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Topics covered in this issue

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Table of contents

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DATA PROTECTION

Court of Justice of European Union Clarifies that De-Referencing May Be Limited to European Union Member States

On 24 September 2019 the Court of Justice of the European Union ("CJEU") ruled on a preliminary question referred to it by the "Conseil d'État" (Council of State, France) on the interpretation of the territorial scope of the "right to be forgotten" (*i.e.*, the de-referencing of data subjects in search results).

The preliminary question results from a dispute between Google and the French Data Protection Authority, the "Commission nationale de l'informatique et des libertés" ("CNIL"). The CNIL fined Google following its refusal to remove all links to web pages from the list of results displayed when searching a specific person's name following that person's request for relevant links to web pages to be removed. Instead, Google had limited its removal to searches conducted from the domain names corresponding to the versions of its search engines in Member States. Google subsequently lodged an application for annulment of the CNIL decision with the Conseil d'État.

The Conseil d'État then referred several questions to the CJEU to determine whether "the right to de-referencing" under EU law should be interpreted as meaning that a search engine operator is required, when granting a request for de-referencing, to remove all links (a) on all of the domain names used by its search engine; or (b) corresponding to the version of the Member State in which the request is deemed to have been made; or (c) on the domain names distinguished by the national extensions used by that search engine for all of the Member States.

The CJEU noted as a preliminary point that it had already held that the operator of a search engine (such as Google) is obliged to remove from the list of search results when searching for a person's name, any links to third party web pages that contain information relating to that person. This also applies in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful (C 131/12, *Google Spain and Google*, judgment of 13 May 2014 – *see, this Newsletter,* Volume 2014, No 5, p. 6).

The CJEU then observed that Google Inc's French establishment falls within the scope of the EU legislation on the protection of personal data because it carries out activities, including commercial and advertising activities, which are inextricably linked to the processing of personal data carried out for the purposes of operating its search engine. Furthermore, the CJEU concluded that Google's various national sites must be considered as a single act of data processing in view of the existence of gateways between its various national versions.

As regards the scope of dereferencing outside the European Union, the CJEU considered that in a globalised world, user's access from outside the Union to the referencing of a link regarding a person whose interests are situated inside the Union is likely to have an "immediate and substantial effect on that person within the Union itself". According to the CJEU, this could justify the existence of a competence on the part of the EU legislator to establish a de-referencing obligation that applies to all versions of a search engine.

However, the CJEU also considered that numerous third states do not recognise the right to de-referencing or have a different approach to that right. Furthermore, it noted that the right to the protection of personal data is not an absolute right, but must be balanced against other fundamental rights in accordance with the principle of proportionality. The CJEU concluded that there is no obligation under EU law, for a search engine operator who grants a request for de-referencing made by a data subject, following an injunction from a supervisory or judicial authority of a Member State, to carry out a de-referencing on all versions of its search engine because EU law does not currently provide for cooperation instructions and mechanisms as regards the scope of a de-referencing outside the Union.

At the same time, the CJEU pointed out that the regulatory framework provides the national supervisory authorities with the instruments and mechanisms necessary to reconcile a data subject's rights to privacy and the pro-

tection of personal data with the interest of the whole product throughout the Member States in accessing the information in question. Accordingly, a national supervisory authority is able to adopt, where appropriate, a de-referencing decision which covers all searches conducted from the territory of the Union on the basis of that subject's name. The CJEU added that, on the versions of that search engine corresponding to all the Member States, measures should be taken which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user from conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request.

Lastly, the CJEU pointed out that EU law does not prohibit that de-referencing should concern all versions of the search engine in question. Accordingly, a supervisory or judicial authority of a Member State remains competent to balance, in the light of national standards of protection of fundamental rights, a data subject's right to privacy and the protection of that data subject's personal data, on the one hand, and the right to freedom of information, on the other. The operator of the search engine can thus carry out a de-referencing concerning all versions of that search engine after weighing these rights against each other.

INTELLECTUAL PROPERTY

Targeting May Serve to Establish International Jurisdiction in Online EU Trade Mark Infringement Cases

In a judgment delivered on 5 September 2019 in *AMS Neve and Others*, C-172/18, the Court of Justice of the European Union ("CJEU") clarified the rules of international jurisdiction in online EU trade mark infringement cases.

The case concerned an action brought by the proprietor of a trade mark against a third party that had used signs identical or similar to that mark in advertising and offers for sale on a website and on social media platforms. The CJEU examined the case having regard to Regulation 207/2009 on the European Union trade mark ("EUTMR"), which applied at the time the claim was brought.

The EUTMR sets out various criteria for determining in which Member State a trade mark holder can bring an action for the infringement of its trade mark. According to Article 97(1) EUTMR, if the defendant is domiciled in a Member State, the applicant must bring its action in the courts of that Member State. If the defendant is not domiciled in an EU Member State, actions can be brought before the courts of the Member State in which he has an establishment. Alternatively, Article 97(5) EUTMR provides that infringement actions may be brought in the courts of the Member State in which the act of infringement has been committed. However, if the defendant is established and domiciled in one Member State and advertises and offers for sale infringing goods on a website to which targets traders and consumers in another Member State, difficulties arise in interpreting Article 97(5) EUTMR and in identifying the place of infringement. The Court of Appeal (England & Wales) (Civil Division) decided to refer a question for a preliminary ruling to the CJEU since it considered that the court of first instance had misinterpreted previous judgments and the case law of the ECJ in general (*i.e.*, cases *Wintersteiger* (C-523/10) and *Coty Germany* (C-360/12)).

The CJEU has now clarified that courts in the Member State where consumers and traders (to whom the advertising and the offers are directed) are located, have jurisdiction to hear a claim for infringement of an EU trade mark. In the CJEU's view, that forum constitutes the place of infringement according to Article 97(5) EUTMR, notwithstanding the fact that the defendant is established elsewhere or that the products covered by the advertising are located elsewhere.

The CJEU thus rejected the interpretation of the jurisdiction criterion intended as the place where the infringer set up his website and activated the display of his advertising and offers for sale. The CJEU explained that if such an interpretation were to be maintained, then the alternative jurisdiction criterion laid down in Article 97(5) EUTMR would be deprived of any purpose.

Court of Justice of European Union Defines Conditions for Copyright Protection Afforded to Designs

On 12 September 2019, the Court of Justice of the European Union ("CJEU") ruled on a question for preliminary ruling concerning Article 2, a) of Directive 2001/29 on the harmonisation of specific aspects of copyright and related rights in the information society ("Copyright Directive"). The CJEU found that copyright protection must not be granted to designs on the sole ground that, over and above their practical purpose, they produce a specific aesthetic effect.

In August 2013, G-Star – which designs, produces and sells clothing - brought an action in Portugal against a competitor, Cofemel. G-Star accused Cofemel of producing and selling clothes incorporating models that were copied from some of its own designs. G-Star argued that its designs constitute original intellectual creations and qualify as "works" eligible for copyright protection. Works whose authors are granted the exclusive right to authorise or to prohibit reproduction, communication to the public and distribution under the Copyright Directive, benefit from the intellectual property protection affords by EU law. In parallel, Directive 98/71 on the legal protection of designs ensures specific protection for designs.

Both the Portuguese court, in first instance, and the Tribunal da Relaço de Lisboa, on appeal, held that G-Star's clothing designs were included in the list of works that qualify for copyright protection under the Portuguese

Code on Copyright and Related Rights. However, the Portuguese Supreme Court held that the Code does not explicitly clarify which degree of originality is required for designs, serving a practical purpose, that would cause them to qualify for copyright protection. The Supreme Court therefore requested the CJEU whether the Copyright Directive precludes provisions of national legislation from granting copyright protection to designs if a specific condition is satisfied, namely the existence of a particular degree of aesthetic or artistic value.

In its judgment, the CJEU first stated that the protection of designs, on the one hand, and copyright protection, on the other, pursue different objectives and are subject to distinct rules. While the former regime protects a subject matter which, although being new, is functional, copyright protection is reserved for subject matters that merit being classified as "works". In addition, the duration of the protection afforded to copyrighted works is significantly larger. Therefore, the cumulative grant of the protection of designs and copyright protection can be envisaged only in specific situations.

Applying established case-law, the CJEU recalled that designs may be classified as "works" - and therefore be protected by both Directives - when two conditions are satisfied: (i) the design must constitute an original creation reflecting the freedom of choice and personality of its author; and (ii) it must be possible to identify that original creation with sufficient precision and objectivity.

On that basis, the ECJ held that the aesthetic effect which a design may produce cannot constitute a determining factor that is relevant in itself to characterise the existence of a "work" within the meaning of the Copyright Directive, since this effect "*is the product of an intrinsically subjective sensation of beauty experienced by each individual who may look at the design in question*".

In line with the Advocate General's Opinion, the ECJ concluded that copyright protection cannot be based on the circumstance that a design produces a significant aesthetic effect. As is the case for all works, clothing designs must satisfy the conditions of originality and objectivity in their form of expression.

LABOUR LAW

Joint Committee No. 200 – Salary Increase of 1.1% on 1 September 2019 for All White-Collar Employees?

Within Joint Committee No. 200, an industry-level collective bargaining agreement was concluded on 1 July 2019 (*Collectieve arbeidsovereenkomst van 1 juli 2019 gesloten in het aanvullend paritair comité voor de bedienden betreffende de koopkracht in het kader van het Koninklijk Besluit van 19 april 2019 tot uitvoering van artikel 7 §1 van de wet van 26 juli 1996 tot bevordering van de werkgelegenheid en tot preventieve vrijwaring van het concurrentievermogen/Convention collective de travail du 1 juillet 2019 conclue au sein de la commission paritaire auxiliaire concernant le pouvoir d'achat dans le cadre de l'arrêté royal du 19 avril 2019 portant exécution de l'article 7 §1 de la loi du 26 juillet 1996 relative à la promotion de l'emploi et à la sauvegarde préventive de la compétitivité* – the "White-Collar CBA").

The White-Collar CBA provides for a statutory salary increase of 1.1% of the base monthly salary of white-collar employees on 1 September 2019 (the "Industry Salary Increase"), provided the employer does not employ any blue-collar employees.

In case both white-collar and blue-collar workers are employed, the employer may be obliged to abide by specific rules provided for by a collective bargaining agreement which only applies to a limited number of industries (*e.g.* construction sector, garage sector, cleaning sector) and provided several conditions are met. In a nutshell, the purpose of the specific rules is to align the supplementary pensions between white- and blue-collar workers who belong to the same business activity or professional category.

The main features of the White-Collar CBA are as follows:

Industry Salary Increase

As a general principle, the employer can decide to apply the Industry Salary Increase on 1 September 2019 or, as an alternative, grant:

- (an) equivalent benefit(s) (the "Equivalent Benefit(s)"); and/or
- (an) equivalent merit salary increase(s) (the "Merit Salary Increase(s)"),

during the period commencing on 1 January 2019 and expiring on 31 December 2020 (the "Reference Period").

Such Equivalent Benefit(s) and/or Merit Salary Increase(s) should be granted on a recurring basis as from 1 January 2021 at the latest.

Equivalent Benefit(s)

Employers can opt to award (an) Equivalent Benefit(s) instead of the Industry Salary Increase, such as an increase of the employer's contributions into the group insurance and/or an increase of the employer's contribution to the meal vouchers. One-off premium(s) granted during the Reference Period can also be allocated to the Industry Salary Increase, under the same conditions as the Equivalent Benefit(s).

The budget for the Equivalent Benefit(s) must equal the employer's cost of the Industry Salary Increase.

The deadline for concluding a collective bargaining agreement with the trade unions or, in the absence of trade unions, to inform the employees (in writing) about their non-entitlement to the Industry Salary Increase as a result of the conversion into (an) Equivalent Benefit(s) is the moment of payment of the employees' salary for September 2019.

Merit Salary Increase(s)

Employees who have already received or will receive (a) Merit Salary Increase(s) during the Reference Period which is equal to at least the employer's cost of the Industry Salary Increase, will not be entitled to the Industry Salary Increase either.

The Merit Salary Increase(s) cannot be linked to an automatic salary scale increase based on seniority and/or professional experience. In other words, the Merit Salary Increase(s) should be performance related.

Timing of Award of Equivalent Benefit(s) and/or Merit Salary Increase(s)

The Equivalent Benefit(s) and/or the Merit Salary Increase(s) can be granted before or after September 2019, provided that they are granted during the Reference Period.

For instance, an employer could decide to allocate a Merit Salary Increase awarded in May 2019 to the employer's costs of the Industry Salary Increase. An employer may also choose to grant an additional premium in December 2019 which is at least equivalent to the employer's cost of the Industry Salary Increase.

STATE AID

European Commission Suspects that Belgian Tax Rulings Amounted to State Aid Benefiting 39 Multinational Companies

On 16 September 2019, the European Commission (the "Commission") announced the launch of in-depth investigations into "excess profit" tax rulings granted by Belgium to 39 multinational companies.

This move follows the annulment by the General Court of the EU of 14 February 2019 (Case T-131/16, Belgium v. Commission) of a previous Commission decision finding that the excess profit exemption system constituted State aid which had to be recovered by Belgium. Between 2005 and 2014, Belgium issued "excess profit" tax rulings in favour of 39 Belgian companies belonging to international groups. As a rule, Belgian tax rules apply to profit generated by activities in Belgium. However, the "excess profit" tax rulings allowed multinational companies to diminish their corporate tax by an amount considered as "excess profit", *i.e.*, profit resulting from their affiliation to a multinational group.

On 11 January 2016, the Commission found this system to constitute State aid and ordered the recovery of the aid. However, the General Court of the EU annulled this decision on the grounds that the acts identified by the Commission as forming State aid did not set out all the essential elements of the scheme or defined in a general and abstract manner its beneficiaries.

According to Commissioner Vestager, the Commission is "*concerned that the Belgian "excess profit" tax system granted substantial tax reductions only to certain multinational companies that would not be available to companies in a comparable situation*". As a result, and "[f]*ollowing the General Court's guidance*", the Commission has decided to "*open separate State aid investigations to assess the tax rulings*". This decision does not prejudge the outcome of the investigations.

General Court of European Union Confirms Commission's Finding of State Aid Favouring Belgian Ports

On 20 September 2019, the General Court of the EU delivered three judgments in state aid cases involving Belgian ports (cases T-673/17 *Port autonome du Centre and de l'Ouest and Others v Commission*, T-674-17 *Le Port de Bruxelles and Région de Bruxelles-Capitale v Commission,* T-696/17 *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*). The underlying decision of the European Commission (the "Commission") concerns a State aid scheme regarding the taxation of ports in Belgium. The Belgian Income Tax Code exempted a number of Belgian ports from the scope of application of the corporate tax. These port authorities were instead subject to the tax on legal persons, which is lower than the corporate tax. In the contested decision, the Commission took the view that these tax exemptions constituted State aid within the meaning of Article 107(1) TFEU and were incompatible with the internal market (See, this Newsletter, Volume 2017, No 8, p. 24).

The General Court first confirmed established case law concerning the notion of economic activity and undertaking under Article 107(1) TFEU. The General Court held that, insofar as the Belgian Ports carry out economic activities (*e.g.* providing port infrastructure to shipping companies and shipbuilders), they are undertakings within the meaning of Article 107(1) TFEU. It emphasised that these activities are provided for remuneration. The General Court noted that the fact that the price is unilaterally defined by the port authorities does not mean that this does not reflect the market dynamics (*e.g.* the demand). In addition, the fact that these economic activities are connected with the exercise of public powers – the revenue of these activities is used to finance the non-economic activities carried out by the port authorities – is insufficient to prove that they are indissolubly linked with the exercise of State authority.

Second, the General Court also took a position on the "selectivity test" of general fiscal measures under Article 107(1) TFEU. The Belgian authorities argued before the Commission and the General Court that port authorities are exempted from corporate tax pursuant to the general

rules and criteria of the Belgian tax system. These rules and principles provide that 'companies' are subject to corporate tax, while resident legal persons other than companies are subject to the tax on legal persons. Since ports are not 'companies', they are subject to the tax on legal persons. In this regard, the General Court repeated that the port authorities in question carry out economic activities for remuneration. Under the common rules of income taxation applicable in Belgium, companies operating for profit are subject to corporate taxation. As such, the exemption granted to port authorities constitutes a derogation from the "common or normal" rules on taxation. Moreover, the General Court noted that none of the elements raised by the Belgian authorities were capable of distinguishing the situation of port authorities from that of other companies: the fact that port authorities use part of their revenues from economic activities to finance their non-economic activities does not make them any different from other companies subject to corporate taxation.

The General Court further held that the exemption would be selective even if it were not to constitute a derogation from the reference system. In fact, in cases such as the present one, where a fiscal measure is designed in a way to favour specific categories of undertakings (in this case, port authorities) and discriminate against economic entities in a comparable situation, the measure is to be considered as "a priori selective". In other words, the General Court maintained that even in the absence of a formal derogation from the common rules of taxation, such a fiscal measure constitutes State aid within the meaning of Article 107(1) TFEU.

Finally, the General Court stated that the measure derogated from the ordinary tax regime without being justified by the nature or scheme of the tax system, since it was not based on the measure's logic or the technique of taxation but resulted from the government's objective to favour organisations regarded as socially deserving.

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