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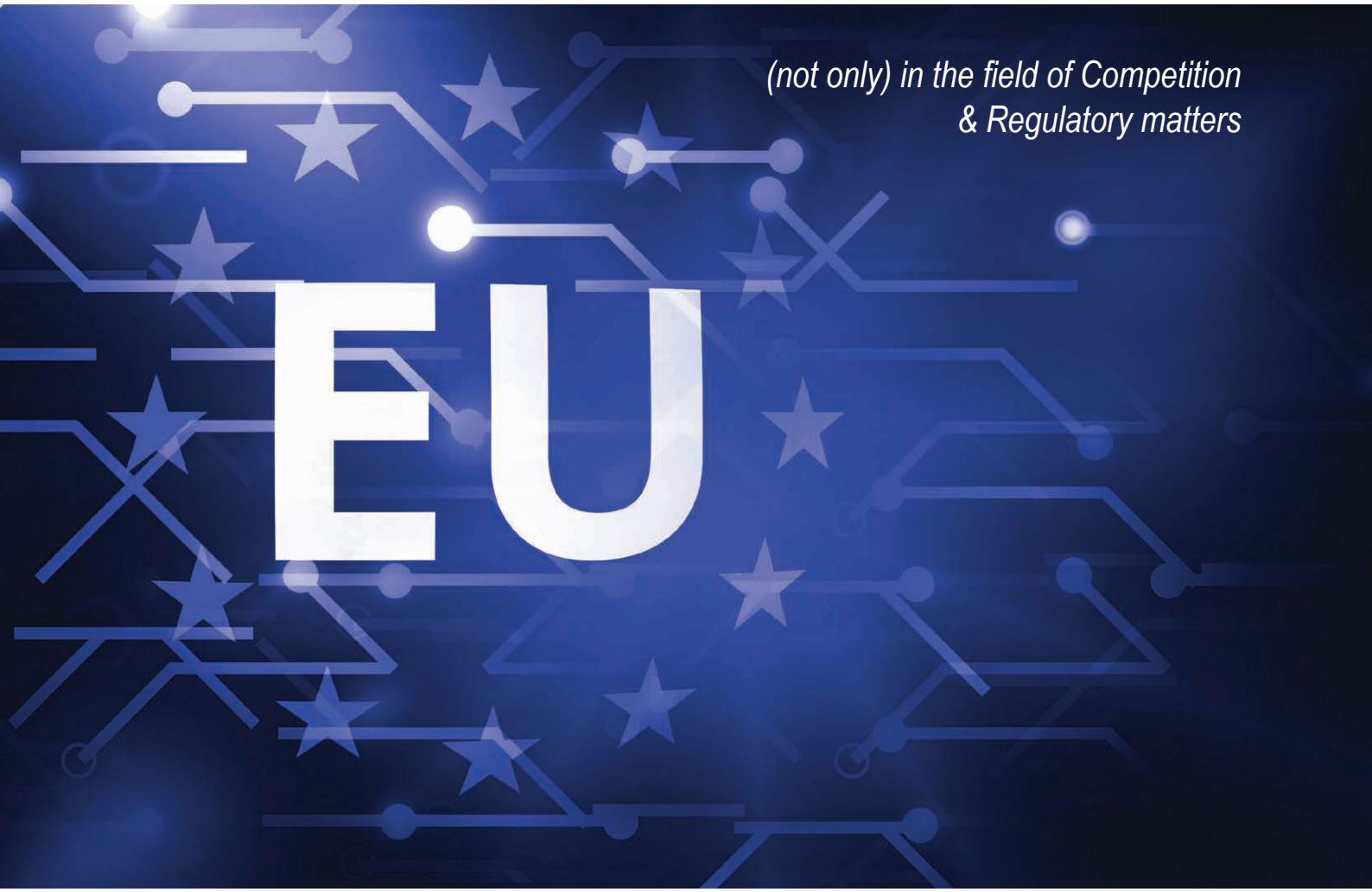
EU Legal News

I/2018

Strategic thinking I Individual approach I Excellent legal team I Long-term partnership



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DEALWATCH By ISI Emerging Markets (2016–2017)

MERGERMARKET (2009–2015)

Summary

Introduction

Dear Clients and Business Friends,

It is a pleasure for me to present the latest issue of our **EU Legal News** to you. This edition will cover major changes and new trends in EU law and the way they are reflected in the Czech system of laws.

This year's highlight will be **the General Data Protection Regulation** which will apply from 25 May 2018. We are keeping you posted on this regulation on an ongoing basis, and this EU Legal News issue is no exception in this sense. In this issue we focus on the institute of a data protection officer (DPO), whom some of you will have to appoint starting from May. In particular we draw your attention to the recommendations of Working Party 29 regarding the appointment and duties of the DPO, and we elaborate on possible approaches to fulfil this specific new duty. We also cover the topic of a new outsourcing service as regards the performance of the role of a DPO that our law firm is offering now.

We are also bringing to your attention a summary of the draft directive which envisages the creation of a legal framework governing **the informal restructuring of the financial exposure of corporations** – outside of insolvency proceedings and in a basically non-public manner in order to prevent bankruptcy. In the IP area we are presenting a view of **the future of IP rights after Brexit**, especially with respect to the draft position paper issued by the European Commission, which addresses unitary IP rights. Besides personal data issues, there are other hot EU topics such as **the regulation of the movement of impersonal data in the EU** (which is why we have also focused on barriers to their free movement), and we present a summary of the requirements under a new EU draft regulation on this topic.

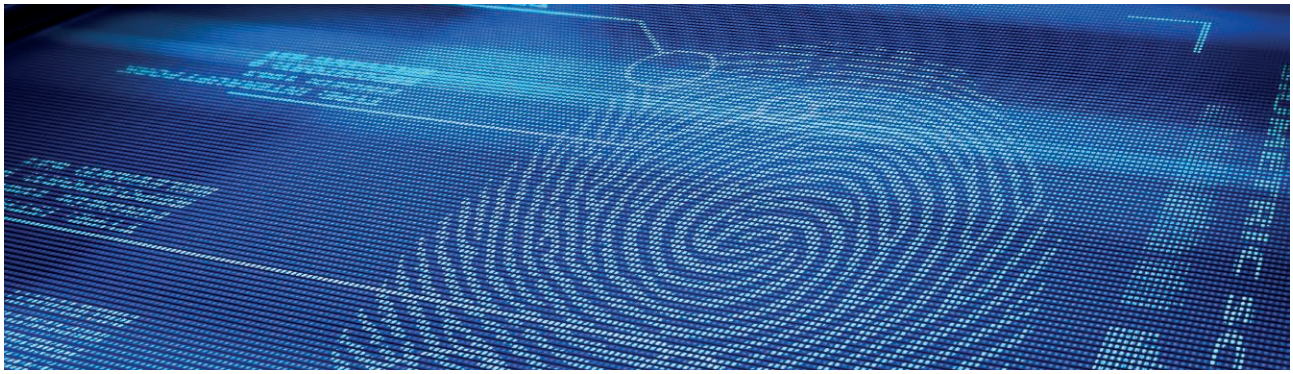
Last but not least we would also like to present you with a Slovak perspective on **the amendment of the act on the residence of aliens** effective from May 2017, which transposes the directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. Our lawyers, equipped with valuable practical experience with the still fresh implementation regulations, have focused on the specific features of the application to grant temporary residence for employee transfer purposes.

This EU Legal News issue also **covers competition law news and information on the Commission's intention to make public procurement more efficient**.

Our law firm is eager to support you in navigating this complex world again in 2018, which the firm began under the new name of HAVEL & PARTNERS.

I hope you will find the news interesting to read.

Robert Nešpůrek



DPOaaS: Outsourcing of DPO Services

Nominating a data protection officer (DPO) is one of important obligations data controllers and processors must fulfil under the General Data Protection Regulation (GDPR).

As DPO services may be provided also by a third party, many organisations will consider outsourcing these activities. HAVEL & PARTNERS has years of experience advising on personal data protection and IT matters, so it decided to offer DPO services and further long-term support in the field of GDPR compliance in cooperation with **FairData Professionals a. s.**, a new company with full access to the capacities, know-how and experience of the law firm.

Offered services

- Outsourcing of the DPO services for controllers and processors of personal data that are obligated to appoint a DPO or decide voluntarily to appoint a DPO
- Professional support to DPOs appointed internally from among staff members or local support to foreign DPOs (designated e.g. on a group level)
- Acting as a quasi-DPO – an unofficial "officer" providing support to the organisation and monitoring its compliance with data processing requirements under the GDPR
- Further support and advice on data security and compliance

Advantages of our services

- **Stability and professionalism:** we have more than 12 years of expertise in the field of personal data protection and continue to build a strong and stable team with advantages you can benefit from in cooperating with a reliable partner on a long-term basis
- **Relevance:** we work in many sectors and know our clients' needs; GDPR rules should be applied in a way to cover risks while still allowing business to be done
- **Increasing value:** we perceive the correct application of the GDPR as an opportunity to apply a modern approach to the use of data in business and to enhance reputation
- **Risk-oriented:** the most conservative solution is not always the best solution; also when investing in data protection it is necessary to evaluate real benefits to protection of data subjects
- **Combined expertise:** our teams combine legal and IT expertise
- **Synergies:** DPO-related costs may not be marginal, but our service will take advantage of economies of scale
- **Efficiency:** thanks to detailed knowledge of your organisation, we can more efficiently assess the changes you are going to implement in the field of personal data processing
- **Prevention:** we will notify you of changes in legal regulations, new case-law or developments in the application of laws and provide you with company-specific change recommendations
- **Long-term support:** it is our vision to become one of the major providers of this type of service offering reliable long-term support to our clients

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GDPR: Will the new regulation result in a lack of data protection officers?

*As soon as the General Data Protection Regulation[1] ("**GDPR**" or "**Regulation**") enters into force, it will bring along a number of new obligations for personal data controllers, as well as processors. One of them is to appoint a data protection officer under the new framework ("**Officer**" or "**DPO**") which serves in particular to monitor accountability. The Officer is to facilitate compliance of data controllers' (processors') activities with the GDPR. However, the new concept brings a number of unanswered questions regarding the DPO's appointment, certification or liability that worry data controllers while the effective date of the Regulation is approaching (25 May 2018).*

A look at history and EU guidelines

Some controllers established in the EU are more or less familiar with the DPO concept, as outlined below. However, to a majority of them, this will be a completely new concept with which they have no experience. The DPO's role was introduced in EU Member States by Directive 95/46/EC[2] ("**Directive**"). The Czech Republic chose the route of the notification / registration duty and did not take the opportunity to embody the concept of a person authorised to protect personal data in its laws. Similarly as a DPO under the GDPR, a DPO designated under the Directive was to ensure in an independent manner the internal application of the national provisions taken to implement the Directive and to keep evidence of processing operations carried out by the controller. According to information contained in a report[3] of 2005 of the working party set up under Article 29 of the Directive ("**WP29**"), only five Member States implemented the exemption from the notification duty and introduced conditions for the fulfilment of the DPO's role.[4] Some Member States, such as Germany, laid down more detailed rules for the DPO's role and set out different requirements for mandatory appointment for the public sector on one side and for the private sector on the other side.[5] As for countries with a legal tradition closer to that of the Czech Republic, Slovakia introduced the concept of DPO in 2013. There, unlike in other countries, this role could only be performed by individuals.[6]

The current regime governing DPOs is based on the experience of individual EU Member States as described in the WP29 report referred to above. Nevertheless, despite all experience gathered so far with this concept, the Regulation is not clear and explicit in defining certain conditions or requirements for the duties of DPOs. For this reason, the WP29 published guidelines on data protection officers ("**Guidelines**") on 13 December 2016 (last revised on 5 April 2017). The objective of the Guidelines is in particular to clarify requirements for the designation, position and tasks of a DPO. The issues related to the position and tasks of and requirements imposed on a DPO are addressed in our latest issue of Legal News, in the article entitled When, whom and how to appoint a data protection officer under the GDPR.

Appointing a DPO

Although the obligation to appoint a DPO will not apply to all controllers and processors from May 2018, the WP29 recommends to entities not subject to the appointment obligation designating a DPO on a voluntary basis. The existence of a DPO may reduce the risk of a breach of the rules prescribed by the Regulation.

The role of the DPO may be performed by own employee of the controller or the processor or by an external entity under a service agreement. In both cases, the DPO must

[1] *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).*
[2] *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.*
[3] *The report of the Working Party set up under Article 29 of the Directive on the obligation to notify the national supervisory authorities, the best use of exceptions and simplification and the role of the data protection officers in the European Union. 10211/05/EN, WP 106.*
[4] *German, Netherlands, Sweden, Luxembourg and France.*
[5] *In Germany, every private entity with more than four persons engaged in automated data processing is obliged to appoint a data protection official. Every public entity must appoint a data protection official without exception.*
[6] *S. 27(3) of Act No. 122/2013 Z. z., on Personal Data Protection and Amendments to Certain Acts: The data protection officer may only be an individual who has full legal capacity, is of previous good character and has a valid certificate issued by the Office under Section 24.*

comply with all requirements imposed on him or her and, at the same time, must be protected against unfair termination of the service agreement or unfair dismissal. In particular, the DPO must not have a conflict of interests with regard to its function as a DPO. The DPO may fulfil other tasks and duties for the controller or the processor on condition that such tasks and duties do not result in a conflict of interests. To avoid any conflict of interest, the DPO must not hold a position within the organisation that allows him to determine the purposes and means of personal data processing. A conflict of interests may also arise if the DPO is to represent the controller or the processor in court or similar proceedings in cases involving personal data protection. This requirement is closely related to the provision of Article 38(3) of the GDPR, under which the DPO carries out his or her activities independently and with a sufficient level of autonomy. For this purpose, the DPO must not be given instructions regarding the exercise of such tasks, irrespective of whether an employee or an external DPO. The controller or the processor is required to publish the contact details of the DPO to ensure that data subjects (and supervisory authorities) can contact the DPO directly without having to contact another part of the organisation.

It should be noted that an internal DPO is not an ordinary employee of the controller or the processor. In practice, organisations often have dedicated persons within their internal structure who supervise the legitimacy of personal data processing and give advice and instructions to other entities within the organisation. However, the DPO has a specific position as he or she is not bound by instructions of the controller or the processor and does not look after the organisation's interests. In certain cases, the DPO even notifies of breaches of the Regulation contrary to the interests of the controller or the processor. Although the DPO is a concept completely new to the Czech legal environment, an employee who has supervised personal data processing may be nominated as a DPO with effect from May 2018, subject to compliance with the Regulation.

Accountability of the DPO as an employee of the controller or the processor

The Regulation contains no provisions rendering the Officer directly liable for non-compliance with the Regulation by the entity designating the DPO. The GDPR clearly provides that implementing and maintaining processing activities in compliance with the Regulation is the responsibility of the controller or the processor that must be able to demonstrate such compliance. If the controller or the processor adopts decisions in conflict with the Regulation and the DPO's advice, the DPO should be allowed to explain his or her differing opinion to the management. In this respect, the DPO is directly subordinated to top managers. As a result, the GDPR assumes that DPOs "*shall not be dismissed or penalised by the controller or the processor for performing their tasks*". This provision ensures that the DPOs will be able to perform their tasks independently and, at the same time, will be protected against penalties that may be imposed on them on the grounds of fulfilment of their obligations. However, the DPO may be lawfully dismissed under national laws for other reasons unrelated to the performance of the tasks under the Regulation. Nevertheless, the WP29 stated that the more stable the contractual relationship between the controller / the processor and the DPO is, the more room there is for an independent performance of the activities by the DPO.

Can the role of the DPO be fulfilled based on a certificate only?

The Regulation lays down no requirements regarding the certification of DPOs, although certificates for DPOs have become available since the introduction of this position and in connection with the application of the GDPR. However, the DPOs need not to have a certificate[7] to perform the role and the controller may designate a 'non-certified' person.

The obligation imposed on data controllers by the Regulation is to designate the DPO on the basis of professional qualities and, in particular, expert knowledge of data protection law and practices and the ability to fulfil the tasks assigned to the DPO by general regulations. The Regulation prescribes no specific form of a certificate of professional qualities or an external certification. The Regulation does not even leave room for the form of verifying the qualities or other parameters of the qualification and personal fitness to be determined by an implementing regulation of the European Commission or by Member States. After the DPO is appointed by the controller or processor, the person appointing the DPO in which the DPO fulfils this role must provide the DPO with resources necessary, among other things, to maintain his or her expert knowledge. The expertise may not be inferred solely from the DPO's 'professional' certificate[8] as the personal data protection issues are related to a number of legal regulations, in the light of which the provisions of the Regulation can be applied. Mere knowledge of the GDPR is no set formula guaranteeing the proper fulfilment of the DPO's role.

DPOs in numbers

Given that the GDPR will also apply to companies registered outside of the EU if there is a European element

[7] *Czech Office for Personal Data Protection in Data Protection Officer [Pověřenec pro ochranu osobních údajů [cit. 28/11/2017]. Available in Czech at https://www.uoou.cz/poverenec-pro-nbsp-ochranu-osobnich-udaju/d-27307/p1=3938.*

[8] *Czech Office for Personal Data Protection. A dozen of errors regarding the GDPR. [cit. 28/11/2017]. Available in Czech at https://www.uoou.cz/desatero-omylu-o-nbsp-gdpr/d-23799/p1=4720.*

of data processing, in particular if they process data on EU citizens,[9] such companies must meet the obligations arising from the Regulation. A study by the International Association of Privacy Professionals[10] has indicated that, under the GDPR, at least 28,000 DPOs will be required,[11] while, for example, the DPO's average annual salary in the UK is to amount to £47,500.[12]

Adequate salary will correspond to adequate knowledge and compliance with the requirements imposed on DPOs by the Regulation. Besides expertise in personal data protection legislation and procedures, the DPOs should have excellent management skills and the ability to work easily with internal staff at all levels as well as to support and act as a go-between for the supervisory authorities in respect of the controller. The tasks the DPO will have to fulfil will not be easy as he or she must be able to ensure internal consensus and notify the supervisory authorities of any non-compliance (such as data breaches), while knowing that the company may be subject to high penalties for non-compliance with regulations, compliance with which is to be ensured by the DPO.

Conclusion

Personal data controllers or processors will have to take on the uneasy task of selecting the Officer and, where an internal DPO is to be appointed, of defining his or her role in the company's organisational structure. An assessment of organisational aspects, professional qualities, workload and fee may play a key role in the choice between various set-ups of the DPO. The controller need not employ a DPO and fully rely on the qualifications of one or two persons. An alternative described in more detail in our article When, whom and how to appoint a data protection officer under the GDPR is to designate an external DPO providing services under a service agreement. This can be a suitable option to ensure compliance of personal data processing with the new Regulation that will come into effect in no time. It is clear that in view of the number of controllers and processors, at least at the beginning, there will be a lack of qualified DPOs. However, all will depend on a strategically well-selected procedure adopted by the controller or the processor when designating the Officer, particularly in respect of the specific nature of the given personal data processing.

[9] *The Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or a processor not established in the Union where the processing activities are related to (i) offering goods or services to such data subjects in the Union irrespective of whether connected to a payment, or (ii) the monitoring of the behaviour of such data subjects in so far as their behaviour takes place within the Union.*

[10] *The IAPP is a not-for-profit association founded in 2000. It provides a forum for privacy professionals to share best practices, track trends, advance privacy management issues, standardize the designations for privacy professionals and provide education and guidance on opportunities in the field of information privacy.*

[11] *https://iapp.org/news/a/study-at-least-28000-dpos-needed-to-meet-gdpr-requirements/.*

[12] *https://www.itjobswatch.co.uk/jobs/uk/data%20protection%20act.do.*

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Jaroslav Havel, Robert Nešpůrek and Richard Otevřel on the most recent list of global leading lawyers in IT

The prestigious UK rating agency Who's Who Legal has published a global overview of leading lawyers in the information technology sector, *Who's Who Legal: Data 2018*. The list features 762 lawyers from all over the world and includes three representatives of the biggest Czech-Slovak law firm HAVEL & PARTNERS – managing partner Jaroslav Havel, partner Robert Nešpůrek and counsel Richard Otevřel. As a result, HAVEL & PARTNERS (before 31 December 2017 called Havel, Holásek & Partners) now has the highest number of listed specialists in the data field of all legal firms in the Czech Republic.

Reform of personal data regulation to be followed by non-personal data

*Many corporations and institutions throughout Europe are currently busy adapting to the new Regulation of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("**GDPR**"), which will enter into effect in May 2018. However, for the time being, let us take a look at the recent legislative initiative concerning non-personal data as the free flow of non-personal data across the borders of Member States can also constitute a key aspect of building the European digital single market.*

Nowadays, data are an important driving force of economic growth and enlargement of the employment market. Data analysis, the global trend of the modern times, improves efficiency and decision-making, in particular by facilitating prediction of future events. Data have a great potential in many sectors, from healthcare to designing and building "smart cities". The free flow of non-personal data means the unrestricted and unimpeded movement of data across borders and IT systems within the European Union. In its communication on *Building a European Data Economy* from January 2017, the Commission notes that "data economy" is characterised by an ecosystem of different types of market players – such as manufacturers, researchers and infrastructure providers – collaborating to ensure that data is accessible and usable in the EU. The value of the EU data economy was estimated at EUR 257 billion in 2014, or 1.85% of EU GDP. This increased to EUR 272 billion in 2015, or 1.87% of EU GDP. The same estimate predicts that, if policy and legal framework conditions for the data economy are put in place in time, its value will increase to EUR 643 billion by 2020, representing 3.17% of the overall EU GDP.

Current restrictions on the movement of non-personal data, and contemplated remedial measures

In order to fully unlock the aforesaid potential of the data economy, the Commission recommends creating a comprehensive and coherent set of rules for the data retention and processing services in the EU. To this end, the Commission has initiated a proposal for a new Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union of 13 September 2017, COM(2017) 495 final (the "**Proposal**"), aiming in particular to address the following issues:

- Improving the mobility of non-personal data across borders in the single market so that Member States will no longer compel organisations to store or process data in their territory, except for restrictions justified on grounds of public security; this should enable organisations to conduct their activities abroad more easily and at lower costs, thanks in particular to the free flow of data through IT systems; in addition, Member States will be required to notify to the Commission any new or existing non-personal data localisation restrictions;
- Ensuring that the powers of competent authorities to request and receive access to data for regulatory control purposes remain unaffected, and that the competent authorities are able to perform inspections and audits regardless of where the data are being stored and processed, whether physically or in cloud;
- Making it easier for professional users (while pursuing their commercial or business activities) of data storage or other processing services to switch service providers and to port data, while not creating an excessive burden on service providers or distorting the market, e.g. in the form of codes of conduct.

One of the commonly-cited consequences of existing barriers to the free flow of non-personal data through Member States is the legal uncertainty of service providers as to identification of the laws applicable to the cross-border retention and processing of data. In this respect, the Proposal promises to provide a single legal framework for the whole European Union. In our practice we have encountered data retention and processing localisation restriction to the territory of the Czech Republic for example in the context of public procurement where the contracting authority imposed the obligation of local storage as one of the preconditions for the award of the public contract.

The Commission has found that, in practice, due to these barriers organisations do not make full use of cloud services, do not choose the most (cost-)efficient location for IT resources, do not switch service providers or do not transfer data back to their own IT systems. Companies and other organisations across the EU currently miss new business opportunities due to barriers to the free flow of data. Member States typically restrict the flow of data by prescribing where data can be stored and/or processed assuming that services are better secured at those locations, even though there are no legitimate reasons for doing so. The Commission is of the opinion that the principle of free flow of non-personal data could make it considerably easier to enter new markets, to expand organisations' activities, and would eliminate data duplicity on multiple storage sites in various Member States. Besides, it would contribute to building up a reliable and secure electronic communications sector and to reducing the cost of associated services on the ground of more intense competition among their providers. Users should benefit from a larger choice of service providers and more flexible data organisations and analyses.

Legislative framework and outlook

Although the Proposal relates to non-personal data (which cannot alone or in combination enable identification of a specific natural person), it will complement the current EU framework for the use of personal data comprising in particular the GDPR, Directive 2016/680/EU on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (probably to be soon replaced by the e-Privacy Regulation). These pieces of legislation will together form a comprehensive legal framework enabling the free flow of data between Member States and their protection.

The Proposal is currently being discussed in the relevant EU legislative bodies. If it successfully passes the due legislative process, it is likely to enter into force in 2019.

Based on the current wording of the Proposal and the Commission's recommendations, non-personal data storage or processing service providers should, within 1 year of the regulation's entry into force, consider developing the above-mentioned codes of conduct that will inform professional users, in a clear and transparent manner and in advance, about the conditions of portability of data to another service provider, including technical requirements, the time required for porting the data, the fees for data porting, and other terms and conditions.

Conclusion

Despite the increased emphasis on the protection of privacy of natural persons, which is strongly accentuated in the contemporary data-based information society, the flow of non-personal big data also constitutes an equally important part of data economy. Analysis and assessment of such data offers ample opportunities to business companies for further development of existing, and for forming new, business models with a potential for promoting the growth of data economy and increasing European Union's competitiveness vis-à-vis other strong economies worldwide.

Hence, the Proposal is a decisive step towards lifting barriers to portability of non-personal data. On its path towards applicability, however, it can still undergo changes in the European Parliament and the Council. The possible topics for discussion among Member States may include, for example, the effort to apply the exemption from free movement on the ground of public security to other similar grounds. Indeed, the criterion of public security in itself is so general that it could encompass a rather wide range of data, which in practice could unreasonably hinder the effects of the Proposal.

Another factor that could impair the actual impact of the Proposal on trade within the EU and the European Union's competitiveness with foreign markets is the upcoming Brexit, if it resulted in taking the United Kingdom out of scope of the Proposal and thus to a certain extent giving an advantage to the UK over EU Member States, because the data stored and processed there (unless a measure with effects similar to those of the Proposal will be adopted in the United Kingdom) would be the subject of UK regulation and their free flow to the EU could not be effectively enforced. Many multinational corporations still have their global headquarters in the United Kingdom.

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Restructuring under the Directive proposal – an opportunity or a threat?

*Intensive debate is currently under way in EU bodies on the proposal for a directive that could have a substantial impact on insolvency proceedings and the restructuring process in individual EU Member States. The proposal No. 2016/0359/COD[1] ("**Proposal**") submitted by the European Commission envisages, among other things, the establishment of a legal framework governing informal restructuring of corporations' financial engagement ("**Informal Restructuring**"). There is no such instrument in the Czech Republic and it has often been called for not only by our clients. Apart from the Informal Restructuring, the Proposal makes it clear that the national insolvency law should be gradually increasingly harmonised in individual EU Member States. In this article we will introduce the Informal Restructuring concept and draw attention to certain issues encountered in the Proposal. In fact, there is a risk that a number of provisions will be misused.*

In what way does the Informal Restructuring differ from reorganisation?

The Czech Insolvency Act provides for reorganisation as one of the methods of addressing a company's bankruptcy. Reorganisation allows debtors to handle the crisis in a flexible way, which is especially expedient for larger entities. Nonetheless, a reorganisation is public, relatively costly and is governed by formal insolvency proceeding regulations.

As opposed to reorganisation, Informal Restructuring does not constitute a formal method of tackling bankruptcy. It is an out-of-insolvency and practically a non-public way of resolving a crisis; its aim is to prevent bankruptcy. Based on the Proposal, which establishes the duty of Member States to transpose the Informal Restructuring into national regulations, the corporations concerned should moreover keep at least partial control of their assets and the day-to-day operation of the business.

A stay of individual enforcement actions under Informal Restructuring

One of the key mechanisms of Informal Restructuring is proposed to be the *stay of individual enforcement*. This instrument restricts individual enforcement of claims by creditors, except for employees' outstanding claims. The measure is primarily intended as a protection against creditors who are not willing to discuss restructuring, and are eager to enforce their claims individually.

It is at courts' sole discretion to grant this measure. Since the instrument is at risk of being misused by companies seeking restructuring, individual creditors may apply to courts for refusal to grant the measure or for cancellation of an already granted measure. The duration of the stay measures should not, as a rule, exceed 4 months. The corporation concerned should prepare a restructuring plan in the meantime.

Other impacts of the above-mentioned stay of enforcement include, among other things: (i) the suspension of the obligation to file for insolvency; (ii) a limitation on the right of the creditors concerned to withdraw from contracts or to

[1] *A Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU.*

withhold performance from already signed contracts; (iii) the right of a corporation to request appointing a restructuring expert. These measures should facilitate the restructuring and protect the company from suppliers who would otherwise default.

Funding provided to debtors on the verge of bankruptcy and ways to address this

In our banking practice, we have many times experienced a strong reluctance on the part of banks and other entities to engage in refinancing of borrowers on the verge of bankruptcy. A number of clients did not want to risk that the funding provided could subsequently be challenged in insolvency proceedings. This is especially true of transactions with an international element where several differing insolvency regulations enter into play. Often, however, refinancing of existing credit exposure, or the increase in its volume, is one of the conditions for preserving plant operations and averting bankruptcy.

In this respect, the Proposal offers a solution: excluding transactions from respondent's actions under the insolvency law. Furthermore, the Proposal allows Member States to grant preferential status to claims under the new funding compared to other claims registered in insolvency proceedings.

The Proposal seeks in particular to incentivise entities to provide the necessary funding not only to implement the restructuring plan but also to ensure the plant remains in operation during the restructuring negotiations. Our experience has shown that without cash-flow hedging, it is very difficult to prevent the value of company's assets from falling until the restructuring plan has been endorsed.

However, the drawback of the protection of new funding lies in the fact that the restructured company could abuse the mechanism and conclude a disadvantageous funding agreement without being able to review it later. The role of respondents' actions is often crucial in insolvency proceedings, since it is possible to use them to seek ineffectiveness of legal acts that have damaged the creditors. If the Informal Restructuring fails, the legitimate interests of other creditors may be jeopardised in subsequent insolvency proceedings as a result of new funding.

To prevent possible abuse, creditors are to be provided with double protection, both quantitative and qualitative. The protection will be granted only to financing that will be essential for resuming the day-to-day business of the borrower or for its survival until the restructuring plan has been endorsed. If the new financing transactions are made fraudulently or unfaithfully, other creditors will be able to counteract them.

What next?

The Proposal is currently being discussed by the EU Council's working bodies and its final wording is likely to be modified further. The manner of transposing the regulation into the Czech system of laws, however, will be more fundamental than the final wording of the directive. If the Proposal is adopted, its transposition will result in a number of double-edged provisions. Although the Proposal seeks to introduce a number of anti-abuse instruments, the question is whether the protection will be sufficient or whether the new provisions will do more harm than good depending primarily on the quality of the transposition. If implemented, its practical application might reveal any other possible flaws.

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What is the future of IP rights following Brexit?

It has been 18 months since the referendum on the withdrawal of the United Kingdom from the European Union. In this context, intellectual property rights having unitary character will have to undergo substantial changes that must be agreed upon during the withdrawal negotiations to ensure continuity in the protection provided to the rights of IP holders and applicants. This article summarises the most important points of the European Commission's position paper that tries to outline suitable solutions for the legal uncertainty. We also mention other important IP issues that will have to be addressed in connection with Brexit.

On 8 September 2017, the European Commission ("**Commission**") released a draft position paper ("**Paper**") setting out the main principles regarding the validity of intellectual property rights following Brexit. The Paper outlines the Commission's objectives for negotiations with the United Kingdom for the withdrawal from the EU under Article 50 of the Treaty on the European Union regarding intellectual property rights ("**IPRs**"). The Paper contains no details; these will have to be discussed and set out during the ensuing negotiations.

The Paper deals mainly with IPRs having unitary character, such as EU trademarks, registered Community designs, unregistered Community designs, protected geographical indications and protected designations of origin and Community plant variety rights. Brexit generates uncertainty and many questions for the IPR holders: Will such unitary rights continue to be valid in the UK after Brexit? If so, to what extent? Will any administrative steps have to be taken or any fees will have to be paid to make the rights valid in the UK? The Paper tries to find answers to some of the questions, as the EU of course wishes to ensure continuity in the equal protection of existing unitary rights in the UK following Brexit. And naturally, the UK has the same interest. The above applies to existing, registered rights as well as new, not yet registered applications for unitary rights.

Main principles for Brexit negotiations

The key principles formulated by the Commission for Brexit negotiations with the United Kingdom set out in the Paper are the following:

1. The holders of existing IPRs having unitary character will automatically receive an identical/similar right in the UK at no extra costs and with a minimum of administrative burden. For example, a registered EU trademark should automatically become a national trademark registered in the national register at the UK Intellectual Property Office ("**UKIPO**") without the need to file a national application or an application for conversion. In practice, this will involve more than one million trademarks and more than one million designs. The automatic transfer of rights will also require a high level of readiness on the part of the UKIPO.
2. If any new domestic legislation needs to be implemented in the UK, the legislation must already exist at the time of the withdrawal. For example, this applies to protected geographical indications and protected designations. There is currently no domestic legislation in the United Kingdom on the protection of designations of origin and geographical indications.
3. Any IPR applications placed before the withdrawal date that have unitary character and are still under prosecution (i.e. ongoing) at the time of withdrawal, are to maintain any priority benefit they have when applying to receive the equivalent recognition in the UK, providing that the priority should be continued.
4. IPRs that were exhausted in the EU territory before Brexit (which means that further commercial use by third parties cannot be opposed by the owner of the IRP) will remain exhausted in both the EU and in the UK territory. The conditions of this exhaustion will be determined under EU law.

Besides unitary IPRs, the Paper also deals with databases and supplementary protection certificates. This will be addressed in one of the next issues of our EU Legal News.

Will domestic registration also need to be made for trademarks in the UK?

Following the Brexit referendum, the number of trademark and design applications filed in the UK nationally has

increased. Now a mirror effect can be expected to come. It will be more advantageous to file an EU application as both the EU trademark and the national trademark in the UK will be valid following Brexit. Nevertheless, other issues will have to be addressed in this respect, such as the definition of the renewal period and the period and requirements for the obligation of use. A typical borderline case is a situation when an EU trademark is older than five years and has been used in EU Member States other than the UK. A question suggests itself as to when a trademark that is automatically recognised in the UK can start to be used. This applies vice versa to EU trademarks that so far have only been used in the UK but not in other EU Member States. More problems will surely come with EU applications where opposition proceedings are pending. However, the list of such questions is far from exhaustive.

Will existing agreements granting IPRs need to be revised?

By now, issues exist that should be addressed by owners of EU trademarks that are the subject of licensing agreements, settlement agreements or other contracts. So far, most agreements have been entered into to cover the whole of the EU. After Brexit, a decision will have to be made whether or not the agreements continue to apply in the UK. Certainty for trademark owners and users can of course be provided by entering into an amendment to the agreements concerned. Agreements that are to be executed now should be made with caution and anticipate all future possibilities, at least as long as the situation is chaotic and legally uncertain.

Who will be authorised to represent IP right holders?

As explained earlier, the above principles are considered crucial by the Commission in the negotiations with the UK. However, there are other points that need to be discussed and that will probably arouse strong emotions, such as representation before the UKIPO or the EU Intellectual Property Office („**EUIPO**"). UK law firms and patent agents may represent holders of and applicants for EU trademarks or registered EU designs. But the question is whether they will still have this option after Brexit. IP right holders will have to take account of the fact that EU trademarks that will automatically cover the UK after Brexit and are represented by agents from countries other than the UK will need representation in the UK.

Marques position paper

On 19 November 2017, Marques Ltd ("**Marques**"), the European association representing the interests of brand owners, published its position paper on Brexit. In the first place, it commented on the current achievements of the Brexit negotiations and urged all parties involved to start and progress bilateral talks about the technical aspects relating to IP law and procedure as soon as possible, as it was less than 18 months before the UK was to leave the EU (19 March 2019). Marques also provided its statement on the Paper. While it basically supports most of the principles set out in the Paper, Marques believes that the Paper only scratches the surface of many issues. Marques is concerned that the Paper has not received any response from the UK the UKIPO and the EUIPO. It believes that unitary IP rights should enjoy special treatment in the negotiations. The Marques position paper also deals with other issues not addressed in the Paper, as outlined above, such as representation and the interpretation of existing licensing agreements or .eu domain names.

After the editorial deadline EUIPO issued a document relating to intellectual property rights post-Brexit.[1] We assume that other organisations representing the interests of IPR owners, such as the ECTA and the government agencies referred to above, will publish their own position papers. We will keep you informed of any developments in this respect.

What to do next

It is clear that although the Commission has published the Paper as guidance as to how IP rights should be protected after Brexit, we are still faced with uncertainty – a year and a half after the referendum and nine months since Article 50 of the EU Treaty was triggered. In addition, numerous other related issues remain to be solved besides the fundamental principles for negotiations. As a result, all strategic thinking about industrial rights extending to the UK must take account of any potential scenario. We will be monitoring the situation carefully and will keep you updated on any progress.

[1] *https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/news/QandA_brexit_en.pdf.*

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Can a supplier prohibit sales of luxury products via third-party online platforms?

*In December last year the Court of Justice of the European Union ("**CJEU**") issued an important decision in the case Coty (C-230/16). The CJEU dealt with the question of whether it is possible to prohibit authorised distributors from sales of luxury products in a discernible manner via third-party online platforms (such as eBay or Amazon).*

CJEU Judgement

The CJEU relied on the opinion of the Advocate General Wahl from July last year in which non-price forms of competition (e.g. on a product quality basis) and positive effects of the selective distribution system in relation to luxury products were emphasised.

In line with previous case-law the CJEU firstly concluded that the ban on anti-competitive agreements in general need not apply to selective distribution systems, if three conditions are met. Firstly, the existence of selective distribution should be justified by the very nature of the product. Thus, the purpose of selective distribution should be preserving quality and correct use of a product. Secondly, authorised sellers must be selected on the basis of uniformly applied non-discriminatory qualitative criteria. And thirdly, the prescribed criteria must be adequate for the purpose of the selective distribution system.

As regards the ban on sales of products in a discernible manner via third-party online platforms, the CJEU reached the conclusion that such ban does not constitute restriction of competition by object (which is automatically prohibited). In the case of luxury product a selective distribution system may be an indispensable tool for preserving specialised shops and quality of provided services including product presentation. In addition, the CJEU emphasised that the luxury nature of a product does not stem only from its actual quality but also from its image – the way in which such product is presented and perceived.

Similarly as the advocate general, the CJEU supports its argumentation by, among others, the conclusions of a sector investigation conducted by the European Commission in the field of e commerce. During the investigation the Commission found out that currently third-party platforms are not a prevailing distribution channel and that they constitute only one of the online sales forms. Sellers use primarily their own e-shops. Should third-party online platforms become the prevailing distribution channel, the ban on their use could actually pose a ban on internet sales which would constitute restriction of competition.

The ban for authorised sellers to sell luxury products in a selective distribution system (in a discernible manner) via third-party platforms can be justified by the fact that in general there is no contractual relationship between the manufacturer of luxury products and the third party. Thus, manufacturers of luxury products lose the possibility of controlling whether during the distribution of their products all qualitative requirements are complied with. If not, they cannot even adopt any measures (such as punitive or corrective measures) vis-à-vis such third party. Therefore, for the purpose of preserving the luxury image of products it may be necessary to impose the considered ban directly on authorised distributors within the distribution system. It is important that such ban is applied uniformly and in a non-discriminatory manner vis-à-vis all distributors.

Commentary

The CJEU judgment is an important signal for sellers operating within selective distribution systems as well as producers of luxury products. However, it should be understood in the whole context of the situation.

The CJEU judgment does not imply that any ban on internet sales (under a selective distribution system) will be compliant with competition law. The conclusions of the CJEU cannot be applied in all cases or unconditionally, as such ban is conceivable only in relation to goods deserving special treatment, for example because of their luxury character. It will be necessary to consider the restriction of sales via online platforms also with regard to the present state of development of e-commerce for a particular product in a particular country. If sales of a particular product via third-party online platforms become the prevailing or nearly exclusive distribution method in a given country, their restriction may pose a restriction of internet sales falling within the prohibition of anti-competition agreements.

Therefore, we recommend to manufacturers and importers to analyse applicability of the conclusions contained in the judgment in the case *Coty* to their own situation in relation to a particular product and territory on which it should be distributed.

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European Commission notice in fight against dual quality of food products

*Dual quality of food products in the European Union, an issue many food manufacturers are facing, is being intensely discussed as it is still not entirely clear which circumstances legally allow for a different quality of food products. The President of the European Commission ("**Commission**") said on 13 September 2017 that it was not acceptable that citizens of some European countries were sold food products of lower quality than those of other countries despite the identical packaging and branding. Then the Commission, too, voiced its opinion on this matter. Are its conclusions, however, helpful in assessing whether and in which cases dual quality of food products is admissible or whether it will always be an unfair commercial practice?*

Underlying considerations

Dual quality of food products is especially an issue for countries of Central and Eastern Europe, which have been repeatedly expressing their concerns over the issue at EU meetings. The media often report that some food products sold under the same brands in the Czech Republic contain less cocoa, fish fingers do not contain as much fish as those sold in other EU Member States, spaghetti contains less wheat, German ketchup more tomatoes, etc. Food producers either deny these differences or justify different contents by saying they have to adjust the products to the local market, to a different quality of local raw materials, or to various needs and (taste) preferences of their customers. Yet consumers frequently believe that they are offered products of lower quality.

Having decided to take up the fight against dual quality of food products, on 26 September 2017 the Commission issued its Commission Notice under 2017/C 327/01 on the application of EU food and consumer protection law to issues of Dual Quality of products — The specific case of food ("**Notice**"), in which it published guidance on the application of EU food and consumer protection law to issues of dual quality of products ("**Guidance**"). The Commission seeks to facilitate the practical application of the existing law since there are several pieces of EU legislation that can be immediately applied to solving the issue of dual quality of products. Food products, specifically, are addressed in: the General Food Law Regulation,[1] the Regulation on the provision of food information to consumers[2] and the Unfair Commercial Practices Directive.[3]

In the Guidance, the Commission states that each product (hence each food product) does not always have to be identical in EU Member States. It is therefore natural that producers may launch and sell goods with different composition or characteristics provided that they fully abide by EU law and, if applicable, specific requirements of each given Member State. A requirement for identical products would be in breach of the principle of free movement of goods within the EU.

The Commission explicitly admits in its Guidance that products of the same brand having different characteristics comply with EU legislation since they can be influenced by many legitimate factors like the place of manufacture, locally available raw materials or consumer preferences in destination regions. However, what is not desired is when products are marketed under an identical brand but with a different composition in a way that could mislead the consumer, and the goal of the Guidance is to prevent such cases.

Analysis of applicable EU legislation

As for the Regulation on the provision of food information to consumers, the Commission has issued only very brief Guidance that does not provide EU Member States with

[1] *Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.*
[2] *Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.*
[3] *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.*

any significant novelties on the issue of dual quality of food products. The Commission only states that this Regulation must be observed.

The objective of the Unfair Commercial Practices Directive ("**Directive**") is to safeguard economic interests of consumers against unfair commercial practices. The Directive also lays down the rules for how to present information to consumers, and it is this Directive that the Guidance gives the most attention to.[4]

It is indisputable that when buying food, each of us looks at one or several branded products that are on offer in a certain category (e.g. coffee, cheese, chocolate, etc.), and it is the existence of these branded products that most affect our purchase decision. The consumer's decision to buy a specific product is based to a great extent on his or her subjective perception of what the given brand means for him or her. "*Original*" or "*the founder's recipe*" are phrases that can also be frequently found on product packaging and may act in the mind of consumers as a certificate of the quality of traditional products.

For the Member States to properly check the quality of food products sold in various parts of the EU, the product must always be compared to a "product of reference", which is characterised by (i) being marketed "under the same packaging and branding" in several Member States, (ii) being sold in the majority of those Member States with a given composition, and (iii) the fact that consumers' perception of its main characteristics corresponds to its composition as it is advertised in the majority of those Member States.[5]

A commercial practice could be deemed unfair if the offering of products to consumers shows any of the following elements: (i) consumers have legitimate specific expectations from a product compared to a "product of reference" and the product significantly deviates from these expectations, (ii) the trader omits or fails to convey adequate information to consumers and they cannot understand that a difference with their expectations may exist, and (iii) this inadequate or insufficient information is likely to distort the economic behaviour of the average consumer, for instance by leading him or her to buy a product he or she would not have bought otherwise.[6]

In the Guidance on this Directive, the Commission admits that a "constant quality" does not necessarily mean identical products in various geographical areas. Indeed, it is common that products are tailored to local consumer preferences and other conditions. Producers perform sensory optimisations to fit dietary habits that may be different from one region to another. Furthermore, there may be objective differences in sourcing, due to the availability of raw materials (or specific local requirements), that have an effect on the composition or taste of products and that are therefore difficult for producers to avoid.

Frequently, new recipes are introduced to reflect technological progress or nutritional reformulation policies, which cannot be done simultaneously in all markets. We are living in a "new world" of organic food and gluten-, lactose-, or sugar-free products. Owing to the young generation in particular, producers are bound to search for healthy options because people are not as interested in some traditional products as they used to be. This is e.g. the case of Coca-Cola, the traditional manufacturer and leader on the market of non-alcoholic beverages that announced a recipe change following a drop in the demand for the traditional fizzy drink with a high sugar content.

Practical aspects

Insufficient information on differentiation of products may influence consumers' purchase decisions. After checking compliance with EU food law, when enforcement authorities have specific information that differentiation practices of a particular food business operator might amount to unfair commercial practices, they might consider performing market tests that involve product comparisons across different regions and countries. Such tests should be carried out with a common testing approach on which the Commission is currently working.

Based on the concrete facts and circumstances of each particular case, the enforcement authorities should further consider reasons for product differentiation, which are now defined on a very general level:

(i) The presentation of a product, or its advertising, that would induce consumers to believe the product is the same everywhere in the Single Market (stressing its uniqueness, its origin);

(ii) Marketing strategies of various versions of a product which are potentially confusing for consumers; and

(iii) Insufficient information or a lack thereof for consumers about the fact that elements in the composition of products have been significantly changed compared to the past (e.g. introduction of a new recipe).

While the assessment of what differences are "significant" may change based on the facts and circumstances of each case, significant differences in the main characteristics of

[4] *The Czech Republic implemented the Directive by Act No. 634/1992 Sb., on consumer protection, as amended, and by Act No. 40/1995 Sb., on advertisement regulation, as amended.*
[5] *Commission Notice No 2017/C 327/01 of 26 September 2017.*
[6] *Commission Notice No 2017/C 327/01 of 26 September 2017.*

a product can generally be found when: (i) one or a number of key ingredient(s) or their percentage in a product differs substantially as compared to the product of reference; (ii) this variation has the potential to alter the economic behaviour of the average consumer who would take a different purchase decision if he or she were aware of such difference.[7]

As this issue concerns practices of business operators across the Single Market and involves a cross-border dimension, competent authorities should seek to conduct the above-mentioned investigation, when this is appropriate, in a coordinated manner. The Consumer Protection Cooperation Regulation[8] establishes mutual assistance obligations between competent authorities to make sure that the authorities of the Member State where the trader is established take the necessary measures to cease infringements which affect consumers in another EU Member State.

What are the next steps?

In the Notice, the Commission states that its action in the fight against misleading consumers in the area of dual quality of food products combines dialogue with stakeholders and practical steps enabling specific measures to be taken by the responsible authorities.

Another step towards clarity would be to improve information on the exact content of products. In the area of food, the Commission is discussing with businesses, in particular food manufacturers and retailers, how to ensure full transparency in product composition beyond the current legal obligations. One option being explored is a Code of Conduct for producers, to set out standards to be respected to prevent dual quality problems. Besides this, the Commission has been looking at enforcement of relevant EU legislation together with national consumer protection and food authorities (in the Czech Republic, these are the Czech Agriculture and Food Inspection Authority and the Czech Trade Inspection Authority).

[7] *Commission Notice No 2017/C 327/01 of 26 September 2017.*
[8] *Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.*

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According to prestigious global ranking, HAVEL & PARTNERS is the best law firm in the Czech Republic in the field of information technology law

The largest Czech-Slovak law firm HAVEL & PARTNERS (until 31 December 2017: Havel, Holásek & Partners) received the 2018 Corporate INTL award for the best law firm in the Czech Republic providing legal advice in the field of information technology law (IT Law – Law Firm of the Year in the Czech Republic). "*Besides advising on information technology law,our specialised legal team also advises on telecommunications, media, e-commerce and personal data protection (now especially in connection with the General Data Protection Regulation - GDPR), and is one of the largest both in the Czech Republic and Slovakia. Our clients include major IT companies and investors who, when expanding their portfolios, focus on investing in technology companies. The international Corporate INTL Award, which we received in 2017, is important feedback to us about the quality of our services*," says Robert Nešpůrek, a firm partner and the head of the IT advisory group.

Intra-corporate transfer as a new type of residence permits in Slovakia

The expected simplification of third-country employee transfers to EU Member States should reduce administrative burden on multinational companies associated with the migration of their employees. However, at the same time, the announced simplification brings many issues as to the interpretation of individual statutory requirements and their application in practice. We have looked into how this process works in Slovakia and bring you practical guidance that can help you prepare documents related to employee transfers.

In May 2017, an amendment to the Act on the Residence of Foreign Nationals took effect which has transposed Directive 2014/66/EU of the European Parliament and of the Council into Slovak law.

Compared to standard applications for residence permits for employment, applications for temporary stay permission for the purposes of intra-corporate transfer have the following specific features:

Place for filing the application

An application for temporary stay permission may be filed solely at the embassy in the state in which the employee's host employer is located, while an ordinary residence permit application for employment may be filed directly with the immigration police in Slovakia on condition that the foreign national's stay in Slovakia is legal. On the next day following the date of filing the application, the foreign national may travel to Slovakia (of course, on condition of legal stay).

A disadvantage of this procedure is that after the application is received by the embassy, it must be translated (if necessary) and then sent to the Slovak immigration police for decision, along with the embassy's opinion. The time limit for delivering a decision (30/90 days) only begins to run when the application is received by the immigration police in Slovakia. Given that applications are delivered by diplomatic mail, the decision-making process takes more time and is out of the applicant's control. The police have no obligation to inform the applicant whether the application has been received. Consequently, the applicant has no option but to contact the police on a daily basis to inquire whether or not the application has been delivered. As a result, it is very hard to estimate how much time it will take before the permission is granted. In our experience, delivery from the USA takes roughly three weeks, by which time the temporary stay permission process will be prolonged.

Opinion of the Employment, Social Affairs and Family Office

Although employment, social affairs and family authorities ("**Office**") do not investigate whether the job concerned was advertised or a new job was created, they must be requested for consent. The request is automatically filed by the police and, also in this case, the applicant has no idea whether and when the application was referred to the competent Office.

However, the consent may only be granted on condition that the host entity in Slovakia has duly complied with its statutory duties. Such duties are enumerated in the Act on Services in Employment and, in some cases compliance is examined by the Office and in some cases by the applicant, such as compliance with duties towards the tax authority, social security administration or health insurance companies. In addition, the host entity must not be in liquidation or insolvent, and must not have any record in the list of illegal employers for the last five years. In practice, this means that if the company has breached an obligation in the last five years before filing the application (e.g. by registering an employee with the social security administration

a mere day later and hence having been included in the list of illegal employers), its employee will not be granted the residence permit. The same will apply to each, even minor error or underpayment due to government authorities or in cases when a vexatious insolvency petition is filed.

Essential elements of the application

Besides ordinary details that must be included in an application, an application for temporary residence permit for the purpose of intra-corporate transfer must contain the following information:

a) the fact that the applicant is a company's key employee who either has high-level qualifications or is otherwise crucial for the company and, therefore, the company wishes to transfer the employee to the host entity; this fact may be substantiated with a certificate of education or a declaration stating that it is a key employee (for example, the employee has worked for the company for many years and has extensive know-how in the company's internal processes); the employee must have worked for the company for at least 6 months before the date of filing the application, providing that compliance with the requirements for employment duration may be substantiated with a valid employment agreement under local law;

b) the fact that the original employer and the host entity are related parties that are members of the same group of employers; the relation between the companies can be easily substantiated in the case of companies with a simple structure or in countries where a public extract from a companies register can be easily obtained; where the relation between the companies cannot be substantiated with an extract from the companies register, this can be done using affidavits confirming the affiliation of both companies;

c) the fact that it is an intra-corporate transfer; the Act sets out no details as to how such a fact should be substantiated; we are of the opinion that affidavits issued by both entities or a written intra-corporate transfer agreement stipulating detailed conditions of the transfer would be sufficient; the agreement should also contain other elements, such as a condition that the employee will return to their original employer in the home state after the end of their stay in Slovakia; the agreement or affidavits should also include the employee's consent to the transfer.

Term of residence

Temporary permission to stay may be granted for the purposes of the intra-corporate transfer for three years. Once the permission is granted, the employee will receive a certificate of residence and an authorisation bearing the abbreviation 'ICT'. During this period and on the basis of the permission, the employee may very easily obtain a temporary permission to stay in other EU Member States as well, where they can work in other entities within the same group of employers. If the employee wishes to stay in Slovakia after the expiry of the term, they can apply for another type of temporary residence permission, such as for the purpose of employment, business or family reunification.

Conclusion

The objective of the amendment is to simplify the procedure for transferring third-country nationals employed within the same group of employers to EU Member States and to relieve multinational companies from the administrative burden associated with the activities of their key, third-country employees.

However, only practice will show whether it is indeed a simplification of the process or a strictly formalist interpretation of individual statutory requirements that will bring increased administrative burden.

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The European Commission initiates measures to modernise public procurement and make it more efficient

*The European Commission (the "**Commission**") has launched an initiative designed to improve the quality of public procurement, i.e. to modernise it and make it more efficient, by means of several instruments. These in particular include formulating adequate strategies in priority areas, establishing an ex ante assessment mechanism for large projects, and providing guidance on innovation procurement.*

Commission's initiative to improve the quality of public procurement and make it more efficient

In late 2017 the Commission introduced an initiative that should be conducive to a more efficient, better and more sustainable procedures of public procurement, in response to the Investment Plan for Europe by means of which the EU is striving to stimulate its economy and fully exploit the potential of investments. The fundamental document introducing the aforesaid initiative is a communication from the Commission (see http://ec.europa.eu/docsroom/documents/25612), describing individual priorities in more detail.

Priority areas and an appeal to the Member States to develop a strategic approach

Within the initiative, the Commission defines 6 priority areas it considers of key importance for achieving its goals. At the same time, the Commission calls upon the Member States to develop a strategic approach to public procurement policies reflecting the following priority areas:

a) Mainstreaming innovative, green and social criteria in public procurement, with an emphasis on pre-market consultation, comprehensive qualitative assessments as well as procurement of innovative solutions at the pre-commercial stage;

b) Professionalising public buyers, in respect of which the Commission has drawn up specific guidance and recommendations regarding possible professionalisation policies: http://ec.europa.eu/docsroom/documents/25614;

c) Improving access of small and medium-sized enterprises to procurement markets, not only within the EU but also in other markets where the EU will seek to improve the status quo and achieve reciprocity;

d) Increasing transparency, integrity and better data regarding public procurement, especially by means of new e-forms, publicly accessible contract registers, and enabling the reporting of corruption and other inappropriate conduct by setting up effective reporting mechanisms and protecting whistleblowers against retaliation;

e) Digitalisation of procurement procedures, which will be mandatory by October 2018, alongside with developing additional tools to enable digital transformation of procurement based on eCertis, the European Single Procurement Document, and the European Standard for eInvoicing;

f) Cooperation among contracting authorities across the EU.

Ex ante aid mechanism – Helpdesk and preliminary assessment of large projects by the Commission

Within this initiative the Commission introduces an ex ante aid mechanism for contracting authorities and national authorities while awarding large projects. The basic tools of this mechanism include a Helpdesk and preliminary consultations for high importance projects.

The Helpdesk will assist contracting authorities/entities and national authorities with projects whose estimated value is at least EUR 250 million, with a view to preventing incorrect setting of complex projects at an early stage. The Helpdesk will serve to answer specific questions, provide specific guidance, and clarify specific public procurement issues. The Helpdesk thus can be used to address issues such as suitability of the contemplated procurement procedure, fulfilment of conditions for exemption from application of the procurement directives, suitability of the contemplated evaluation criteria, etc. The Helpdesk will be accessible via a dedicated system at https://ec.europa.eu/growth/tools-databases/pp-large-projects/query/prepareNewQuery.

Regarding projects of high importance for Member States or with a total estimated value in excess of EUR 500 million, it will be possible to ask the Commission to provide a preliminary consultation on the full intent/plan of the procurement concerned from the perspective of its compliance with the European procurement law. Such ex ante consultations can provide significant assurance to the contracting authorities regarding the suitable configuration and targeting of large projects.

Ex ante consultations will aim at a more comprehensive assessment of intents by the Commission than is the case with answers to specific questions within the Helpdesk, and will be provided on the basis of notification procedure described in more detail in the communication from the Commission at http://ec.europa.eu/docsroom/documents/25613.

Guidance on innovation procurement

Within the initiative, Innovation procurement is one of the Commission's key priorities as it may open doors to more efficient solutions responding to new needs that have not been sufficiently covered by current market solutions.

The Commission believes that national contracting authorities are not sufficiently aware of the possibilities and methods of innovation procurement. Therefore, the Commission has prepared draft guidance to provide contracting authorities/entities with necessary information and practical advice on promoting and implementing innovation procurement.

The draft guidance was submitted for public consultation; its current version is available at http://ec.europa.eu/docsroom/documents/25724 and it covers 4 principal areas: (a) added value of the public procurement of innovation, (b) strategy issues, (c) tools to attract innovators, and (d) tools for innovation-friendly procedures.

The Commission has initiated this public consultation to acquaint the public with innovative procurement methods and at the same time to enable the public to comment on this topic and, where applicable, to influence by their own progressive ideas the road to a more modern method of public procurement. The Commission intends to use the outcomes of the consultation in the preparation of instructions to the Member States' public authorities for adopting strategic procedures for innovation.

Conclusion

In a nutshell, by the procedures described above as well as by additional instruments described in guidance documents and recommendations for Member Sates the Commission seeks to implement new modernised methods of public procurement. By this initiative the Commission desires to achieve a more efficient, better and more sustainable public procurement procedure. It will depend on individual Member States as well as the Commission how these objectives, or at least some of them, will be actually and successfully accomplished.

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Competition Law Update

Competition law in the EU has seen numerous new and interesting cases recently. This overview is intended to introduce to you the most interesting cases in this area.

New Act facilitates enforcement of damages by parties prejudiced by anti-competitive conduct

A new Czech Act on damages under competition law entered into effect in September 2017, implementing the relevant EU Directive. The purpose of the Act is to promote, and improve the efficiency of, enforcement by injured parties (direct as well as indirect providers and purchasers) of compensation for the harm caused to them by anti-competitive conduct (such as abuse of dominance or cartels).

The Act introduces, inter alia, a limitation period of five years for bringing an action for damages. This should afford the injured parties sufficient time to prepare the action. The limitation period is suspended for the duration of proceedings before administrative authorities.

In addition, the new Act substantially alleviates the injured parties' burden of proof, emphasising the binding nature of the antitrust authority's decision for courts and introducing several rebuttable presumptions (e.g. a presumption of harm caused by a horizontal *hard-core* cartel). Further, the Act allows access to evidence possessed by antitrust authorities, and also facilitates access to evidence in the possession of third parties. This is also possible during pre-trial discovery stage, which allows the injured party to rely on the information so obtained in considering whether their action for damages has any chance of success.

More detailed information is available in our Competition Flash 09-2017.

The Czech Supreme Administrative Court decided on actions to cease unlawful interference

Undertakings more and more frequently invoke legal protection against dawn raids carried out by the Czech Office for the Protection of Competition (the "Office") in antitrust proceedings, by means of an action to cease unlawful interference. In its recent judgment in ČD Cargo, the Supreme Administrative Court has confirmed the principle of review of the lawfulness (proportionality) of an unannounced search.

An unannounced search is lawful if there is an "equation mark" between the scope of the Office's suspicion (based on the evidence gathered, leniency, etc.), the scope of the authorisation to carry out an unannounced search (produced by the Office when carrying out a dawn raid), and the actual extent of the search carried out (by means of the documents searched and seized).

Thus, unless the Office inspects documents falling outside of the scope of the Office's suspicion, the intervention is deemed proportionate (i.e., lawful). Too broad a definition of the scope of investigation in the authorisation (by using phrases such as "in particular") in itself is not the cause of unlawfulness.

Commission launched inquiry into e-commerce[1]

During the sector inquiry, the Commission has analysed around 8,000 contracts relating to the online sales of consumer goods and distribution of digital content, finding the widespread use of geo-blocking (where certain internet content is only accessible from certain countries) and an increased use of selective distribution systems.

Following the sector inquiry, the Commission has initiated several proceedings. For example, Nike, Sanrio and Universal Studios are suspected of prohibiting cross-border online sales of licensed products, and Guess is the subject of similar investigation on the ground of restricting the cross-border sales of their apparel.

Largest individual fine in history for Google[2]

The Commission fined Google EUR 2,420,000,000 for giving advantage to its own Google Shopping comparison service in its search results. Google's own shopping comparison service was displayed to searching consumers at the top of the search, while rival comparison services were demoted. By doing so, Google abused its market dominance.

Lithuanian Railways abused its dominant market position[3]

In 2008, a company in the PKN Orlen group and a major commercial customer of Lithuanian Railways, considered

[1] *http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.*
[2] *http://europa.eu/rapid/press-release_IP-17-1784_en.htm.*
[3] *http://europa.eu/rapid/press-release_IP-17-3622_en.htm.*

using the services of another rail operator. The state-owned Lithuanian Railways, responsible for railway infrastructure, responded by dismantling 19 kilometres of track from the shortest route from Lithuania to Latvia.

Consequently, not only was the customer prevented from using the services of a competitor rail operator, but they also had to start using a much longer alternative route operated by Lithuanian Railways. For this abuse of a dominant market position, the Commission has fined Lithuanian Railways an amount of nearly EUR 28 million.

CJEU has allowed ban on sales of luxury goods through online marketplaces

The German company Coty, one of the largest cosmetics producers, contractually prohibited its distributors from offering Coty's products through third-party online platforms (such as Amazon). Distributors were selected by Coty based on a number of criteria (including, for example, requirements with regard to the equipment of brick-and-mortar shops or marketing activities of resellers). The purpose of these measures was to preserve and promote the luxury image of Coty's products.

CJEU held in December 2017 that the selective distribution systems and ban on sales of (luxury) goods through certain online platforms was not in conflict with competition laws. Indeed, these restrictions can be justified by the producer having control of compliance with the qualitative criteria during distribution (such as the luxury image of the goods).

For more details please see our Competition Flash 12-2017.

The General Court annulled Commission Decision declaring a concentration to be compatible[4]

The concentration between two cable television operators, Liberty Global and Ziggo, was declared compatible by the Commission in 2014. A year afterwards, a competitor of the two undertakings concerned, KPN, challenged that decision by bringing an action before the General Court, which annulled the Commission's contested decision in October 2017. The Commission will have to reconsider the original concentration in light of the current competition circumstances and the General Court's judgment.

This has been a second such Commission decision in 2017 annulled by the General Court upon a third party's application. These cases demonstrate that even after the Commission declares a concentration to be compatible, competitors of the undertakings concerned are able to have such decision annulled.

CJEU issued a judgment on excessively high fees charged by collective copyright management organisations[5]

The Latvian collective copyright management organisation was found by the Latvian Competition Council to have charged unfairly high rates for the use of musical works in shops and service centres.

In response to the request for a preliminary ruling, CJEU stated that a comparison of fee rates with those in neighbouring countries can be used as an indicator of excessive pricing. However, the reference countries have to be selected in accordance with objective and appropriate criteria, while comparison with states with different economic conditions have to be made with regard to the citizens' purchasing power.

CJEU further stated that in order to assess the unfair nature of the rates charged by the collective management organisation, a difference between rates has to be 'appreciable', i.e. both significant and persistent.

In its turn, the collective management organisation has to show that its prices are fair by reference to objective factors that have an impact on management expenses or the remuneration of rightholders.

[4] *Judgment of the General Court of 26 October 2017 in case T-394/15 KPN v Commission. Available here: http://curia.europa.eu/juris/document/document.jsf?text=&docid=196107&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1892333.*

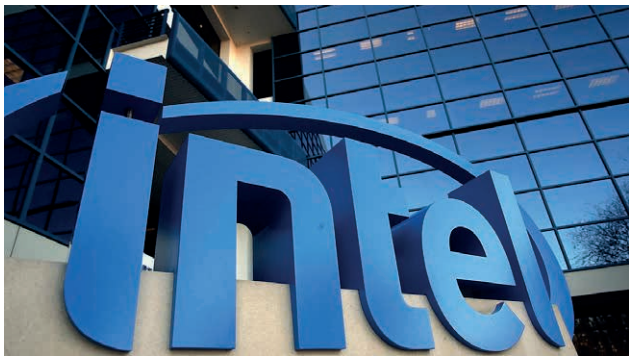
[5] *Judgment of the Court of Justice no. C-177/16 of 14 September 2017 in Latvijas Autoru apvienība. Available at http://curia.europa.eu/juris/liste.jsf?language=en&num=C-177/16.*

CJEU judgment in Intel[6]

In 2009, the Commission imposed a fine of EUR 1,060,000,000 on Intel for having abused its dominant position on the market for central processing units (CPUs). The abuse by Intel of its dominant position was characterised by Intel granting rebates to computer manufacturers (Dell, HP, Lenovo) on the condition that they will purchase from Intel all, or almost all, of their CPUs. Intel also made payments to those manufacturers for delaying the manufacture and sales of computers that were to be mounted with the latest CPUs from AMD.

Intel contested the Commission's decision by bringing an action before the General Court. The General Court held that Intel's practices constituted a *per se* abuse (and so it was not necessary to assess the effects it had on the market).

CJEU set that judgment aside in September 2017, stating that inasmuch Intel's defence was based on a reference to an economic analysis of the effects of the allegedly abusive practices, the General Court should have examined it even though the abusive practice falls in the category of conduct prohibited *per se*.



Sector inquiry by the Office into the market for mobile voice and data services[7]

The Office has analysed whether effective competition is in place in mobile operators' markets, and whether a prohibited cartel or abuse of dominant position could not occur in those markets. The inquiry covered a period of five years from 2012 to 2017.

The Office has found that none of the Czech mobile operators is in a dominant position. The entire market is oligopolistic, while virtual operators do not exert any substantial competitive pressure (as they have small market shares).

Although the tariff prices of individual operators did not differ much, a large percentage of customers obtain individualised offers. In the context of those non-public offers, the market is non-transparent and consequently the likelihood of cartel or concerted conduct is low. In addition, prices in the Czech Republic are not as high as in foreign countries.

Commission examines possibilities for using artificial intelligence[8]

The Commission is examining threats to the protection of competition posed by the boom of artificial intelligence and complex software, such as price algorithms.

Such software could facilitate collusion between competitors, or conceal anticompetitive conduct. For example, although under normal circumstances it is possible to detect price sharing between companies' directors, it would be very difficult to unveil and punish such practices if performed by computers without human interference.

The Commission has therefore announced a public tender for professional advice on how artificial intelligence could help competition authorities in discovering anticompetitive practices (such as by monitoring changes in prices, or detecting non-standard conduct).

[6] https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170090en.pdf.
[7] https://www.uohs.cz/cs/hospodarska-soutez/aktuality-z-hospodarske-souteze/2342-uohs-dokoncil-sektorove-setreni-v-oblasti-mobilnich-hlasovych-a-datovych-sluzeb.html.
[8] http://ec.europa.eu/competition/speeches/text/sp2017_06_en.pdf.

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