducing an action against the subsequent final decision of the Irish DPC. In turn, this national court is able, where appropriate, to make a request to the Court of Justice for a preliminary ruling.

In line with this system of judicial review, we now await the judgment of the competent Irish court following WhatsApp's challenge of the final decision of the Irish DPC.

To be continued!

For the sake of comprehensiveness, we note that WhatsApp can also bring an appeal, limited to points of law only, before the Court of Justice, against the decision of the General Court, within two months and 10 days of being notified of the decision.

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

PRIVACY AND DATA PROTECTION

The European Court of Justice clarifies the obligations for search engine operators when receiving a request for de-referencing ("right to be forgotten")

Author: Marie Manhaeve & Karel Janssens

In its ruling of 8 December 2022, the European Court of Justice made further clarifications regarding the obligations for data subjects and operators of search engines when making/receiving a request for de-referencing (right to erasure) (case C-460/20).

What preceded this

Two managers of a group of investment companies were the subject of articles published online. These articles criticised the group's investment models and contained photographs of the managers in luxury vehicles, in a helicopter and in front of an aeroplane. Internet users were able to access these articles and photos by entering the names of the managers into Google's search engine.

The managers called on Google, as the controller of the personal data processed by its search engine, to de-reference the links to the articles in question from the list of search results on the grounds that they contained inaccurate claims and defamatory opinions. They also asked Google to remove their photographs, displayed in the form of thumbnails, from the list of results of an image search. Google refused to comply with these requests and claimed to be unaware of whether or not the information in the articles was accurate.

The matter ended up before the German *Bundesgerichtshof*, which decided to stay the proceedings and refer questions to the European Court of Justice ("CJEU") for a preliminary ruling. The *Bundesgerichtshof* asked the CJEU:

1) whether de-referencing by a search engine operator is subject to the condition that the question of the accuracy of the referenced content has been resolved, at least provisionally;

2) whether, for the purposes of examining a request for de-referencing seeking the removal of photographs from the results of an image search, account should be taken solely of the informative value of the thumbnails, in the neutral context of the list of results, or whether regard must also be given to the original context of the publication of the photographs, which is not apparent solely from diplaying thumbnails in the context of the list of results.

The CJEU's findings

First question. The CJEU pointed out that the operator of a search engine who receives a request for de-referencing must ascertain whether the inclusion of the link in the list of search results is necessary for exercising the right to freedom of information of internet users (see also Article 17(3)(a) of the General Data Protection Regulation). Indeed, the right to protection of personal data is not an absolute right but must be balanced against other fundamental rights.

This balancing exercise is always based on a case-by-case assessment of the relevant circumstances, notably the nature of the information, its sensitivity to the private life of the data subject and the public's interest in having this information. As such, the right to freedom of expression and information cannot be taken into account when at least part of the information referred to in the request for data erasure – that is not minor in relation to the content as a whole – proves to be inaccurate.

The question here is (i) to what extent the person who has submitted the request for de-referencing must provide evidence to support his or her claim relating to the inaccuracy of the information and (ii) whether the operator of the search engine must itself seek to clarify the facts in order to establish whether or not the allegedly inaccurate information is accurate.

In this regard, the CJEU found that the person requesting the removal of the links must establish that the information or part of it is manifestly incorrect. However, that person only has to provide such evidence as may reasonably be required in light of the circumstances of the particular case. He or she cannot be required, at the pre-litigation stage, to produce a judicial decision made against the publisher of the website, even in the form of a decision given in interim proceedings.

On the other hand, the Court also clarified that the search engine operator cannot be required to actively investigate the facts or seek to obtain missing information concerning the accuracy of the referenced content. This would impose a burden on that operator in excess of what can reasonably be expected.

Accordingly, where a person makes a request for de-referencing and submits sufficient evidence establishing the manifest inaccuracy of at least part of the information, the operator of the search engine must accede to that request. Of course, the same applies where the data subject submits a judicial decision made against the publisher of the website. However, where the inaccuracy of such information is not obvious in light of the evidence provided by the data subject making the request, the search engine operator is not required to accede to such a request for de-referencing.

The CJEU also noted that where administrative or judicial proceedings concerning the alleged inaccuracy of information found in referenced content are initiated and where the search engine operator has been informed of such proceedings, the operator should add a warning to the search results regarding the existence of such proceedings.

Second question. Regarding the request to remove the thumbnails, the CJEU considered that displaying photographs of a data subject following a search by name constitutes particularly significant interference with the data subject's rights to private life and that person's personal data. Consequently, the operator of the search engine must ascertain whether displaying the photos is necessary for exercising the right to freedom of information of internet users who are potentially interested in accessing these photographs by means of such a search.

According to the CJEU, a separate balancing exercise has to be made depending on whether this concerns (i) articles containing photographs which illustrate the information provided in the articles and the opinions expressed in them or (ii) photographs displayed in the list of results in the form of thumbnails outside the context in which they were published on the original internet page.

Consequently, with regard to thumbnails in the list of search results, account must be taken of the informative value of these photographs regardless of the context of their publication on the internet page from which they are taken. However, any text element which directly accompanies the displaying of these photographs in the search results and which is capable of casting light on the informative value of these photographs must be taken into consideration.

In conclusion

In response to the preliminary questions, the CJEU provided further clarity on the extent of the obligations and responsibilities incumbent on an operator of a search engine in processing a request for de-referencing based on the alleged inaccuracy of the information in the referenced content. Consequently, the CJEU's ruling provides helpful guidance regarding the oh-so-delicate balancing exercise between the right to private life and to data protection and the right to freedom of expression and information.

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

PUBLIC PROCUREMENT

The Court of Justice rules on the conditions for in-house contracts and horizontal cooperation between public authorities

After having confirmed that public authorities can invoke the direct effect of provisions of directives, the Court of Justice specifies some control conditions for in-house contracts and states that a common objective is a key element for horizontal cooperation between public authorities (joined cases C-383/21 and C-384/21).

Author: Louise Galot

Facts

The public housing company Société de logement de service public Sambre et Biesme (SLSP S&B) and the municipality of Farciennes entered into a framework procurement agreement to create an 'eco-district' comprising 150 public and private housing units in the municipality. Under this agreement, a contract for project management assistance, legal advice and environmental services was awarded directly to Igretec, which is also a public entity.

Igretec is comprised exclusively of legal persons governed by public law. Under Igretec's articles of association, most of the votes and the chairmanship of the various management bodies are reserved for the municipalities.

At the time of the facts, a councillor from Farciennes, who was also a director of SLSP S&B, was on Igretec's board of directors. SLSP S&B bought a single share in Igretec in order to benefit from its services.

The oversight authority responsible for supervising public housing development companies cancelled the agreement, considering that the conditions for a direct award were not met. SLSP S&B and Farciennes challenged this cancellation.

This caused the Belgian Council of State to refer questions to the Court of Justice (Court) for a preliminary ruling that the Court answered in its judgment of 22 December 2022.

Direct effect of Article 12(3) and (4) of Directive 2014/24

According to Article 12(3) of Directive 2014/24 on public procurement, a contracting authority may award a public contract 'in-house' without competitive tendering where the conditions set out in the provision are met. The main condition is that the contracting authority (or several contracting authorities) must exercise control over a tenderer that has been awarded the public contract.

The exclusion of the application of Directive 2014/24 provided for in paragraph 4 of Article 12 is based on cooperation among contracting authorities between which no relationship of control exists.

At the time of the facts, the Belgian law incorporating Directive 2014/24 into domestic law was not yet in force, even though the time limit for its transposition had already expired.

Therefore, the Court first had to answer whether both provisions should be interpreted as having direct effect in

disputes between public law bodies concerning the direct award of public contracts.

Firstly, the Court began by pointing out the two main conditions that need be met for a provision of a directive to have direct effect. The provision must be **unconditional** and **sufficiently precise**.

Secondly, the Court stated that **public authorities** can invoke the direct effect of provisions of directives.

Finally, the Court concluded that both provisions have direct effect.

The control condition of point (i) of the second subparagraph of Article 12(3) of Directive 2014/24

The second question that the Court had to answer was whether point (i) of the second subparagraph of Article 12(3) of Directive 2014/24 should be interpreted as meaning that, in order to establish that a contracting authority exercises joint control with other contracting authorities over the contracting legal person similar to that which they exercise over their own departments, the requirement referred to in that provision that a contracting authority should be represented on the decision-making bodies of the controlled legal person is satisfied solely if the representative of another contracting authority who is also a member of the board of directors of the first contracting authority sits on the board of directors of that legal person.

Firstly, the Court stated that the contracting authority's control over the contracting legal person may not be indirect.

Secondly, the Court pointed out that in order to analyse whether a contracting authority exercises control over the legal person similar to that which it exercises over its own departments, the factors to be considered are the factual circumstances, the applicable legislation and, in particular, the control mechanisms provided for by the articles of association of that legal person.

Thirdly, the Court found that a contracting authority cannot be considered using its own resources and acting on its own when it is not able to intervene in the decision-making bodies of the legal person to which the public contract is awarded through a representative who acts on behalf of that contracting authority itself.

Finally, the Court concluded that in this case, the control condition of point (i) of the second subparagraph of Article 12(3) of Directive 2014/24 was not met.

The common objective of horizontal cooperation under Article 12(4) of Directive 2014/24

The last question answered by the Court was whether Article 12(4) of Directive 2014/24 should be interpreted as meaning that a public contract whereby public service tasks are entrusted to a contracting authority that form part of a cooperative relationship between other contracting authorities is excluded from the scope of that directive.

The Court found that a key element of horizontal cooperation is that the collaboration between the parties should be intended to achieve **objectives common to all of them**.

Such an objective common to all contracting authorities is lacking where, in carrying out its tasks under the public contract concerned, one of the contracting authorities does not seek to achieve objectives which it would share with the other contracting authorities but confines itself to contributing to the achievement of objectives which only those other contracting authorities have in common.

In this case, the Court found that Igretec's objectives differed from the objectives of SLSP S&B and Farciennes.

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

PUBLIC PROCUREMENT

The Court of Justice rules on the protection of confidential information in public procurement procedures

Author: Ludovic Panepinto

A 17 November 2022 judgment helps contracting authorities strike the right balance between protecting confidential information in the tender document and the transparency requirements applicable in public procurement procedures (case C-54/21).

The Polish National Water Management Authority ("Authority") recently carried out a public procurement procedure for the purpose of developing projects relating to the environmental management of certain river basin districts. The contract was awarded to CDM Smith, but Antea brought an action before the Polish courts for the annulment of this award decision, on the grounds that the Authority had failed to disclose the information communicated to it by other applicants with regard to their tenders. The Authority contested Antea's claims, essentially relying on the allegedly confidential nature of the information at issue.

This caused the National Appeal Chamber (Poland) to refer questions to the Court of Justice ("Court") for a preliminary ruling. The Court answered these questions in its 17 November 2022 judgment (case C-54/21).

In substance, the National Appeal Chamber sought clarification as to how the Authority should reconcile its obligations, deriving from EU law, to protect the confidential information provided in the tenders, at the same time as ensuring the transparency of the procurement procedure and providing the data needed to exercise review rights against award decisions.

Some key takeaways from the judgment can be found in the lines below:

Confidential data are not limited to trade secrets

Under Polish legislation, trade secrets must, at the request of the tenderers holding them, be treated confidentially, while any other information submitted by the tenderers to the contracting authority must be made public. In this respect, the Court ruled that Member States are free to limit the scope of the obligation to treat information as confidential on the basis of the concept of "trade secrets" as defined by EU law. However, national legislation must allow contracting authorities to exceptionally refuse to disclose information which, while not covered by this concept of trade secrets, must remain inaccessible pursuant to an interest or objective protected by EU public procurement law, such as the legitimate commercial interests of a public or private economic operator, or fair competition.

Granting any confidentiality application as a matter of course is contrary to EU law

In its referral, the National Appeal Chamber underlined that any application for confidential treatment of data provided by tenderers would systematically be granted by the Polish contracting authorities as a matter of course. The Court stressed that such a practice would be in contradiction with EU law. Indeed, a contracting authority cannot be bound simply by an economic operator's claim that the information submitted is confidential. This authority must state reasons in this respect, and it must also, to the extent possible, communicate the essential content of the data concerned to any unsuccessful tenderer that requests such data.

The Court provides specific guidance on certain types of information

The information at issue in the dispute before the Polish courts included (i) the relevant experience of other tenderers and the references relating thereto, (ii) the identity and professional qualifications of the people that they put forward to perform the contract or the sub-contractors and (iii) the design of the projects to be performed under the public contract and the manner of performance of that contract. In this respect, the Court ruled that the contracting authority must assess whether that information has a commercial value outside the scope of the public contract in question, where its disclosure might undermine legitimate commercial concerns or fair competition. The contracting authority may, moreover, refuse to grant access to that information where, even though it does not have such commercial value, its disclosure would impede law enforcement or would be contrary to the public interest. A contracting authority must, where full access to information is refused, grant that tenderer access to the essential content of that information, so that observance of the right to an effective remedy is ensured.

In its judgment, the Court provided specific clarification as to whether data that falls into each of these categories of information should be treated as confidential. For instance, a tenderer's experience is not, as a general rule, secret, while the design of the projects planned to be carried out under the public contract and the description of the manner of performance of the contract may be treated as confidential, either because of an intellectual property right or because of a commercial value independent of such intellectual property right.

Misclassifying data as confidential can prevent legal remedies from being time-barred

One of the National Appeal Chamber's questions concerned the consequences to be drawn from the refusal to disclose information that was wrongly classified as confidential by the contracting authority, to an unsuccessful tenderer challenging a decision awarding a public contract. According to the Court, in such a case, it is for the national courts to assess whether the failure to disclose that information means that the applicant is not able to bring an effective action against that award decision, and to redress any infringement of the right to an effective remedy. Where national law does not allow such a redress in the context of pending proceedings, national courts must either annul that award decision or find that the applicant may bring a fresh action against the award decision already taken, with the time limit for doing so starting only from such time as the applicant has access to all the information that was wrongly classified as confidential.

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

FOREIGN SUBSIDIES

The Foreign Subsidies Regulation: Commission given new investigative powers regarding financial contributions from third countries

Author: Gauthier Michiels

On 12 January 2023, the Regulation on foreign subsidies distorting the internal market came into force. This gives the European Commission new powers to investigate undertakings that benefit from foreign subsidies and, where appropriate, to redress the distortive effects on the internal market by imposing measures on the recipient undertakings.

The concept of foreign subsidy

The Regulation on foreign subsidies distorting the internal market ("FSR") has a wide scope. It allows the European Commission ("Commission") to investigate all kinds of economic sector, as long as it involves a foreign subsidy granted to an undertaking engaging in an economic activity in the internal market.

In the context of the FSR, a foreign subsidy is defined as a financial contribution which is provided directly or indirectly by a third country, which confers a benefit (including the granting of special rights – as fiscal incentives, loans or guarantees – without adequate remuneration in line with normal market conditions) and which is limited, in law or in fact, to one or more undertakings or industries.

The financial contribution can be granted through public or private entities, provided the actions of that private entity can be attributed to the third country.

The FSR's investigation tools

Under the FSR, three investigation tools are at the disposal of the Commission.

The FSR sets out **two *ex-ante* tools**, which consist of:

- The prior notification of concentrations, where the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least EUR 500 million and the transaction involves a foreign financial contribution of at least EUR 50 million.

- The prior notification of bids in public procurements, where the estimated contract value is at least EUR 250 million and the bid involves a foreign financial contribution of at least EUR 4 million for each third country.

In addition, the FSR provides the Commission with a general investigation tool that allows the Commission to start investigations of its own motion into alleged distortive foreign subsidies (the so-called "*ex officio* review"). In the context of such review, the Commission can also request *ad hoc* notifications for smaller concentrations and public procurement procedures.

In-depth investigation

Where it suspects that distortive effects are occurring from a notified concentration or public procurement, as well as from

financial contributions that have been found relevant by a preliminary review (within the context of an *ex officio* procedure), the Commission is enabled to conduct "**in-depth investigations**". To this end, the Commission may also request that the third country concerned by the subsidy supplies information or even conducts an inspection in its territory. In this respect, the non-cooperation of an undertaking outside the Union can be taken into account in the final decision.

Following such an investigation, the Commission assesses whether the foreign subsidy distorts the internal market. Pending the Commission's review, no concentration under investigation can be implemented, and the bidder cannot be awarded the public contract.

Assessment of the distortive effects of foreign subsidies

The methodology for the assessment of distortive effects is globally modelled on verifying the compatibility of state aid. The Commission will proceed in two steps.

Firstly, a distortion is deemed to exist where the foreign subsidy is to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market. A list of categories of foreign subsidy that are "most likely to distort the internal market" has also been drawn up and includes foreign subsidies granted to an ailing undertaking, directly facilitating a concentration or enabling an undertaking to submit an unduly advantageous tender in relation to public procurement.

Where it is found that a foreign subsidy is distortive, the Commission will then take into account the balance between the negative effects of the foreign subsidy under review against its positive effects. On this basis, it will decide whether to impose redressive measures or to accept commitments and, if applicable, the nature and level of those measures or commitments.

Possible outcomes and decisions of the Commission

After companies have been given the opportunity to submit their observations in respect of the exercise of their right of defence, the Commission will take a decision.

It can adopt a "**decision to raise no objection**" to the subsidy, a "**decision with commitments**" (in this case, the Commission agrees to make binding commitments that have been deemed appropriate for the undertaking) or a "**decision with redressive measures**". These may consist, among other things, of the repayment of the foreign subsidy, offering access to facilities, reducing market presence or requiring undertakings to dissolve a concentration. Commitments and redressive measures have to be proportionate. The Commission must, in this respect, take into account its balancing test when adopting measures or binding commitments.

Last but not least, where an undertaking does not comply with a decision, the Commission can impose a fine that can amount to a maximum of 10% of the aggregate turnover of the undertaking concerned for the preceding financial year.

Next steps

With its entry into force, the FSR will move into its crucial implementation phase and start to be applicable in six months, starting on 12 July 2023. As of this date, the Commission will be able to launch *ex-officio* investigations. The notification obligations for companies will be effective as of 12 October 2023.

It should, however, be noted that, with a few exceptions, the Commission is empowered to investigate foreign subsidies granted up to five years prior to the entry into force of the FSR.

Please contact *Raluca Gherghinaru*, *Pierre de Bandt* or *Jeroen Dewispelaere* for further information about the FSR and/or for general legal advice relating to state aid law.

STATE AID

The Grand Chamber of the Court of Justice deals yet another blow to the Commission's attempts to recover allegedly unlawful state aid granted in the form of a tax ruling – the *Fiat* decisions

Author: Tatiana Ghysels

The Court annulled the Commission's decision ordering Luxembourg to recover €30 million in unpaid taxes from Fiat as it found that the Commission's analysis of Luxembourg's reference system and, by extension, its conclusion as to the existence of a selective advantage granted to Fiat, was erroneous (joined cases C-885/19 P and C-898/19 P).

On 8 November 2022, the Grand Chamber of the Court of Justice (the "Court") set aside the judgment delivered by the General Court of the EU (the "General Court") in joined cases T-755/15 and T-759/15 and annulled the Commission's decision of 21 October 2015 on the state aid amounting to €30 million allegedly granted by Luxembourg to Fiat (joined cases C-885/19 P and C-898/19 P).

Background

On 3 September 2012, the Luxembourg tax authorities adopted a tax ruling in favour of Fiat Chrysler Finance Europe ("FCFE"), an undertaking of the Fiat group that provides treasury services and financing to Fiat companies established in Europe. The tax ruling at issue approved a methodology for determining FCFE's remuneration for those services that enabled that undertaking to determine its corporate income tax liability to Luxembourg on a yearly basis. In a decision of 21 October 2015, the Commission found that the tax ruling constituted unlawful and incompatible state aid, in contravention of the provisions of Articles 107 and 108 TFEU. The Commission thus ordered Luxembourg to recover the aid from FCFE.

Luxembourg and FCFE each lodged an appeal before the General Court seeking an annulment of the Commission's decision. In a judgment of 24 September 2019, the General Court dismissed these actions for annulment, confirming the validity of the Commission's decision. In their respective appeals, Fiat and Ireland requested that the General Court judgment be set aside.

The Court's reasoning

The Court set out to assess whether the condition of the measure conferring a ***selective advantage*** on the beneficiary, which constitutes one of the four conditions required in order to classify a national measure as "state aid" under the TFUE, was met in the case at hand. In the area of taxation, the examination of that condition involves, as a first step, the identification of the **reference system**, in other words the "normal" tax system applicable in the Member State concerned. The second step requires a demonstration that the tax measure at issue constitutes a derogation from that reference system, in the sense that it differentiates between operators who are in comparable factual and legal situations, without justification with regard to the nature of the reference system.

In its assessment of whether the Commission erred in the first step of the analysis of the selectivity condition, namely the identification of the reference system, the Court pointed out that, outside the spheres in which EU tax law has been harmonised, it is the Member State concerned that determines the characteristics constituting the tax, by exercising its

exclusive competence in the area of direct taxation.

According to the Court, the Commission erred in law in deciding that, in the case of a tax system which pursues the objective of taxing the profits of all resident companies, whether integrated or stand-alone (as was the case in Luxembourg), the application of the **OECD's arm's length principle** – according to which "*transactions between intra-group companies are remunerated as if they had been agreed to by independent companies negotiating under comparable circumstances*" – for the purposes of applying Article 107 TFEU, is justified, irrespective of whether that principle has been incorporated into national law. On the contrary, as Luxembourg had argued, the Commission should have taken into account the specific way in which said principle had been incorporated into Luxembourg law with regard to integrated companies in particular.

The Court therefore found that, by endorsing the Commission's approach, the General Court had failed to realise that it is the national law applicable in the Member State concerned that should be taken into account exclusively in order to identify the reference system. By accepting that the Commission may rely on rules that are not part of Luxembourg law, even though the Commission did not have the power to define the "normal" taxation of an integrated company autonomously, the General Court's judgment also infringed the treaty provisions relating to the adoption of EU measures for the approximation of Member State legislation relating to direct taxation.

The Court concluded that the grounds of the General Court's judgment under appeal relating to the Commission's line of reasoning, according to which the tax ruling at issue derogated from the Luxembourg reference system, are vitiated by an error of law. The Court therefore set aside the judgment under appeal and, giving final judgment in the matter, annulled the Commission's 2015 decision at issue.

The Court added that Member States' actions in areas that are not subject to EU harmonisation, such as direct taxation, are not excluded from the scope of the treaty provisions on state aid. This means that tax rulings granted by Member States may constitute state aid measures within the meaning of Article 107 TFUE, as the Commission had been claiming. However, the Commission has an obligation to prove that the state measure at hand constitutes state aid, in that it presents all four classifying conditions identified by the case law of the Court, which it had failed to do 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 state aid law.

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