

DATA PROTECTION

The EDPB on the territorial scope of the GDPR

On 12 November 2019, the European Data Protection Board ("EDPB") adopted [Guidelines 3/2018 on the territorial scope of the GDPR \(Article 3\)](#). Article 3 of the GDPR defines the territorial scope of the Regulation based on two main criteria: the "establishment" criterion as per Article 3(1), and the "targeting" criterion as per Article 3(2). Article 3(1) ensures that the GDPR applies to the processing by a controller or processor carried out in the context of the activities of an establishment of that controller or processor in the Union, regardless of where the actual processing takes place. However, the absence of an establishment in the Union does not necessarily mean that processing activities by a data controller or processor established in a third country will be excluded from the scope of the GDPR, since Article 3(2) sets out the circumstances in which the GDPR applies to a controller or processor not established in the Union, depending on their processing activities. In assessing the conditions for the application of the targeting criterion, the EDPB therefore recommends a twofold approach, in order to determine firstly whether the processing relates to personal data of data subjects who are in the Union, and secondly whether processing relates to the offering of goods or services or to the monitoring of the behavior of data subjects in the Union.

EDPB consultation on the Right to be forgotten initiated

On 2 December 2019, the EDPB adopted [Guidelines 5/2019 on the criteria of the Right to be forgotten in the search engines cases under the GDPR \(part 1\)](#) (the "Guidelines"), aimed at interpreting the Right to be forgotten (in the case of search engines) in light of the provisions of Article 17 GDPR. The EDPB gives the opportunity to integrate the Guidelines through a public consultation, with comments to be sent by 5 February 2020 at the latest, using the form provided.

UNFAIR COMMERCIAL PRACTICES

The TAR Lazio overturns the ICA's decisions on hand luggage policies

On 29 October 2019, the Regional Administrative Court of Lazio ("TAR Lazio") cancelled the fines previously imposed by the Italian Competition Authority ("ICA") on Ryanair and Wizz Air (see [Our Echo of March 2019](#)). In its decisions, the ICA qualified the request for consumers to pay an extra charge for carrying "larger cabin baggage" as an unfair commercial practice according to Sections 20 and 21 paragraph 1.b and 1.d, and 22 of the [Italian Consumer Code](#) and fined Ryanair and Wizz Air accordingly (proceedings [PS/11237](#) and [PS/11238](#)). The TAR Lazio (with rulings no. [12455/2019](#) and no. [12456/2019](#)) overturned the ICA's previous decisions on the following grounds. First of all, it clarified that airlines are free to determine their own tariffs since there is no provision preventing them from updating their pricing policy over time. Secondly, the fact that consumers are accustomed to cabin luggage having a specific standard size does not prevent airlines from taking action in this respect. The TAR Lazio – referring to the definition of "cabin baggage" contained in [Ministerial Decree 1/36 of 28 January 1987](#) and the related [Circular APT-09](#) – noted that the two airlines do not forbid consumers from carrying hand luggage in the cabin, but simply provide for size limits and an extra charge for larger cabin baggage, which moreover does not fall within the definition of "cabin baggage". According to the TAR Lazio, that commercial practice also does not conflict with the ruling of the European Court of Justice in the [Vueling Case \(C-487/12\)](#), which prohibited extra charges for cabin baggage (considered essential for travellers) only "provided that it meets reasonable requirements in terms of its weight and dimensions and complies with applicable security requirements". In the absence of a general tariff regulation that determines the specific minimum measurements, an assessment of "reasonable" size is therefore left to the individual companies (and the competent national authorities).

happy holidays
2020



TRADEMARKS

The Court of Turin's ruling on the "Tic Tac" case

On 12 November 2019, the Court of Turin issued its judgment in the ["Tic Tac" case](#), in which it ruled that the shape trademark registrations covering Ferrero's "Tic Tac" container are valid. In particular, the Court of Turin held that shape trademarks are valid even where the shape includes a technical solution, provided it is not the only possible way to obtain the relevant technical result. In the case at issue, the Court of Turin ruled that the "Tic Tac" container shape was not exclusively necessary to obtain a technical result, although Ferrari had previously registered as a patent and utility model a container characterized by a specific hermetic closing system which was apparently present in the "Tic Tac" container.

PATENTS

New rules of procedure of the EPO's Boards of Appeal

New Rules of Procedure of the Boards of Appeal of the European Patent Office ("EPO") will apply to proceedings in relation to which an appeal is lodged as from 1 January 2020, as well as to pending appeal proceedings. Click [here](#) for more details.

INDUSTRIES

E-COMMERCE

Strong customer authentication for electronic payments

On 14 September 2019, the [Commission's Delegated Regulation \(EU\) 2018/389](#) entered into force. The Regulation supplemented the Payment Services Directive ([Directive 2015/2366/EU](#) – herein the "PSD2 Directive") with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication, which was implemented in Italy by [Legislative Decree no. 218/2017](#). The PSD2 Directive (as recently supplemented) establishes the so-called "strong customer authentication" ("SCA") requirement for electronic payments with the aim of preventing online consumer fraud. The SCA consists of the use of two or more elements classified under the categories of knowledge (i.e. something only the user knows), possession (i.e. something only the user possesses) and [inherent nature] (i.e. something the user is). Such elements are independent of each other, so that the breach of one does not compromise the reliability of the others, and they are designed to protect the confidentiality of the authentication data. According to [Commission Delegated Regulation \(EU\) 2018/389](#), SCA does not apply to low-value remote electronic payment transactions provided that (a) the amount paid does not exceed Euro 30; and (b) the cumulative amount paid since the last application of SCA does not exceed Euro 100 or (c) the number of previous payments made by the same payer since the last application of SCA does not exceed five consecutive individual payments. These new rules and the SCA have the potential to be an important driver in encouraging consumer confidence in online shopping and to offer e-commerce a chance for growth.

MEDIA

AGCOM on the adoption of guidelines on the centralized sale of audiovisual rights by Lega Nazionale Professionisti Serie A

On 2 December 2019, the Italian Communications Authority ("AGCOM") started a preliminary [investigation](#) concerning the adoption of guidelines on the centralised sale of audiovisual rights by Lega Nazionale Professionisti Serie A for football seasons 2021/2022, 2022/2023 and 2023/2024. This investigation has been undertaken in the context of AGCOM's surveillance activities on the rules governing the ownership and exploitation of audiovisual sports rights (pursuant to [AGCOM Resolution No. 307/08/CONS](#)). The aim of the guidelines is to set out general rules on the exploitation of audiovisual sport rights – based on the principles of fairness, transparency and non-discrimination – to be complied with by participants in the audiovisual media sector. The deadline for the conclusion of the proceedings is scheduled for 27 January 2020.

TELECOMMUNICATIONS

The ICA on certain promotions of telco operators

On 12 November 2019, the Italian Competition Authority ("ICA") concluded proceedings [PS/11380](#) and [PS/11381](#) against two mobile communications providers and issued them with fines of Euro 4.3 million and 6 million respectively, for the violation of paragraphs 22 and 65 of the [Italian Consumer Code](#). The first of the two contested violations relates to "winback" promotions, which are customized offers addressed to former clients for the purposes of winning back their business. Specifically, the contested advertising messages omitted key information relating to the tariff plan proposed to former customers, such as additional costs over and above the initial estimated price and restrictions on use. The ICA considered such advertising as misleading and likely to lead consumers to make transactional decisions that they would not otherwise have made. With regard to the second violation, the ICA challenged the pre-activation by telco operators of fee-based services in the context of subscription by consumers of the main mobile telephony offer, without their prior and express consent.

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