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## Highlights



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### Topics covered in this issue





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# COMPETITION LAW

***Belgian Competition Authority Publishes Annual Report for 2018***

On 17 June 2019, the Belgian Competition Authority ("BCA") published its annual report for the year 2018 (the "Report"). The Report describes the activities of the BCA in 2018 and contains statistics on its resources and results in 2018 compared to 2017.

The statistics reveal a slight decrease in the number of pending competition investigations from 12 in 2017 to 11 in 2018. Over the last year, the Competition College of the BCA adopted a total of 4 decisions regarding the imposition of interim measures, compared to 2 in 2017. These interim measures concerned the supply of electricity meter boxes (*See, this Newsletter, Volume 2018, No. 9, p. 5*) and the international horse-jumping sector. The horse-jumping investigation was eventually terminated after the *Fédération équestre internationale* offered commitments (*See, this Newsletter, Volume 2019, No. 1, pp. 4-5*). As was the case in 2017, the Competition College of the BCA did not adopt any decision on the merits in competition cases in 2018. The Report further shows that the average duration of competition procedures decreased from 5 years per procedure in 2017 to 3 years and 5 months in 2018.

As regards merger control, the Report reveals an increase in the number of notifications from 30 in 2017 to 35 in 2018, including a significant increase of simplified notifications (from 19 in 2017 to 28 in 2018). Notable merger decisions adopted in 2018 include the clearance of the acquisition of Mediafin by Roularta and Rossel (*See, this Newsletter, Volume 2018, No. 3, p. 4*), the lifting of specific merger commitments imposed on Kinepolis (for a discussion on the subsequent appellate judgment by the Brussels Court of Appeal in November 2018 and the BCA's decision of March 2019, *see, this Newsletter, Volume 2018, No. 12, p. 5 and Volume 2019, No. 3, p. 3*) and the acquisition of VNG Bouwmarkten by Intergamma Holding BV.

The BCA notes that, while it has continued to hire additional staff, it is still unable to dedicate the necessary resources to the different cases. The Report further mentions that the BCA is in the process of updating its 2012 study on price differences in the retail sector in Belgium and in neighbouring countries following the publication by the Belgian Pricing Observatory (*Prijzenobservatorium/Observatoire des prix*) of its yearly analysis on the prices of goods in Belgium in March 2018 (*See, this Newsletter, Volume 2018, No. 5, p. 5*).

Finally, the Report includes the BCA's enforcement priorities for 2019, as already published on 1 March 2019 (*See, this Newsletter, Volume 2019, No. 3, p. 3*).

The Report is available in Dutch and in French.

***Belgian Competition Authority Fines Professional Organisation of Pharmacists***

On 28 May 2019, the Belgian Competition Authority ("BCA") imposed a fine of EUR 1 million on the professional organisation of pharmacists (*Orde der Apothekers/Ordre des pharmaciens* – the "PO") for infringing Article IV.1 of the Belgian Code on Economic Law and Article 101 of the Treaty on the Functioning of the European Union. According to the BCA, the PO had taken a range of exclusionary measures to thwart the development of MediCare-Market, a retailer of medicines and other, less regulated health products.

The BCA found that the PO had relied on a range of techniques to hamper MediCare-Market's development, including disciplinary proceedings and court proceedings.

Interestingly, the BCA also blamed the PO for limiting price competition, even though the scope for such competition is narrow as far as medicines are concerned in view of the regulatory framework applying to this product. However, the BCA took issue first and foremost with attempts made by the PO to stifle competition for health products other than medicines. For example, the PO had initiated court proceedings against MediCare-Market for publicity in which MediCare-Market promised price reductions on non-pharmaceutical products. In the PO's view, this constituted unethical behaviour unbecoming of a pharmacist. The BCA disagreed and added that, to the contrary, Medi-

Care-Market's actions were welcome because they made pharmacists aware of the legitimacy of price competition for products other than medicines. While the BCA is somewhat ambiguous on this, it also seemed to favour price competition for medicines in forms such as end-of-year reductions. This is illustrated by the BCA's reference to an OECD finding of 2017 that the pricing level of medicines in Belgium was higher than that in neighbouring countries.

Additionally, the BCA made short shrift of the PO's public service remit. The BCA held that legitimate public-service obligations cannot serve as a pretext for anti-competitive behaviour. This holding was based in part on a 2014 EU General Court judgment, which confirmed a European Commission decision which found that the French *Ordre national des pharmaciens* had breached competition rules (Case T-90/11, *Ordre national des pharmaciens and others v. European Commission*, ECLI:EU:T:2014:1049). Similarly, the BCA rejected the PO's general interest arguments that it was supposedly justified in pursuing MediCare-Market in order to (i) protect the credibility of the pharmacist's profession; (ii) safeguard public health; and (iii) guard against the excessive consumption of medicines. The BCA went even further by positing that the PO's general approach to shut down MediCare-Market (or at least stunt its development) amounted to a restriction of competition by object. Therefore, the BCA was not required to show any anticompetitive effects. Still, it went on to demonstrate the potential and actual adverse effects on competition resulting from the PO's conduct.

Following the BCA's decision, the PO issued a public statement that it would analyse the decision and consider its options.

# CONSUMER LAW

***Court of Justice of European Union Clarifies Scope of "Aggressive Practices" in Business-to-Business Relationship under Unfair Commercial Practices Directive***

On 12 June 2019, the Court of Justice of the European Union (the "ECJ") issued a judgment clarifying the scope of "*aggressive practices*" under Articles 8 and 9 of Directive 2005/29/EC of 11 May 2005. This judgment concerned unfair business-to-consumer commercial practices in the internal market (the "UCPD"). Specifically, the ECJ held that requiring a consumer to make a final decision regarding the procurement of telecommunications services while in the presence of the courier providing the standard-form contract (i) does not constitute an aggressive commercial practice in all circumstances; (ii) does not constitute an aggressive commercial practice through the exercise of undue influence based solely on the ground that the standard-form contract was not provided to the consumer in its entirety prior to the courier's visit; and (iii) does constitute an aggressive commercial practice through the exercise of undue influence in situations where the courier adopts unfair conduct with the effect of significantly limiting the consumer's freedom of choice (ECJ, 12 June 2019, Case C-628/17, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Orange Polska S.A.*).

The ECJ delivered its judgment in response to the Polish Supreme Court's request for a preliminary ruling regarding a dispute between Poland's Office of Competition and Consumer Protection and the telecommunications provider Orange Polska ("Orange").

Consumers may initiate the process for concluding a new contract or amending an existing contract with Orange online or by telephone. To do so online, the consumer consults Orange's website, where the standard-form contract is accessible via a link. The consumer does not declare that he has taken cognisance of the standard-form contract when placing his order online. The order is completed by a courier, who delivers to the consumer a draft of the contract or amendment, which is pre-signed by Orange. The consumer then signs the contract or amendment in the presence of the courier, declaring that he has taken cognisance of the documents. If he does not sign, he must visit a physical retailer or reorder online or by telephone. The contract is then activated.

On 30 December 2010, the Chairman of the Office of Competition and Consumer Protection ordered Orange to cease the practice of requiring consumers to conclude contracts in the presence of a courier. The Chairman concluded that the process was an unfair commercial practice under Polish law on combating unfair market practices. Under that law, a commercial practice is aggressive if, because of impermissible influence, the practice "*significantly impairs or is likely to significantly impair the average consumer's freedom of choice*". The Chairman of the Office of Competition and Consumer Protection held that requiring consumers to make a decision regarding the standard-form contract in the presence of the courier inhibits the consumers from taking full cognisance of the content of the contract, thus infringing their freedom of choice.

The Competition and Consumer Protection Court of Poland annulled that decision on 27 October 2014. The Chairman of the Office of Competition and Consumer Protection appealed, but that appeal was dismissed by the Warsaw Court of Appeal on 4 March 2017. The Chairman of the Office of Competition and Consumer Protection then appealed to the Polish Supreme Court on a point of law. That court stayed the proceedings and asked the ECJ to clarify the circumstances when the conclusion of a contract for telecommunications services would constitute "*aggressive commercial practices*".

The ECJ first considered whether Orange's model for concluding a telecommunications contract which requires the consumer to make the final transactional decision in the presence of a courier without being able to take freely cognisance of the contract's content, constitutes an aggressive commercial practice in all circumstances. It held that Orange's model did not necessarily constitute an aggressive commercial practice. In reaching this conclusion, the ECJ reiterated that only the practices in Annex I of the

UCPD are unfair in all circumstances without a case-by-case assessment.

The ECJ went on to analyse whether Orange's model constitutes an aggressive commercial practice through the exercise of undue influence solely because Orange did not provide the consumer with the individual standard-form contract prior to the courier's visit. The ECJ began by noting that it must assess the context of each individual case in detail before classifying a commercial practice as "aggressive" under the UCPD. Citing Article 2(j) of the UCPD, the ECJ additionally explained the concept of undue influence as "*exploitation of a position of power in relation to a consumer so as to apply pressure* [...] *in a way which significantly limits the consumer's ability to make an informed decision*". The ECJ recalled that the UCPD's objective is to protect consumers against unfair commercial practices, based on the assumption that there is unequal bargaining power and asymmetrical access to information between consumers and traders.

Because the consumer (i) had access to the standard-form contract on Orange's website before the courier's visit; and (ii) could review the contract's content at that time, the ECJ decided that the consumer's freedom of choice was not unduly compromised by Orange's practice of concluding contracts via the courier service. The ECJ left it for the lower court to determine whether the consumer did, in fact, have the opportunity to access the information prior to the courier's visit. Still, the ECJ made two caveats for the lower court's consideration: (i) the information on which the consumer bases his or her decision must be sufficient to ensure his or her freedom of choice; and (ii) the mere fact that a consumer does not actually access the information does not constitute *per se* evidence of an aggressive commercial practice.

Finally, the ECJ considered whether Orange's contracting process constitutes an aggressive commercial practice through the exercise of undue influence when the courier adopts unfair conduct limiting the consumer's freedom of choice. The ECJ noted that the contracting procedure as described does not, as such, constitute an aggressive commercial practice. However, if the courier exhibits additional conduct that restricts the consumer's freedom of choice, the contracting procedure may be considered an aggressive commercial practice. According to the ECJ, such conduct might include informing the consumer that a delay in signing the contract will lead to less favourable contract conditions later or that a delay risks the imposition of fines or suspension of service. Any such conduct that hinders the consumer's freedom of choice would be considered an aggressive commercial practice.

# CORPORATE LAW

***New Directive on Restructuring and Insolvency Adopted***

On 26 June 2019, Directive (EU) 2019/2013 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 was published in the Official Journal of the European Union (the "Directive").

The main objective of the Directive is to ensure that all companies in the EU have access to effective national preventive restructuring frameworks by further harmonising national rules on insolvency and restructuring procedures. Currently, the range of procedures available to debtors in financial difficulties differs between Member States. Some Member States only provide insolvency procedures that can be initiated at a relatively late stage.

Pursuant to the Directive, Member States will have to create one or more clear and transparent early warning tools that allow for the detection of circumstances that could give rise to a "likelihood of insolvency" (a term to be defined by national law). These preventive insolvency tools should allow debtors to take appropriate actions without delay. During the preventive restructuring procedure, the debtors will remain in control of their assets and their day-to-day business operations.

Because the negotiation of a restructuring plan is critical for the success of a restructuring, the Directive aims to facilitate negotiations. For example, an external restructuring practitioner may, and in some circumstances must, be appointed. Furthermore, a debtor may benefit from a stay of individual enforcement actions for a maximum of 12 months, which should give the debtor time to prepare and implement the restructuring plan.

Finally, the Directive provides that the preventive restructuring frameworks will not affect employees' rights, including the rights under applicable collective bargaining agreements and the right to information and consultation.

The Directive will enter into force on 16 July 2019. The Member States have two years from that date to transpose the Directive into national law.

# DATA PROTECTION

***European Data Protection Board Adopts Guidelines on Codes of Conduct under General Data Protection Regulation***

On 4 June 2019, the European Data Protection Board ("EDPB") adopted Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679 ("GDPR"). The Guidelines seek to provide practical guidance and interpretative assistance in relation to the application of Article 40 and Article 41 of the GDPR. These provisions deal with codes of conduct and the monitoring of codes. The adoption of the Guidelines follows the EDPB's public consultation on its draft Guidelines (*See, this Newsletter, Volume 2019, No. 2, p. 9 and 10*).

A copy of the Guidelines can be found here.

***Belgian Data Protection Authority Seeks Views on Direct Marketing***

On 12 June 2019, the Belgian Data Protection Authority ("DPA") announced its plan to update its recommendation on direct marketing. To this end, the DPA has initiated a two-part public consultation process. The first part probes for the most asked questions and issues in relation to the application of the GDPR. The second part seeks input on which techniques and methodologies are used by the data controller for direct marketing.

The press release with access to the public consultation is available in Dutch and French.

# INTELLECTUAL PROPERTY

***General Court Rules on Adidas Three-stripe European Union Trade Mark***

On 19 June 2019, the General Court of the European Union ("General Court") denied the appeal made by Adidas AG ("Adidas"), a German sportswear manufacturer, to overturn a decision of the Second Board of Appeal of the European Union Intellectual Property Office ("EUIPO"). The General Court thereby refused the registration of Adidas' three stripes as a figurative trade mark, which Adidas uses as a pattern.

In December 2013, Adidas filed an application with the EUIPO for registration of an EU trade mark. Adidas qualified the three stripes as a figurative trade mark in its request for registration and described it as follows: "*The mark consists of three parallel equidistant stripes of identical width, applied on the product in any direction*". In 2014, Adidas registered the trade mark with the EUIPO for clothing, hats and shoes. Afterwards, the Belgian firm Shoe Branding Europe BVBA filed an application for declaration of invalidity of the mark.

Both the Cancellation Division, in first instance, and the Second Board of Appeal of the EUIPO, on appeal, found that the trade mark should not have been registered since it was in breach of Article 7(1)(b) of Council Regulation No 207/2009 of 26 February 2009 on the European Union Trade Mark. According to the Second Board of Appeal, Adidas failed to establish that its mark had gained distinctive character through use across the EU. The General Court has now confirmed this decision. According to the General Court, the sign was not sufficient to identify the products as associated with the brand.

In its judgment, the General Court first noted that, contrary to what Adidas argued, the trade mark is not a pattern mark consisting of a series of regularly repetitive elements, but rather an ordinary figurative mark. As such, the Second Board of Appeal of the EUIPO did not misinterpret the trade mark as a figurative mark. The General Court also agreed with the Second Board of Appeal of the EUIPO that it is not possible to take into consideration forms of use that do not honour the other vital features of the registered mark, such as its colour scheme. Indeed, Adidas submitted an abundance of evidence showing white stripes against a black background, whereas the trade mark (shown above) consists of black stripes against a white background.

Lastly, the General Court found that Adidas did not demonstrate that the trade mark at issue is used across the territory of the EU because Adidas failed to prove the use in all EU Member States. As a result, the General Court concluded that the evidence before it was insufficient to establish that the trade mark had acquired, in the whole EU territory, distinctive character following the use which had been made of it.

The General Court ruling appears to address issues affecting the specific elements of the sign that Adidas filed and how Adidas sought the registration. In particular, Adidas presented the trade mark as a figurative mark or a logo, but Adidas intended to use it as a pattern. Moreover, Adidas filed the trade mark in a different colour scheme than what is most often used. Regardless of the foregoing, Adidas owns many more trade marks that involve three equidistant stripes. The practical effect of this judgment is likely to be minimal.

Adidas can still appeal the judgment to the Court of Justice of the European Union.

# LITIGATION

***General Court of European Union Annuls Micula State Aid Decision of European Commission***

On 18 June 2019, the General Court of the European Union (the "General Court") handed down its long-awaited judgment in the *Micula* case (Cases T-624/15, T-694/15 and T-704/15, *European Food and Others v Commission,* EU:T:2019:423).

The case finds its origins in the investment made by the Miculas, two investors of Swedish nationality, in the food production sector in Romania in the 1990s. At the time of investment, they made use of numerous tax incentives which Romania had put in place in order to attract foreign investment.

In 2005, as Romania prepared to accede to the European Union, the tax incentives were revoked in an effort to conform to EU law on state aid.

The Miculas then instituted ICSID proceedings against Romania based on the Romania-Sweden Bilateral Investment Treaty, arguing that the revocation of the tax incentives constituted a breach of their rights under that treaty. The arbitral tribunal issued its award in 2013, holding that by revoking the incentives, Romania had indeed failed to award the claimants fair and equitable treatment. The arbitral tribunal awarded the Miculas EUR 180 million in damages.

In 2015, the European Commission handed down a decision (the "2015 EU decision") declaring that the ICSID award in favour of the Miculas amounted to state aid. The 2015 EU decision prohibited Romania from paying the amount due under the award. The Commission also ordered Romania to recover any compensation already awarded to the Miculas.

The Miculas challenged the 2015 EU decision before the General Court.

In its judgment handed down on 18 June 2019, the General Court annulled the 2015 EU decision. It found that (i) the European Commission did not have the competence to adopt the 2015 EU decision since EU law does not apply to international breaches of law committed by Romania prior to its accession to the European Union; and (ii) the arbitral award did not constitute state aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union ("TFEU").

*Lack of Competence to Adopt 2015 EU Decision and Inapplicability of EU Law*

The Miculas argued, first, that the European Commission lacked competence to issue the 2015 EU decision since EU law did not apply in 2005, which is when Romania revoked its favorable tax incentives regime. The argument follows that it is irrelevant that Romania joined the EU in 2007 and that the arbitral tribunal only delivered its award in 2013.

The Miculas also argued that the 2015 EU decision was based on the incorrect premise that the tax incentives regime in place in Romania until 2005 constituted state aid prohibited by EU law.

The European Commission contested the allegation that the 2015 EU decision was aimed at challenging the tax incentives regime in place prior to 2005. It argued that Romania granted the aid at issue after its accession to the EU "*either through the conversion of the arbitral award, by means of its recognition, into a valid legal right under national law, or through Romania's implementation of the arbitral award*" (para. 64).

The General Court dismissed the European Commission's arguments and agreed with the Miculas. It found that the Miculas' right to receive compensation arose at the time when Romania repealed the tax incentives regime (para. 75). Since this event took place before Romania's accession to the EU, EU law did not apply to that situation. According to the General Court, although the arbitral tribunal delivered its decision awarding the compensation to the Miculas in 2013, this arbitral award was "*merely an ancillary element of the compensation at issue and is not, as such,*

*severable from the earlier tax incentives*". Consequently, "*it cannot be classified as new aid and serve as a basis for the competence of the Commission and the applicability of EU law for all events occurring in the past* […]" (para. 77).

Importantly, the General Court also noted that the amounts granted to the Miculas as compensation for the damage resulting from Romania's revocation of the tax incentives regime were calculated by the arbitral tribunal from the moment that this regime was repealed (on 22 February 2005) until its scheduled expiry (on 1 April 2009). The General Court then noted that:

- with respect to the amounts granted as compensation for the period predating Romania's accession to the European Union (*i.e.*, 22 February 2005 – 31 December 2006), those amounts could not constitute state aid within the meaning of EU law since EU law did not apply during that period; and

- with respect to the amounts granted as compensation for the period subsequent to Romania's accession to the European Union (*i.e.*, 1 January 2007 – 1 April 2009), "*even assuming that the payment of compensation relating to that period could be classified as incompatible aid, given that the Commission did not draw a distinction between the periods of compensation for the damage suffered by the applicants before or after accession, the Commission has, in any event, exceeded its powers in the area of state aid review*" (para. 91).

*Micula's Arbitral Award Does Not Constitute State Aid*

The Miculas also contended that the arbitral award did not confer an advantage on them (which is an essential element of state aid pursuant to Article 107 TFEU). The Miculas argued that the arbitral award was intended solely to compensate them for the damage that they suffered. They added that the award did not reinstate the tax incentives regime, but rather granted them compensation for Romania's breach of its obligations under the Romania-Sweden Bilateral Investment Treaty.

The General Court made the following findings in response to this argument:

- Regarding the compensation corresponding to the period predating Romania's accession to the European Union (*i.e.*, 22 February 2005 – 31 December 2006), the General Court recalled the holding in Asteris (joined cases C-106/87 to 120/87), that "*compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful or incompatible aid*".

  On the basis of this case law and since EU law did not apply during the 2005 – 2006 period, those amounts could not be regarded as "*compensating for the withdrawal of unlawful or incompatible aid*". Consequently, in so far as the arbitral award offered compensation during that period, it did not confer an advantage to the Miculas.

- Regarding the compensation corresponding to the period subsequent to Romania's accession to the European Union (*i.e.*, 1 January 2007 – 1 April 2009), the General Court found that since "*the compensation at issue covered, at least in part, a period predating accession (from 22 February 2005 to 1 January 2007) and as the Commission did not draw a distinction, among the amounts to be recovered, between those falling within the period predating accession and those falling within the period subsequent to accession, the decision by which it classified the entirety of the compensation as aid is necessarily unlawful*".

The General Court concluded that the 2015 EU decision was unlawful "*in so far as it classified as an advantage and aid within the meaning of Article 107 TFEU the award, by the arbitral tribunal, of compensation intended to compensate for the damage resulting from the withdrawal of the tax incentives, at least in respect of the period predating the entry into force of EU law in Romania*".

*Conclusion and Implications*

Irrespective of any appeal to the Court of Justice of the European Union ("ECJ"), the judgment of the General Court will have immediate and direct consequences on the Micula enforcement cases currently pending in other jurisdictions, particularly in the UK and in Belgium. In the latter proceedings, the Brussels Court of Appeal recently sought a preliminary ruling from the ECJ asking whether the 2015 EU decision superseded the enforcement proceedings of an ICSID award. The judgment handed down today may cause this request for a preliminary ruling to become moot.

# TELECOMMUNICATIONS

***According to Court of Justice of European Union, SkypeOut Is Regulated Telecommunications Service***

On 5 June 2019, the Court of Justice of the European Union ("ECJ") delivered a judgment on the legal classification of the *SkypeOut* feature provided by Skype Communications ("Skype"). This feature allows users to call a fixed or mobile number from a device connected to the internet, such as a computer, a smart phone or a tablet, using the internet, and more specifically, the so-called "voice-over internet protocol" technology. The issue at hand was whether such a service qualifies as an "electronic communications service" (ECS) within the meaning of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ("Framework Directive").

*Facts*

In May 2016, the Belgian Institute of Postal Services and Telecommunications ("BIPT") adopted a decision imposing a fine of EUR 223,454 on Skype for providing an electronic communications service by means of the *SkypeOut* feature without notifying itself as a telecommunications operator. Unconvinced by Skype's arguments in the ensuing action for annulment, namely that *SkypeOut* did not represent an electronic communications service, the Court of Appeal of Brussels requested the ECJ to rule on the matter in the framework of a preliminary ruling procedure.

The Court of Appeal asked, in essence, whether a so-called "voice-over internet protocol" service, made available via software, terminated on a public switched telephone network, to a fixed or mobile number covered by a national numbering plan falls under the notion of an electronic communications service ("ECS") within the meaning of Article 2(c) of the Framework Directive. According to that provision, an ECS is a service which (i) is normally provided for remuneration; and which (ii) wholly or mainly consists in the conveyance of signals on electronic communication networks.

*Judgment*

In its judgment, the ECJ found that the use of *SkypeOut* requires the involvement of telecommunications service providers authorised to send and terminate calls to fixed or mobile telephone numbers via a public switched telephone network ("PSTN"). In order to provide the *SkypeOut* service, Skype concludes agreements to that effect with the telecommunications service providers, to which it pays remuneration. Consequently, Skype makes the transmission technically possible in order to provide it to users against remuneration.

The Court then stated that, according to established case-law, a service must include the conveyance of signals in order to be classified as an ECS. The fact that the transmission of signals takes place through infrastructure that does not belong to the service provider is irrelevant, insofar as the provider is responsible to the end-user for transmitting signals that ensure the user is supplied with the service. In the case at hand, Skype assumes responsibility towards the users of *SkypeOut* for the transmission of voice signals on the PSTN, despite the fact that the telecommunications service providers are contractually liable to Skype.

According to the ECJ, the fact that *SkypeOut* is merely a feature of the Skype software, which can be used without that feature, cannot have any bearing on the classification of the *SkypeOut* service as an ECS. The reason for this is that the services offered by the Skype software and by the *SkypeOut* feature have clearly distinct purposes and remain entirely autonomous in their operation. It is also irrelevant for the qualification of the *SkypeOut* service that Skype indicates in its general terms that it assumes no responsibility for the transmission of signals to users of the *SkypeOut* feature.

In view of the above, the ECJ sided with BIPT and concluded that the *SkypeOut* service constitutes an ECS.

*Implications*

Following the judgment of the ECJ, Skype is considered a "telecommunications operator" and is, therefore, subject to EU telecommunications regulations. Consequently, the principles laid down in the Framework Directive, such as the principle of universal service, protection of subscribers and their personal data and regulated tariffs, apply to

the *SkypeOut* feature. This means that, in the future, Skype will have to respect the same rules as any other telecommunications company.

***Google's Gmail Does Not Constitute Electronic Communications Service***

On 13 June 2019, the Court of Justice of the European Union ("ECJ") handed down its judgment in case C-193/18, *Google LLC v. Bundesrepublik Deutschland*, holding that Google's Gmail, a web-based emailing service, is not an "electronic communications service" for the purposes of Article 2(c) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the "Framework Directive").

The dispute arose between Google and the German Federal Agency for Electricity, Gas, Telecommunications, Post and Rail Networks (the "Agency"). The Agency found that, under German law, Google's Gmail service, which functions by means of the internet, constitutes a telecommunications service subject to German legislation imposing additional security, law enforcement cooperation, consumer and data protection standards. The Agency ordered Google to register with the Agency, failure of which would give rise to a penalty payment.

Google challenged the decision on the grounds that the Gmail service is not an electronic communications service since that service does not emit signals and is not a remunerated service as required by the definition contained in Article 2(c) of the Framework Directive. After making its way through several layers of the German judicial system, the Higher Administrative Court for the Land of North Rhine-Westphalia stayed the proceedings and referred the case to the ECJ for a preliminary ruling.

In holding that the Gmail service is not an electronic communications service, the ECJ first recalled that the concept is defined "*in positive and negative terms*". Pursuant to Article 2(c) of the Framework Directive, an electronic communications service is defined as "a *service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting*".

The ECJ also drew attention to the fact that the various directives constituting the relevant regulatory framework make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any such responsibility. Put simply, the frameworks pertaining to content and transmission articulate their own specific objectives (*see,* to that effect, judgments of 7 November 2013, *UPC Nederland*, C-518/11, EU:C:2013:709, paragraph 41, and of 30 April 2014, *UPC DTH*, C-475/12, EU:C:2014:285, paragraph 36).

In the light of this distinction, the Court accepted that the provider of a web-based email service, like Gmail, conveys signals by transmitting data online since "*it uploads to the open internet and receives from it, via its email servers, the data packets relating to the emails sent and received, respectively, by the holders of a Google email account*".

Nonetheless, the ECJ held that Google's service "*does not consist wholly or mainly in the conveyance of signals on electronic communications networks*". Rather, the ECJ held that the internet access providers and the operators of the internet's various networks "*convey the signals necessary for the functioning of any web-based email service, and it is they who bear responsibility in accordance with the judgment of 30 April 2014, UPC DTH (C-475/12, EU:C:2014:285, paragraph 43)*".

The ECJ held that its finding cannot be challenged by the mere fact that "*the supplier of a web-based email service actively participates in the sending and receipt of messages, whether by assigning to the email addresses the IP addresses of the corresponding terminal devices or by splitting those messages into data packets and uploading them to, or receiving them from, the open internet for the purposes of transmitting them to their recipients" since it "does not appear to be sufficient to enable that service, on the technical level, to be regarded as consisting 'wholly or mainly in the conveyance of signals on electronic communications networks' within the meaning of Article 2(c) of the Framework Directive*".

Lastly, the ECJ clarified that the fact that Google also operates its own electronic communications networks in Germany was immaterial for the question raised.

## In the centre of Europe with a global reach

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