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COMMERCIAL LAW

E-Commerce Directive Found Applicable to Airbnb in Long-Awaited Judgment of Court of Justice of European Union

On 19 December 2019, the Court of Justice of the European Union (the **CJEU**), sitting in Grand Chamber, found Directive 2000/31/EC of 8 June 2000 on specific legal aspects of information society services, in particular electronic commerce, in the Internal Market (the **E-Commerce Directive**) to apply to services provided by operators of collaborative platforms such as Airbnb (CJEU, Case C-390/18, *Airbnb Ireland*).

Factual Background

The case involved Airbnb Ireland UC (*Airbnb Ireland*), a company established in Ireland which forms part of the Airbnb Group. Airbnb Ireland operates against a commission an electronic platform on which hosts – either professionals or private individuals – rent short-term accommodation to persons looking for such accommodation. In addition to this core business, Airbnb Ireland offers related ancillary services, such as photography services, civil liability insurance and a guarantee against damage, a tool to estimate the appropriate rental price, as well as a system of star-based evaluations by the host and the guest.

The judgment was given in response to a request for a preliminary ruling from the District Court of Paris (*Tribunal de Grande Instance de Paris*). The French Association for professional tourism and accommodation (**AhTop**) had lodged a criminal complaint on account of the activities relating to the mediation and management of buildings and businesses without a professional licence. AhTop contended that, in addition to connecting two parties through a platform, Airbnb Ireland offered supplementary services amounting to real estate agent services. Following AhTop's complaint, the Public Prosecutor brought charges against Airbnb Ireland for handling funds in the context of real estate agent services without a professional licence, in violation of French law. In turn, Airbnb Ireland denied acting as a real estate agent and claimed that the French law at hand was incompatible with the E-Commerce Directive and therefore inapplicable.

Against this background, the investigating judge (*juge d'instruction*) decided to stay the proceedings and request clarifications from the CJEU as to whether:

1. the services provided in France by Airbnb Ireland via an electronic platform managed from Ireland benefit from the freedom to provide services enshrined in Article 3 of the E-Commerce Directive; and
2. the French rules restricting the profession of real estate agent are enforceable against Airbnb Ireland.

First Question

On the first question, the CJEU considered that the service provided by Airbnb Ireland meets all four conditions of Article 1(1)(b) of Directive (EU) 2015/1535 of 9 September 2015 and therefore constitutes an "information society service" within the meaning of the E-Commerce Directive.

Indeed, the service is provided against remuneration from the guest and not from the host, even though such remuneration is collected by another entity of the Airbnb Group (*i.e.*, Airbnb Payments UK). In addition, Airbnb Ireland's service is provided electronically and at a distance. Finally, the service is provided at the individual request of the recipients of the service, insofar as the host places an online advertisement and the interested guest places a corresponding request.

Pursuant to established case law, even if a service meets all four conditions of an information society service, it cannot be categorised as such if it forms a component of an overall service which falls under another legal classification. In the case at hand, AhTop claimed that the intermediation service provided by Airbnb Ireland should be viewed as an integral part of an overall service consisting mainly in the provision of accommodation services. Nevertheless, the CJEU considered that the essential feature of the platform managed by Airbnb Ireland lies in the compiling of

offers of places of accommodation through a structured list using a harmonised format. The importance of this feature implies that it cannot merely be considered an ancillary service to the provision of an accommodation service. Additionally, this essential tool is not necessary to the provision of accommodation services. Lastly, the host bears the sole responsibility for setting the rental price of the place of accommodation, without intervention or decisive influence from Airbnb Ireland. That characteristic allowed the CJEU to differentiate the services provided by Airbnb Ireland from those offered by Uber, which was found to have a decisive influence on the conditions under which its drivers operate and was consequently found to be a taxi operator in a CJEU judgment of 20 December 2017 (*See, [this Newsletter, Volume 2017, No. 12, p. 7](#)*). By contrast, the intermediation service provided by Airbnb Ireland could not be said to form part of a larger overall service whose main component is the provision of accommodation.

Therefore, the CJEU held that the intermediation service provided by Airbnb Ireland is an information society service within the meaning of the E-Commerce Directive.

Second Question

On the second question, Airbnb Ireland argued that the French law restricting the activity of real estate agent was incompatible with the E-Commerce Directive, insofar as the French Republic had not satisfied the conditions of Article 3(4) of that Directive allowing EU Member States to adopt measures restricting the freedom to provide information society services. Under Article 3(4)(b) of the E-Commerce Directive, the EU Member State concerned must notify the European Commission and the EU Member State on whose territory the service provider in question is established of its intention to adopt the restrictive measure at stake. After recognising that the French law at hand did in fact restrict the freedom to provide information society services, the CJEU found that it was unenforceable as against Airbnb Ireland in view of the French government's failure to meet this essential procedural requirement.

Conclusion

The CJEU held that services such as those provided by Airbnb Ireland fall within the scope of the E-Commerce Directive. It follows that the free movement of such services from other EU Member States can only be restricted

under national law if the substantive and procedural conditions laid down in the E-Commerce Directive are fulfilled. As a result, Airbnb should not have to obtain a real estate agent licence in order to pursue its activities in France or be subject to the same accounting, financial and insurance obligations as traditional real estate agencies.

DATA PROTECTION

New Measures to Protect Whistleblowers

On 26 November 2019, Directive 2019/1937 on the protection of persons who report breaches of Union law (the **Whistleblower Directive**) was published. The Whistleblower Directive defines standards for protecting individuals who report information on breaches of EU law which they acquired in a 'work-related context'.

For many companies, the Whistleblower Directive could bring about significant changes. It requires firms with at least 50 employees to set up an internal reporting channel and offer whistleblowers protection against retaliation. Examples of breaches of EU law for which minimum standards of protection are established in the Directive include infringements of rules governing public procurement, product safety, financial services, personal data protection and environmental protection. Member States must encourage whistleblowers to report through internal reporting channels before turning to external reporting channels.

The protection of individuals working in the public and private sectors is not limited to current and actual employees but extends to candidates for employment, self-employed persons, former employees, shareholders and persons in managerial bodies. Volunteers and trainees also benefit from the protection offered by the new whistleblowing rules. This protection precludes against any form of retaliation, including threats and attempts of retaliation in forms such as suspension, dismissal, withholding of promotion, a negative performance assessment or unfair treatment. The Member States are required to provide effective, proportionate and dissuasive penalties.

When setting up an internal reporting channel, firms must make sure that the channels for receiving the reports are designed, established and operated in a secure manner that ensures that the confidentiality of the identity of the reporting person and any third party mentioned in the report is protected. Additional procedural obligations include the obligation to acknowledge receipt of the report and to ensure a diligent follow-up. The external reporting channels to be established by the Member States must largely satisfy the same procedural requirements.

Since whistleblowing procedures will almost always imply the processing of personal data, the Whistleblower Directive explicitly foresees that any processing of personal data must be carried out in accordance with applicable data protection regulations, including the General Data Protection Regulation (**GDPR**). It adds that personal data that are manifestly not relevant for the handling of a specific report should not be collected or, if accidentally collected, should be deleted without undue delay.

The Whistleblower Directive must be implemented in national law by 17 December 2021.

Draft European Data Protection Board Guidelines on Right to Request Delisting from Search Engine Results

On 13 May 2014, the Court of Justice of the European Union (**CJEU**) decided in its Google Spain judgment (Case C-131/12) that a data subject has the right to be forgotten (See, [this Newsletter, Volume 2014, No. 5, p. 6](#)). More specifically, the data subject has the right to request a search engine provider to erase any links to web pages displayed following a search made on the basis of his or her name (**the right to request delisting**, often also referred to by the somewhat misleading denominator "the right to be forgotten"). The right to request delisting has been incorporated in Article 17 of the General Data Protection Regulation 2016/679 (**GDPR**) (right to erasure). Although this right has a general scope and applies to all data controllers, the European Data Protection Board (**EDPB**) published on 2 December 2019 draft guidelines concerning the right to request delisting from search engines (the **Draft Guidelines**).

The Draft Guidelines only apply to processing by search engine providers. Conversely, they do not apply to processing carried out by the third-party websites that originally published the online content. Although a data subject may also have the right to request the original publisher to erase his or her personal data, such requests fall outside the scope of the Draft Guidelines.

Two fundamental rights come into conflict in the context of a delisting request: the right to privacy (including protec-

tion of personal data) and the right to freedom of expression (including the freedom of information). Consideration of a delisting request will therefore often result in a balancing exercise between those rights.

Grounds of Right to Request Delisting

Article 17, GDPR lists the grounds on which a data subject can base a delisting request submitted to a search engine provider. If one of these grounds applies, the search engine provider will be required to erase the personal data "without undue delay". However, "erase" does not imply a complete removal from the servers of the search engine provider. It only means that the link to a third-party website must be erased from the list of search results when a search is made on the basis of the name of the data subject. It will therefore still be possible for a link to the third-party website to turn up if the search query is different.

The first ground for a delisting request is if the data subject's personal data returned in the search results are no longer necessary for the purposes of the search engine's processing. This begs the question as to what the purpose of a search engine's processing is. The Draft Guidelines explain that it is the purpose of a search engine to make information more easily accessible to internet users. Therefore, a balancing exercise between the protection of privacy and the interests of internet users must be undertaken. It must in particular be assessed whether the personal data have become outdated or become inaccurate over time (*e.g.*, a link to a company's website containing the data subject's contact details even though the data subject no longer works there).

The second ground for erasure under Article 17, GDPR is if the data subject withdraws the consent which was originally given for the processing (and there is no other legal basis for the processing). The EDPB considers that a request on this basis is unlikely, because a search engine does not process personal data on the basis of consent. This ground will also not apply to search engines by the mere fact that the third-party website processed the personal data on the basis of consent.

The third ground is if the data subject has exercised his or her right to object to the processing of personal data and there are no overriding legitimate grounds for the processing. Article 17, GDPR makes a connection with Arti-

cle 21, GDPR (right to object). If the processing is done on the basis of legitimate interests of the controller or a third party, or for the performance of tasks in the public interest (and therefore not on the basis of consent), the data subject has the right to object to that processing on grounds relating to his or her particular situation. The controller must consequently cease the processing unless he demonstrates compelling legitimate grounds that override the data subject's interests, rights and freedoms. The burden of proof lies with the controller.

This implies again a balancing exercise between the protection of privacy and the interests of internet users. Account must be taken of the data subject's particular situation (*e.g.*, the search result harms the data subject when applying for jobs), but which also includes classic criteria such as: Is the data subject a public figure? Is the information related to his or her professional life? Does the information constitute hate speech? Does the information present an opinion or a fact? The controller who has to demonstrate compelling legitimate grounds can rely on the general exceptions to the right to request delisting which are discussed below.

The fourth ground for erasure under Article 17, GDPR is if the personal data have been unlawfully processed. Unlawful processing refers to the legal basis permitting the processing of personal data listed in Article 6, GDPR. This provision lists grounds for lawful processing, but also refers to the infringement of a legal provision (*e.g.*, processing in violation of national law or a court order).

In the same vein, the fifth ground on which to base a delisting request is if personal data must be erased in order to comply with a legal obligation.

The sixth and final ground is if the personal data were collected in relation to the offer of information society services (*ISS*) to a child. The activities of search engines are likely to fall under the scope of direct provision of *ISS*. Nonetheless, search engine providers do not question whether the personal data which they are indexing concern a child. Yet, in view of their specific responsibilities, they would have to delist content relating to a child and take into account that the application of Article 17, GDPR also depends on the context of the collection of personal data by the original controller. A child is a person below the age of 16 years, unless a specific Member State pro-

vides for a lower age (e.g., in Belgium, the limit is below 13 years). The relevant date for calculating the threshold is the date of the beginning of processing by the original third-party website.

Exceptions To Right To Request Delisting

The Draft Guidelines go on to discuss the exceptions that can serve as a basis for refusing a request for delisting. The primary exception is if the processing is necessary for exercising the right to freedom of expression and information. According to the EDPB, the CJEU established in *Google Spain* that, as a general rule, the data subject's rights will override the interests of internet users. However, a balancing test must be applied in the light of factors such as the nature of the information, its sensitivity, the impact on access to information by the public and the role of the data subject in public life.

A further exception is if the processing is necessary for scientific, historical research or archiving purposes, to the extent that the right to request delisting would make the achievement of these purposes impossible, or would seriously impair it. These purposes must be pursued by the search engine *itself*, which will rarely be the case. It is possible that scientists, historical researchers and archivists not connected to the search engine rely on the search results in question, but that is irrelevant under this exception. However, this last fact may be pertinent in a possible balancing exercise conducted under another exception, if the interests of the data subject are balanced against the interests of internet users.

The Draft Guidelines indicate that further exceptions provided for by the GDPR are unlikely to be relevant to a request for the delisting of search results. These include situations in which the processing is necessary for complying with a legal obligation or takes place in the public interest or is necessary for the exercise of, or defense against, a legal action.

No Duty To Inform Delisted Third-party Website

The Draft Guidelines also note that a controller may have the obligation under Article 17 (2), GDPR to take reasonable steps (including technical measures) to inform controllers which are processing the personal data that the data sub-

ject has requested the erasure of those personal data. By contrast, a search engine provider is not subject to this obligation since it has not made the personal data public, but only indexed it and made it available to the public in a particular order of reference. Search engine providers therefore do not have the obligation to inform the webmasters of the third-party website that was delisted.

The draft Guidelines can be consulted [here](#). Comments can be submitted until 5 February 2020.

Belgian Data Protection Authority's Strategic Plan for 2019-2025

On 12 December 2019, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données, DPA*) released its draft strategic plan for 2019-2025 (***Draft Strategic Plan***). The Draft Strategic Plan sets out the DPA's vision for the coming years, defines priorities and strategic objectives, and identifies the resources needed to guide organisations and citizens towards a digital world in which privacy is considered a reality for all.

The DPA's six strategic objectives are as follows:

1. Improve data protection through awareness-raising (by conducting a more proactive media policy);
2. Enhance data protection through enforcement (by further developing the DPA's dispute resolution chamber (*geschillenkamer / chambre contentieuse*));
3. Improve data protection by identifying and responding to new developments (*i.e.*, developments such as artificial intelligence, blockchain, data mining and face recognition);
4. Enhance data protection through collaboration (e.g., through European (active) cooperation with supervisors in other Member States and the European Data Protection Board (***EDPB***));
5. Make the DPA the leader and reference centre of data protection (e.g., by developing new supervisory instruments such as codes of conduct, data protection impact assessments (***DPIA's***) and binding corporate rules (***BCRs***));

6. Make the DPA an efficient supervisor of data protection (e.g., by maximising the use of electronic infrastructure within the DPA).

The DPA then sets out its priorities. Five specific relevant sectors, namely: (i) telecommunications and media; (ii) government; (iii) direct marketing, (iv) education; and (v) SME's, form part of a first category of priorities.

The DPA also identifies three instruments available under the General Data Protection Regulation (**GDPR**) that will help in reaching a better privacy protection for all citizens: (i) the role of the Data Protection Officer (**DPO**); (ii) the focus on the legitimacy of processing; and (iii) the use of the rights of citizens (e.g., right of access and rectification).

A further category of priorities comprises three societal issues that are high on the social agenda: (i) the use of photos and cameras; (ii) 'online data protection'; and (iii) the use of sensitive data. These priorities may change over time.

The Strategic Plan further addresses the organisational structure of the DPA and the necessary expansion of its budget and staff.

Interested parties are invited to share their views on the Draft Strategic Plan and the DPA expects to publish a final version in the course of January 2020. The text can be consulted on the website of the DPA in [Dutch](#) and in [French](#).

EDPS Publishes New Proportionality Guidelines

On 19 December 2019, the European Data Protection Supervisor (**EDPS**) published guidelines assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data (the **Guidelines**). The Guidelines were developed to equip EU policymakers and legislators responsible for preparing or scrutinising measures that involve the processing of personal data and limit the rights to protection of personal data and to privacy.

The Guidelines complement the EDPS Toolkit assessing the necessity of measures that limit the fundamental right to the protection of personal data (the **Necessity Toolkit**). The Guidelines consist of a legal analysis of the proportionality test applied to the processing of personal data and a practical step-by-step checklist for assessing the proportionality of new legislative measures.

The fundamental rights to be protected include the right to privacy and the right to protection of personal data enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (the **Charter**) and those set out in the European Convention for the Protection of Human Rights and Freedoms (**ECHR**). The proportionality test applied to the fundamental rights to privacy and protection of personal data, as laid down in Article 52 (1) of the Charter, implies that any limitation to the exercise of those rights (i) must be provided for by law; (ii) must respect the essence of the rights; (iii) must genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others; (iv) must be necessary; and (v) must be proportionate.

The Guidelines offer guidance on the application of the "proportionality" requirement. This test involves assessing what safeguards should accompany a measure in order to reduce to an 'acceptable' level the risks created by the envisaged measure for the fundamental rights and freedoms of the individuals concerned. Usually, the effectiveness of existing measures over and above the proposed one should also be assessed under the proportionality test.

The Guidelines point out that proportionality in data protection law is a 'fact-based' concept requiring a case-by-case assessment by the EU legislator. This implies balancing the intensity of the interference and the importance of the objective achieved in a given context.

A copy of the Guidelines can be found [here](#).

INTELLECTUAL PROPERTY

Registration of Trade Mark Containing the Word Element "Cannabis" Rejected as Contrary to Public Policy

On 12 December 2019, the General Court (the **GC**) confirmed that a figurative sign containing the depiction of ten cannabis leaves as well as the word elements "cannabis", "amsterdam" and "store" (the **Cannabis trade mark**) is contrary to public policy, so that its registration must be rejected on the basis of Article 7(1)(f) of Regulation 2017/1001 of 14 June 2017 on the European Union trade mark (the **Regulation**) (GC, 12 December 2019, Case T-683/18, *Conte v. EUIPO*).



On 19 December 2016, Santa Conte filed an application for registration of the Cannabis trade mark for goods and services in class 30 (baked goods, confectionery, chocolate and desserts), class 32 (soft drinks, brewery products, preparations for making beverages) and class 43 (services for providing drinks). The application was denied by the Boards of Appeal of the European Union Intellectual Property Office (EUIPO) on the basis of Article 7(1)(f) of the Regulation, given that the sign was contrary to public policy.

Ms. Conte appealed the Boards of Appeal's decision to the GC. She claimed that the Cannabis trade mark is not contrary to public policy since the goods and services covered by the trade mark are sold legally.

First, the GC assessed whether the Cannabis trade mark could be perceived as a whole by the relevant public as referring to a narcotic substance which is prohibited in a large number of Member States.

To that end, the GC first noted that the decisive criterion to gauge whether a sign is contrary to public policy is the perception which the relevant public will have of the trade mark. It added that the assessment of that perception must be based on the standard reasonable person with average sensitivity and tolerance thresholds. It cannot be limited to the public to which the goods and services are directly addressed but must include other persons who, without being concerned by those goods and services, will encounter the sign incidentally in their day-to-day lives. In addition, the perception by the relevant public may be based on inaccurate definitions from a scientific or technical point of view (e.g., the representation of a cannabis leaf is associated, in the mind of the relevant public, with the psychotropic substance even though it is obtained from dried inflorescences of female cannabis flowers).

The GC went on to analyse the trade mark at issue. It found that the word element 'cannabis' is dominant. This word, which is derived from Latin, is widely used and understood in many European languages. The word "cannabis" has three different meanings: a textile plant, a narcotic substance and a therapeutic substance, the use of which is under review. Hence, that word should not automatically be understood as referring to a narcotic unless there are further indications to that effect.

According to the GC, these further indications can be found in the way the relevant public perceives all the elements forming the Cannabis trade mark. Amongst these further indications are the stylised representation of the cannabis leaf (*i.e.*, the media symbol for marijuana) and the word "amsterdam" (city where the sale of cannabis is tolerated). The GC agreed with the EUIPO that these indications made it very likely that the consumer would interpret the word "cannabis" as referring to the narcotic substance which is illegal in the majority of the European Union.

The GC added that it is irrelevant that the actual content of THC (*i.e.*, an active substance present in the female flowers of the cannabis plant which has psychotropic effects) in the products sold by Ms. Conte does not exceed the threshold of 0,2%, that the services covered by the Cannabis trade mark are not those of a “coffee shop” type establishment in Amsterdam and that the consumption patterns differ from those of narcotics (usually smoked) because this assessment is independent of the trade mark applicant’s conduct and is based only on the relevant public’s perception.

Second, the GC examined whether the Cannabis trade mark is contrary to public policy.

The GC recalled that the grounds for refusal laid down in Article 7(1) of the Regulation, such as refusal on the grounds of public policy, apply even if these grounds exist only in part of the European Union (or even in a single Member State). Hence, it is necessary to take account both of circumstances common to all Member States and of the particular circumstances of individual Member States.

EU law does not impose a uniform scale of values so that the requirements of public policy may vary from one country to another and from one era to another. Public policy protects interests which the Member States concerned consider to be fundamental in accordance with their own systems of values.

The GC noted that, in the Member States where the consumption and use of cannabis remain prohibited, tackling the spread of cannabis meets a public health objective. Hence, it is a matter of public policy. For the GC, the importance of this fundamental interest is underlined by the fact that reducing drug trafficking and drugs-related health damages are serious enough to be addressed by EU law.

The GC therefore concluded that the Cannabis trade mark is contrary to public policy.

Clarifications on Genuine Use of Collective Trade Marks

On 12 December 2019, the Court of Justice of the European Union (the **CJEU**) handed down a judgment on what constitutes genuine use of a collective trade mark (CJEU, 12 December 2019, Case C-143/19P, *Der Grüne Punkt v. EUIPO*).

The collective trade mark at issue is the well known (often green) dot recycling symbol pictured below. It was registered on 19 July 1999 by Der Grüne Punkt – Duales System Deutschland GmbH (**DGP**) for numerous classes of goods and services.



On 2 November 2012, Halston Properties filed an application for partial revocation of that mark on the grounds that it had not been put to genuine use for the goods for which it had been registered. The Cancellation Division of the European Union Intellectual Property Office (**EUIPO**), followed by the Fifth Board of Appeal of EUIPO and the General Court (the **GC**), partially upheld the application. It revoked the trade mark rights for all the goods in respect of which the trade mark had been registered, with the exception of goods consisting of packaging.

In a nutshell, these bodies found that the trade mark at issue was not being used in accordance with its essential function, *i.e.*, to guarantee the identity of the origin of the goods for which it is registered. They found that the average European consumer does not perceive the trade mark as an indication of the origin of the goods but instead perceives the mark solely as an indication that the packaging of the goods will be recycled. Hence, the trade mark at issue does not create or preserve an outlet on the market for the product on which it is affixed, but only for its packaging.

On appeal before the CJEU, DGP claimed an infringement of Article 15(1) of Regulation 207/2009 on the Community trade mark (the **Regulation**), read in conjunction with Article 66 of the Regulation. Article 15(1) of the Regulation provides that trade marks must be put to genuine use by their proprietor. Article 66 of the Regulation describes collective trade marks as a mark "*capable of distinguishing the goods or services of the members of the association which is proprietor of the mark from those of other undertakings*".

First, the CJEU noted that there is genuine use if a trade mark is used in accordance with its essential function. Importantly, individual and collective trade marks fulfill different functions. While the function of individual trade marks is to indicate to the consumer the identity of origin of the goods and services in respect of which they were registered, the function of collective trade marks is to distinguish the goods or services of the members of the association from those of other undertakings.

It follows, according to the CJEU, that a collective mark is used in accordance with its essential function when it enables the consumer to link the goods and services covered with the undertakings which are affiliated with the association proprietor of the mark, thereby distinguishing those goods and services from those originating from undertakings which are not affiliated.

The CJEU observed that, in the case at hand, the GC had held that the trade mark at issue was perceived by the relevant public as indicating the fact that manufacturers and distributors of goods covered are affiliated with the DGP recycling system. The CJEU concluded that the trade mark is thus used in accordance with its essential function.

Second, the CJEU assessed whether the trade mark at issue is used on the market with regard to the goods and services covered. To that end, it is necessary to examine whether the use of the trade mark (here: the affixing of the trade mark at issue to the packaging of the goods of undertakings affiliated with the DGP recycling system) is viewed, in the economic sector concerned, as warranted to maintain or create a share in the market for the goods.

The CJEU insisted that such examination must cover the nature and characteristics of the goods at issue. Hence, if the registration targets a large range of classes, the goods must, if possible, be regrouped into several broader

groups. Each group must then be examined individually. Such an assessment is to be carried out by the GC, not the CJEU. Nonetheless, the CJEU briefly touched upon the category of everyday consumer goods. It noted that these goods are likely to generate packaging waste that the consumer must dispose of on a daily basis. Therefore, it cannot be ruled out that affixing the trade mark at issue on the packaging of this type of goods may influence the consumers' purchasing decision. Hence, it would contribute to the maintenance or creation of a share in the market relating to those goods.

The CJEU found that the GC had failed to carry out such examination with respect to the types of goods and services covered by the trade mark. The CJEU concluded that the GC erred in law in its application of the concept of genuine use to collective trade marks and annulled both the judgment of the GC and the decision of the Fifth Board of Appeal of EUIPO.

Provision of ebooks Is Act of Communication to Public and Not Act of Distribution

On 19 December 2019, the Court of Justice of the European Union (the **CJEU**) held that the provision of e-books on an online platform is an act of communication to the public within the meaning of Directive 2001/29 of 22 May 2001 on the harmonisation of specific aspects of copyright and related rights in the information society (the **InfoSoc Directive**) (CJEU, 19 December 2019, Case C-263/18, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*).

The CJEU delivered its judgment in response to a request for a preliminary ruling from the Dutch District Court of the Hague (*Rechtbank Den Haag*) in proceedings between the publishers associations Nederlands Uitgeversverbond (**NUV**) and Groep Algemene Uitgevers (**GAU**) on one hand and the e-books publisher Tom Kabinet on the other hand.

A dispute arose regarding the question whether e-books publishers are allowed to offer an online service in which "second-hand" e-books may be downloaded without the authorisation of the copyright holder. The dispute related to e-books that had been acquired by Tom Kabinet and then made available for downloading on an online platform to members of the Tom Kabinet reading club during a limited period for a fixed fee of EUR 2.

Article 3(1) of the InfoSoc Directive provides that the authorisation of copyright holders is required for "*any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them*". Pursuant to Article 4(1) of the InfoSoc Directive, authorisation of copyright holders is also required with regard to any form of distribution to the public by sale or otherwise of the original of their original works or copies. By contrast, such authorisation is no longer required after the first sale of the work (known as the exhaustion of the distribution right). Hence, the sale of second-hand books is not conditional on the authorisation of the copyright holders.

The case was submitted to the District Court of the Hague, which decided to stay the proceedings and refer a question to the CJEU as to whether the supply by downloading, for permanent use, of an e-book constitutes an act of distribution for the purposes of Article 4(1) of the InfoSoc Directive, or whether such a supply is covered by the concept of "communication to the public" within the meaning of Article 3(1) of that Directive. In the first case, the distribution right of the copyright holders would be exhausted after the first sale so that they could not object to the offering of second-hand e-books. In the second case, copyright holders would retain that right provided that the communication of their work is made to a new public or through new means.

The issue at stake being unprecedented, the CJEU undertook to interpret the relevant provisions of the InfoSoc Directive in the light of the context in which they were adopted and the objectives which they pursued.

First, the CJEU looked at the Copyright Treaty of the World Intellectual Property Organisation (the *WCT*) since the InfoSoc Directive is an implementation of that Treaty. The Agreed Statements concerning Article 6(1) of the WCT (*i.e.*, the provision on the right of distribution) state that the expressions "original" and "copies" "*refer exclusively to fixed copies that can be put into circulation as tangible objects*". Hence, the CJEU found that the right of distribution provided for in Article 4 of the InfoSoc Directive may not cover the distribution of intangible works such as e-books.

Second, the CJEU examined the explanatory memorandum in the proposal for the InfoSoc Directive. In this document, the European Commission (the *Commission*) noted that the distribution right applies exclusively to the distribution of physical copies. The Commission added that interactive on-demand transmission is covered by the right to control communication to the public. The CJEU inferred from this reference to interactive on-demand transmissions that the right of communication is relevant if several unrelated persons, who are members of the public, may have individual access, from different places and at different times, to a work which is on a publicly available website.

Third, the CJEU recalled that establishing a high level of protection of authors is an aim of the InfoSoc Directive. Hence, the concept of "communication to the public" should be understood in a broad sense as encompassing all communications made to a public which is not present at the place where the communication is made.

Fourth, the CJEU referred to recitals 28 and 29 of the InfoSoc Directive which provide that the distribution right includes the exclusive right to control "*distribution of the work incorporated in a tangible article*" and that the exhaustion of the distribution right does not apply to online services.

Fifth, the CJEU admitted that it had ruled in the past that the right of distribution of computer programmes provided for in Article 4(2) of Directive of 23 April 2009 on the legal protection of computer programmes may be exhausted through the sale both of tangible and intangible copies of computer programmes. This is because this *lex specialis* makes no distinction between tangible and intangible copies, unlike the InfoSoc Directive. Since e-books are not computer programmes (for example, the supply of a book and of an e-book cannot be considered equivalents while the supply of a computer programme on a CD-ROM or through downloading from the internet are similar), they are governed by the InfoSoc Directive.

Sixth, the CJEU held that the conditions for classification as communication to the public developed in its case-law are satisfied. The e-books are "made available" to the public since members of the public may access the protected work from a place and at a time individually chosen by them. In that regard, it is irrelevant whether any person actually retrieved the protected work. In the case at hand, Tom Kabinet makes the e-books available to anyone who is registered with its reading club.

The CJEU also found that the e-books are made available "to the public". Any interested person can become a member of the reading club. In addition, there are no technical measures ensuring that only one copy of the e-book is downloaded by the user in the period during which he or she has access to the work. Similarly, after that period expired, there are no measures preventing the downloaded copy from being used any longer. Hence, the number of persons who may have access to the same work, at the same time or in succession, is substantial.

Seventh, and finally, the CJEU recalled that to be categorised as a communication to the public, a protected work must be communicated (i) either using specific means different from those previously used or (ii) to a new public that was not taken into account when the right holder authorised the initial communication. In the case at hand, the making available of an e-book is generally accompanied by a user licence authorising the user to read the e-book only from his or her own equipment. The offering of e-books on an online platform was not taken into account by the copyright holders. Hence, the communication of the e-books is made to a new public.

LABOUR LAW

2020 Indexation of Thresholds Applicable to Contractual Non-Compete, Training and Arbitration Clauses

Non-compete, training and arbitration clauses contained in employment contracts are only enforceable if specific annual remuneration thresholds (the **Thresholds**) are exceeded. The Thresholds, which are provided for in the Law of 3 July 1978 on Employment Contracts, are subject to annual indexation. As of 1 January 2020, the following Thresholds apply:

- EUR 35,761 instead of EUR 34,819 (in 2019); and
- EUR 71,523 instead of EUR 69,639 (in 2019).

The annual remuneration which serves as the basis to establish whether the Thresholds are exceeded includes the monthly gross remuneration multiplied by twelve increased with the end-of-year premium, the double holiday pay, the variable remuneration, and the value of all the other benefits acquired by the employee on the basis of his/her employment agreement (*e.g.*, medical insurance, company car, etc.).

The requirement to reach the Thresholds is to be assessed at the moment when employment comes to an end. Therefore, if an employee's annual remuneration is under the Thresholds at the beginning of employment, the non-compete, training or arbitration clauses may nevertheless be valid at the end of the employment relationship if the employee's annual remuneration at that time exceeds the Threshold.

Non-compete Clause

A non-compete clause can, as a rule, only apply to employees with a gross annual remuneration in excess of EUR 35,761. If the gross annual remuneration ranges between EUR 35,761 and EUR 71,523, the clause will only be valid if the employee's job function features on the list provided for in the applicable collective bargaining agreement agreed at joint committee level (the **CBA**). If the gross annual remuneration exceeds EUR 71,523 the non-compete clause will be valid, unless the employee falls under

an exception provided for by the applicable CBA. As such CBAs are rare, non-compete clauses are generally only valid for employees whose annual remuneration exceeds EUR 71,523 gross.

However, for sales representatives, the non-compete clause will be enforceable if their annual remuneration exceeds EUR 35,761.

Training Clause

A training clause based on which the employer may request the reimbursement of the value of the training given to the employee in the event of termination of the employment contract prior to a specific date, will only be enforceable if the annual remuneration of the employee exceeds EUR 35,761.

Arbitration Clause

An arbitration clause, based on which parties agree to submit their disputes to an arbitrator, will only be enforceable on the double condition that the annual remuneration of the employee exceeds EUR 71,523 and that the employee takes care of the daily management of the company or performs a comparable function.

2020 Indexation of Maximum Amounts Applicable to Non-Recurring Bonus

A bonus plan concluded in accordance with the Law of 21 December 2007 and collective bargaining agreement No. 90 allows the employer to award a non-recurring bonus based on collective targets being reached (the **Non-Recurring Bonus**).

The Non-Recurring Bonus is subject to favorable tax and social security treatment as long as maximum amounts are observed which are subject to annual indexation. As of 1 January 2020, the Non-Recurring Bonus is exempt:

- from employee's social security contributions up to a maximum amount of EUR 3,413 instead of EUR 3,383 (in 2019) – a specific employer's contribution of 33% nevertheless applies; and
- from withholding taxes up to a maximum amount of EUR 2,968 instead of EUR 2,941 (in 2019).

2020 Indexation of Wages within Joint Committee No. 200

Each year in January, the wages are adjusted to the cost of living for employees of companies belonging to the Joint Committee No. 200, which is the most common Joint Committee.

This indexation is based on the so-called "Health Index", a system which tracks living costs but which excludes the price of tobacco, alcohol and fuel. Wages are increased in line with the percentage change in the Health Index of the previous calendar year.

As of 1 January 2020, a wage indexation of 0.80% applies.

This implies that the gross monthly salaries will be increased with 0.80% as of 1 January 2020 for employees belonging to the Joint Committee No. 200 and that the yearly premium due within the sector covered by this Joint Committee in June 2020 will also be indexed to EUR 265.12 gross instead of EUR 263.02 gross (in 2019).

The next indexation of wages within the Joint Committee No. 200 is foreseen on 1 January 2021.

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VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

