Stanford – Vienna
Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law

Transatlantic Antitrust and IPR Developments

Bimonthly Newsletter

Issue No. 1/2022 (April 20, 2022)

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Antitrust
European Union

Italian Watchdog Imposes Record Fine on Amazon in a Self-preferencing Abuse of Dominance Case

By Gabriele Accardo and Cecilia Borelli

On 9 December 2021, the Italian competition authority ("**ICA**") published its decision in Case A528, fining Amazon over €1 billion for leveraging its dominant position as an online marketplace to favor its own logistics services , in breach of Article 102 of the Treaty on the Functioning of the European Union ("**TFUE**").

The decision raises some interesting points that may inspire the European Commission ("**EC**"), which initiated a parallel investigation in November 2020 covering the whole European Economic Area (with the exception of Italy).

The ICA based its investigation on a "self-preferencing" theory of harm, along the lines of the EC's *Google Shopping* case, somehow departing from the typical consumer-welfare considerations.

Background of the investigation

The ICA's probe was launched in April 2019, over concerns that the terms and conditions on Amazon's marketplace amounted to self-preferencing of Amazon's own logistics services.

In particular, according to the ICA, Amazon granted a series of benefits (the most relevant being access to the *Prime* label), essential for gaining visibility and increasing sales, only to third-party retailers that subscribed to “Fulfillment by Amazon” (or FBA), i.e. the logistic services provided by Amazon. The same advantages were not made available to retailers selling on the Amazon marketplace but using other logistics services.

In doing so, the ICA held that Amazon unduly exploited its dominant position in the market for intermediation services on marketplaces in order to significantly restrict competition in the market for e-commerce logistics services.

Similar concerns prompted, in November 2020, the opening of a probe by the EC into the same practices. The EC carved-out the Italian market from the scope of such investigation, which led to Amazon bringing an action against such carve-out before the EU General Court ("**GC**"). In October 2021, the GC dismissed Amazon's action (Amazon has since appealed the GC's ruling before the Court of Justice of the EU).

The relevant markets and Amazon's (super) dominance

The ICA identified two relevant markets:

1. the Italian market for intermediation services on marketplaces; and
2. the Italian market for e-commerce logistics services.

The ICA held that both markets are national in scope and adopted a relatively narrow definition of the market for intermediation services on marketplaces. In particular, on the basis of their alleged non-substitutability, it excluded from such definition not only offline sales, but also other online sales channels, such as proprietary e-commerce or price comparison websites.

According to the ICA, Amazon – through its marketplace Amazon.it – was in a position of "super dominance" in the Italian market for intermediation services on marketplaces.

This was confirmed by the fact that its market shares in this market had been growing steadily since 2016, reaching 75-80% in 2019, compared to 10-15% for eBay (its main and closest competitor), and that the numbers of total visitors, active consumers and third party retailers using Amazon.it was equal to 200-300% of those of eBay, with such a gap having widened sharply over the past four years.

Taking into account the importance of network effects, brand recognition and customer retention strategies, the ICA took the view that it would be difficult for current competitors (as well as possible new market entrants) to contest the position held by Amazon on the Italian market for intermediation services on marketplaces.

The alleged abusive conduct, seen through *Google Shopping*'s lenses

The ICA found that Amazon's abusive conduct consisted in "*having tied the set of functionalities indispensable for the success of* [third party retailers'] *offer on Amazon.it, thanks to greater visibility and a sales increase, to FBA, the logistics service offered by the Company*".

In this way, Amazon was able to exploit its (super) dominant position as a marketplace to increase demand for its logistics services from third party retailers, to the detriment of competing logistics service providers.

The ICA characterized such allegedly abusive conduct as "self-preferencing", explicitly referring to the theory of harm adopted in the EC's *Google Shopping* decision[1] (upheld by the GC in November 2021). In particular, (like the EC) the ICA considered that self-preferencing consists in an autonomous breach of Article 102 TFEU.

Against the allegations brought by the ICA, Amazon had claimed that ICA's conclusions were based on the incorrect assumption that the services rendered by FBA and the

[1] In *Google Shopping* (Case AT.39740), the EC found that Google had abused its dominant position as a search engine by giving its own comparison shopping service an illegal advantage over those of its competitors.

other logistics services were equivalent. According to Amazon, its FBA service was/is "objectively superior" in terms of speed and timeliness of the delivery. Therefore, in the light of such intrinsic difference, Amazon did not favor its own service by applying "dissimilar conditions to equivalent transactions" (as per Article 102(c) TFEU).

The ICA rejected such an argument, reasoning that Amazon failed to prove that FBA offered a superior service than competing logistics service providers. Thus, the different treatment of such providers in the absence of a valid justification was capable of stifling competition on the merits.

The effects of Amazon's conduct: what about consumers?

When looking at the effects of Amazon's conduct, the ICA focused on the relationship between Amazon and the retailers, without really considering the effects of Amazon's conduct on consumers in terms of price or quality of the service.

Indeed, the ICA found that Amazon’s conduct harmed competing providers of e-commerce logistics services, who lost a significant part of the demand for their services on Amazon.it. Moreover, the conduct also allegedly harmed Amazon's competitors on the market for intermediation services on marketplaces, since the use of FBA discouraged the adoption of a multihoming strategy by retailers on Amazon.it, with prejudice to operators of competing platforms.

In this context, the ICA only summarily affirmed that Amazon's conduct harms "ultimately, customers". This conclusion remained, however, unsubstantiated.

One might wonder whether the ICA should have dedicated more economic consideration to the way the world has changed in the last years with the development of global value chains and logistics and whether it should have investigated further the way fundamental changes in the logistics market have benefited consumers, particularly during the pandemic.

The decision, on the contrary, appears to depart from any consumer welfare consideration. The ICA seems to be inspired by an idea that corporate consolidation may be a negative phenomenon in itself.

Will this be the antitrust approach for dealing with Big Tech moving forward?

Antitrust enforcement against "gatekeepers": a problem of the past already?

As already noted, Amazon has been facing parallel competition proceedings on (broadly) the same conduct also before the EC.

While the tech giant continues fighting its battle(s) before the Italian courts and the EC, the new rules of the Digital Market Act ("**DMA**") in the meantime will likely enter into force, including specially a ban on self-preferencing by "gatekeepers" (as well as other "no-go" conducts) and the power for the EC to levy fines in cases of noncompliance.

As national competition authorities and the EC have shown appetite for action in the digital space, Big Tech may be wondering how likely they could face multiple parallel proceedings under both the EU competition rules as well as the DMA.

Nothing would prevent this to happen in principle. However, at the minimum, the efficiency considerations underlying the rationale to have, in the first place, the DMA (which essentially would ban the most serious conducts outlawed by the competition rules) would make a similar scenario a clear stretch.

When full account is taken of the lengthy and burdensome nature of such proceedings, including the judicial review process, it would be legitimate to question whether the new system will provide the required legal certainty that (also) the digital world deserves.

Afterall providing legal certainty in a timely manner in the digital space is key not only because "justice too long delayed is justice denied", but particularly because innovation happens at a different speed, and may be curbed as a result.

In this connection, while the two systems (antitrust and DMA) may certainly coexist, the recent ruling by the GC in the *Intel* case reminds us that some changes are probably now worth considering in antitrust law enforcement.

The *Intel* saga confirms proceedings can be (too) long, but also that EU Courts can be very thorough in reviewing the allegations brought by the European Commission and evidence in the file.

Getting to the point, the advantages of a system where the EC pleads its case before the EU Courts are evident, particularly in fast moving markets.

As the trialogue discussion on the DMA is about to reach the closing phase, all the stakeholders involved, *in primis* the EC, should seriously sit down to discuss the introduction of a system where the EC brings its cases before the EU Courts, instead of acting in the dual role of prosecutor and decision making body.

For the time being, Big Tech should probably get prepared for having to deal with parallel investigations (under the DMA, the competition rules, and why not the GDPR rules) before a reasonable solution is discussed to avoid the unintended consequences that may clearly occur when multiple authorities feel that they are as much competent to bring proceedings as the others.

Intellectual Property
United States

Not For Trademark : Hermès Claims MetaBirkin NFTs Are Infringing

By Marie-Andrée Weiss

On January 14, 2022, Hermès filed a trademark infringement suit against artist Mason Rothschild, claiming that by selling "MetaBirkins" NFTs, Rothschild infringes and dilutes the HERMÈS trademark. Defendant filed a motion to dismiss on February 9, claiming that the First Amendment gives him the right to sell the NFTs. The case is Hermès International, et al. v. Mason Rothschild, 1:22-cv-00384 (SDNY).

The facts

NFTs (non-fungible tokens) are unique digital assets. Their authenticity and uniqueness are guaranteed by a blockchain from their creation through transfer of ownership, as the blockchain also record the transfers. As such, NFTs are suited to the art market, and NFTs are popular and sometime expensive. A NFT created by digital artist Beeple sold in auction in March 2021 for 69 million USD.

Hermès is a luxury house having its headquarters in Paris. One of its most famous *sacs* is the Birkin, named after British actress and singer Jane Birkin. The Birkin bag is a bigger version of the Kelly Bag, itself named after Grace Kelly, the American actress who became Princess of Monaco.

Mason Rothschild is an artist living in California. Last May, he created a "Baby Birkin" NFT, the digital image of a 40-week-old fetus gestating inside a Hermès Birkin bag. The NFT originally sold for 23,000 USD and was resold for 47,000 USD. Rothschild then created the MetaBirkins.com website, which features and sells "a collection of 100 unique NFTs created with faux fur in a range contemporary color and graphic executions." The complaint alleges that Mason Rothschild "first began advertising the METABIRKINS NFTS under The METABIRKINS trademarks on December 2, 2021, at Art Basel Miami.

A BIRKIN bag may be considered by some as a work of art, at least as a highly collectible item: a bag made from crocodile skin sold at auction in 2016 for HKD 2,320,000 (more or less USD 300,000.00). MetaBirkins are valuable as well: one sold in February 2022 for 3.5 Ether, that is, more or less USD 10,500.

The C&D letter

On December 16, 2022, Hermès International sent a Cease-and-Desist letter (C&D) to Mason Rothschild and carbon copied the OpenSea platform, on which the NFTs were sold. Hermès asked the artist to cease using commercially the Hermès trademarks. Indeed, Hermès owns, among others, U.S. trademark registrations for HERMÈS, BIRKIN, and for the configuration of the Birkin handbag.

The C&D claimed that Mason Rothschild was identifying the NFTs he is selling by using the BIRKIN trademark and that he "employ(s) the HERMÈS trademark to advertise and promote the sale of the Birkin NFTs…". Hermès also claimed that this use of the marks may dilute them.

Disclaimer is not enough

After receiving the C&D, as alleged in the complaint, the MetaBirkins.com website was updated to add a disclaimer stating: "We are not affiliated, associated, authorized, endorsed, or in any way officially connected with HERMES, or any of its subsidiaries or affiliates. The official HERMES website can be found at https://www.hermes.com." The complaint alleges that the disclaimer "unnecessarily" linked to the official Hermes website and "capitalizes the HERMÈS mark" and that "Defendant's uses of the HERMÈS Mark in conjunction with his uses of the BIRKIN Mark, and the display of the METABIRKINS bags, serves only to create a confusing impression among consumers as to the Hermès' sponsorship of the METABIRKINS NFTs or the METABIRKINS website."

The complaint

OpenSea took the NFTs down. Mason Rothschild then sold the MetaBirkins on another platforms. As Mason Rothschild had not taken the MetaBirkins down, Hermès filed a trademark infringement suit on January 14, 2022, in the federal court of the Southern District of New York. The complaint includes claims of false designation of origin, trademark dilution, and cybersquatting (claiming that <metabirkins.com> is infringing and confusingly similar to the BIRKIN mark).

In its complaint, Hermès described Defendant as "a digital speculator who is seeking to get rich quick by appropriating the brand METABIRKINS for use in creating, marketing, selling and facilitating the exchange of [NFTs]".

Hermès claimed that the name MetaBirkin is formed by merely adding "the generic prefix "meta" to the famous trademark Birkin." Hermès has not registered METABIRKIN as a trademark. Other companies have filed trademark registration applications for trademarks protecting their marks in the meta universe, such as McDonald's who filed in February 2022 several meta-related trademarks (for instance, MCDONALD's in Class 43 for "Operating a virtual restaurant featuring actual and virtual goods, operating a virtual restaurant online featuring home delivery”).

The motion to dismiss

On February 9, 2022, Mason Rothschild filed a motion to dismiss, arguing that the trademark infringement claim must be dismissed under *Rogers v. Grimaldi*. In this case, the Second Circuit held that the Lanham Act must be broadly interpreted in cases when the allegedly infringing product is an artistic expression. Under *Rogers*, the Lanham Act:

“should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression. In the context of allegedly misleading titles using a celebrity's name, that balance will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.”

First prong of the *Rogers* test: artistic relevance

Use of the mark by defendant is protected under the *Rogers* test unless such use has no artistic relevance to the underlying work whatsoever.

The motion to dismiss argues it does, pointing out that the bags are “depicted as fur covered… [to] commen[t] on the animal cruelty inherent in Hermès’manufacture of its ultra-expensive leather handbags” and further argues that “[t]he First Amendment guarantees [Defendant]’s rights to respond in the marketplace of ideas to the inescapable corporate brand message by which we are bombarded every day, virtually everywhere we look.”

Before Hermès filed its suit, Mason Rothschild had posted on social media a response to both Hermès and Open Sea, writing that “… the First Amendment gives [him] every right to create and based on [his] interpretations of the world around [him].” He also argued that the NFTs he sells “are also a commentary on fashion’s history of animal cruelty, and its current embrace of fur-free initiatives and alternative textiles.” Jane Birkin had asked Hermès a few years ago to stop using her name for the bag after a video released by People for the Ethical Treatment of Animals showing reptiles being skinned or sawed open alive on farms which supplied luxury brands, including Hermès. The parties settled after Hermès showed that the incident was a unique occurrence.

The motion to dismiss argues that the NFTs are “depicted as fur covered… [to] commen[t] on the animal cruelty inherent in Hermès ’manufacture of its ultra-expensive leather handbags” and further argues that “[t]he First Amendment guarantees [Defendant]’s rights to respond in the marketplace of ideas to the inescapable corporate brand message by which we are bombarded every day, virtually everywhere we look." As such, the Metabirkins could also be considered a parody. The motion to dismiss cites the SDNY *Vuitton v. My Other Bag* case, where the court found that fabric totes with drawings of famous bags were not infringing nor diluting the Louis Vuitton marks, as they were a parody. Hermès was not a plaintiff, but could have been, as one tote showed a drawing of the Hermès Kelly bag.

Second prong of the Rogers test: not explicitly misleading as to the source

The second prong of the *Rogers* test is determining whether use of the mark is not explicitly misleading as to its source. The *Rogers* case was about the title of the Fellini movie *Ginger and Fred*. The Second Circuit distinguished cases where the title of the product would be an endorsement, giving as example "Jane Fonda's Workout" (the case is from 1989…). Such titles would be protected by the Lanham Act. However, as explained by the Second Circuit, "Many titles… include a well-known name without any overt indication of authorship or endorsement — for example, the hit song "Bette Davis Eyes," and the … film "Come Back to the Five and Dime, Jimmy Dean, Jimmy Dean." Defendant argues that the website clearly identifies that the MetaBirkins are works of art.

Rogers would likely guarantee the motion to dismiss to be granted if Jane Birkin, not Hermès, was the Plaintiff, or if the case would have been filed in the Ninth Circuit. The Ninth Circuit adopted *Rogers* in its *Barbie Girl* case, and extending it beyond mere title, as explained in *Mattel, Inc. v. MCA Records*. In *VIP Products v. Jack Daniel's Properties*, the Ninth Circuit held in 2020 that chewy dog toys "Bad Spaniels Silly Squeaker" in the shape of a bottle of Jack Daniel's Old No. 7 Black Label Tennessee Whiskey were not infringing.

Defendant argues that his images "show luxury with no function but communication, luxury emptied of anything but its own image, calling into questions what it is that luxury lovers actually pay for." It is an interesting argument but may be weaker because of the nature of the goods protected by the Hermès marks. When trademarks are used logos, used prominently and externally on the product, they may have very well "no function but communication." Hermès bags are made by highly trained artisans, by hand, and thus the Hermès marks indicate what "luxury lovers actually pay for."

What if a similar lawsuit would be filed across the Atlantic?

The lawsuit was filed in the U.S., where the Birkin handbag cannot be protected by copyright, because it is a useful article, defined by Section 101 of the Copyright Act as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information".

Useful articles are not protectable under U.S. copyright laws.

Other countries, such as France, offer bags and other fashion goods protection under their copyright laws. What is an NFT is currently debated by legal scholars and practitioners. The motion to dismiss argues that the NFTs “signify ownership of an image of a handbag.” The defendant does not sell the Hermès handbags, nor does Hermès claim he does. If the Hermès bag would be protected by copyright, Mason Rothschild would have argued fair use. In a country such as France, he would likely not have claimed that NFTs “signify ownership of an image of a handbag”, as such image may be infringing, because there is not a comprehensive “fair use” defense available to the defendant of a copyright infringement suit. The artist would likely claim instead that the MetaBirkin NFTs are parodies, a defense against copyright infringement claims, commenting on the luxury industry or on the use of expensive leather to manufacture the bags.

This case will be an interesting suit to watch, as it is one of the first trademark infringement suit filed against the seller of NFTs. Other cases have been filed, such as one filed on February 3 by Nike v. StockX LLC, also in the Southern District of New York (Nike v. StockX LLC, 1:22-cv-00983, SDNY), which claims that an online resale platform selling NFTs of Nike sneakers is infringing and diluting Nike’s trademarks. The platform claims on its site that the NFTs do “no more than track ownership of a physical Nike product safely secured in its vault” and that buyer can trade the NFT for the associated physical shoes. This case shows that blockchain can be used to authenticate goods. As Hermès and Nike product 's are routinely illegally reproduced, they will have at heart to defend the source of any Hermès or Nike NFT, for fear of not being able to use the technology to authenticate their products.

Intellectual Property
European Union

The European Union Position on the TRIPS Waiver for COVID-19 Vaccination

By Pratyush Nath Upreti

Since the outbreak of COVID-19, the question of equitable distribution of vaccination and treatment has been the subject of debate. On 2 October 2020, India and South Africa proposed a waiver from the implementation, application and enforcement of Sections 1, 4, 5 and 7 of Part II of the TRIPS Agreement, which respectively address copyright, industrial designs, patents and trade secrets.[2] The revised proposal further clarified the scope of the waiver and initially, the length of the waiver be three years.[3] Since the proposal was tabled, the effectiveness of the waiver has been discussed, many scholars have endorsed the waiver and some have views against it.[4] Both views have merit, but the question remains whether waiver can be effective if implemented.[5]

The waiver proposal received momentum when the United States endorsed the waiver proposal in May 2021. Many countries like Germany have voiced against the

[2] WTO, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19* (Communication from India and South Africa, WTO Doc. IP/C/W/669 (2 October 2020).

[3] See also the revised version of the proposal dated 25 May 2021: WTO, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19* (Communication from the African Group, the Plurinational State of Bolivia, Egypt, Eswatini, Fiji, India, Indonesia, Kenya, The LDC Group, Maldives, Mozambique, Mongolia, Namibia, Pakistan, South Africa, Vanuatu, The Bolivarian Republic of Venezuela and Zimbabwe, WTO Doc. IP/C/W/669/Rev.1, 21 May 2021.

[4] See generally Peter K Yu, 'A Critical Appraisal of the COVID-19 TRIPS Waiver' in Taina E. Pihlajarinne, Jukka Mahonen and Pratyush Nath Upreti (eds) *Intellectual Property Rights in the Post Pandemic World: An Integrated Framework of Sustainability, Innovation and Global Justice* (Edward Elgar Publishing, forthcoming 2022/23). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3945304

[5] see Bryan Mercurio, 'WTO Waiver from Intellectual Property Protection for COVID-19 Vaccines and Treatments: A Critical Review' 62 Virginia Journal of International Law (2021), 10-32; . M. Hilty *et al*., 'Covid-19 and the Role of Intellectual Property' (Position Statement of the Max Planck Institute for Innovation and Competition of 7 May 2021), https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/2021_05_25_Position_statement_Covid_IP_waiver.pdf; Siva Thambisetty *et al*., 'The TRIPS Intellectual Property Waiver Proposal: Creating the Right Incentives in Patent Law and Politics to end the COVID-19 Pandemic', LSE Law, Society and Economy Working Papers 06/2021 (London School of Economics and Political Science Law Department),https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3851737&download=yes

proposal[6] and the European Union (EU), the United Kingdom[7] among others are skeptical about the effectiveness of the waiver, rather persistent that the current TRIPS flexibilities (specifically compulsory license) are capable of addressing crises such as COVID-19.[8]

More recently, the EU has called for clarification[9] of Article 31 of TRIPS through an agreement covering the following: (i) The Pandemic is a circumstance of national emergency and therefore the requirement to negotiate with the right holder may be waived; (ii) To support manufacturers ready to produce vaccines or therapeutics at affordable prices, especially for low- and middle-income countries, on the basis of a compulsory licence, the remuneration for patent holder should reflect such affordable prices; and (iii) The compulsory licence could cover any exports destined to countries that lack manufacturing capacity, including via the COVAX facility.[10]

The EU is therefore seeking clarification on Article 31 and Article 31bis of the TRIPS Agreements. First, the EU proposes to clarify that the 'pandemic' fulfil the requirement of a 'national emergency' under Article 31[11] so that arrangement can be made without prior efforts to obtain authorization from the right holder.[12] Second, while Article 31(h) and paragraph 5 of Article 31bis require payment of adequate remuneration to right holder, the EU proposes that 'WTO Members can set the remuneration to the right holder at a level that reflects the price charged by the manufacturer of the vaccines and therapeutics at affordable prices to low and middle-income countries'.[13] Third, the EU proposes a single notification system where exporting Member under Article 31bis could list all 'countries to which vaccine and therapeutics are to be supplied directly or through the COVAX Facility'.[14] The suggested clarifications would likely facilitate the issuance of compulsory licenses

[6] 'Germany rejects U.S. proposal to waiver patents on COVID-19 vaccines', *Reuters* (6 May 2021) https://prod.reuters.com/business/healthcare-pharmaceuticals/germany-opposes-us-plan-waive-patents-covid-19-vaccines-2021-05-06/

[7] 'WTO TRIPS Council December 2021: UK Statement' https://www.gov.uk/government/news/wto-trips-council-december-2021-uk-statement

[8] European Union, 'Urgent Trade Policy Responses to the COVID-19 Crisis: Intellectual Property' (Communication from the European Union to the Council for TRIPS, 4 June 2021), https://trade.ec.europa.eu/doclib/docs/2021/june/tradoc_159606.pdf

[9] Ibid.

[10] Ibid.

[11] TRIPS, Art. 31 require 'the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time'. However, this requirement is waived in the case 'of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use'.

[12] European Union, 'Urgent Trade Policy Responses to the COVID-19 Crisis: Intellectual Property' (n 6) at 10.

[13] Ibid at 11.

[14] Ibid at 11.

related to COVID-19 vaccines and treatments.

On June 2022, next WTO Ministerial Conference will be held where members are expected to have discussion on the waiver proposal. That said, it is certain that proposal in its current form may not be accepted. Therefore, it will be interesting to see to what extent proponents and opponents of waiver are willing to discuss 'text-based negotiation'.

The WTO members will come together in the next WTO Ministerial Conference in June 2022 to discuss the waiver proposal. Certainly, the proposal in its current form may not be accepted by all the members. Thus, it will be interesting to see how proponents and opponents of waiver are willing to discuss text-based negotiation.

Other developments
European Union

The Data Act Proposal and the Relevance of Mutual Availability of Data between the Public and Private Sectors

By Pedro Colombini

On 23 February 2022, the European Commission presented a Proposal for a Regulation on harmonised rules on fair access to and use of data (Data Act). The proposed Data Act aims to ensure "fairness in the allocation of value from data among actors in the data economy and to foster access to and use of data"[15]. This contribution intends to point out how the Data Act proposal highlights the relevance of data cooperation between government and the private sector.

Context of the Proposal

The Data Act proposal is one of the main legislative initiatives within the scope of the 2020 European Strategy for Data. This proposal complements the Data Governance Act which aims to foster the availability of data for use by increasing trust in data intermediaries and by strengthening data-sharing mechanisms across the EU.

Overview of the main objectives of the proposal

As stated in the text prepared by the European Commission, the main objectives of the Data Act are:

- Facilitate access to and the use of data by consumers and businesses, while preserving incentives to invest in ways of generating value through data;
- Provide for the use by public sector bodies and Union institutions, agencies or bodies of data held by enterprises in certain situations where there is an exceptional data need;
- Facilitate switching between cloud and edge services;
- Put in place safeguards against unlawful data transfer without notification by cloud service providers;
- Provide for the development of interoperability standards for data to be reused between sectors;
- Consistency with existing policy provisions in the policy area.

[15] https://digital-strategy.ec.europa.eu/en/library/data-act-proposal-regulation-harmonised-rules-fair-access-and-use-data , p.3.

Harmonization of legal bases for making data available to public sector bodies and union institutions, agencies or bodies

Among the provisions brought by the Data Act, there are 9 articles (Article 14 to Article 22) that deal exclusively with the obligation to make data available to the public sector. These articles discuss the justifications and procedures for exercising the state's right to request.

In other words, these articles detail rules related to the traditional administrative institute of requisition, which is nothing more than a: “Operation by which the administrative authority, unilaterally, obliges individuals to provide for itself, or for third parties, the provision of services, the use of real estate or movable assets to satisfy exceptional and temporary general interest needs under the conditions defined by law.” [16]

For the purposes of this contribution, what is relevant in these articles of the Data Act is what can be extracted when one realizes that this regulation came later and in a complementary way to Directive (EU) 2019/1024, which deals with the re-use of public sector information.

Thus, it is noted that in 2019 the European Commission created a series of relevant bases for the Open-Data culture, aware of the importance of public data to foster innovation, as can be seen in the text of Directive 2019/1024 itself:

"Providing that information, which includes dynamic data, in a commonly used electronic format allows citizens and legal entities to find new ways to use them and create new, innovative products and services."[17]

In this scenario, it is possible to see that the Data Act complements the European perspective, as it becomes clear that, in the same way that there is recognition - through Directive 2019/1024 - that public data are very useful to promote innovation led by the society and the private sector, the new proposal from the european commission highlights that data held by non-governmental actors can also be extremely important to the government.

Conclusion

In view of the foregoing, the need for mutual availability of data between the public and private sectors is extremely clear. In this scenario, as the last point of this contribution, it may be possible to think, at the European level, of other means of data cooperation between these sectors, particularly sustainable and less imperative means, in order to overcome - or minimize - the need to

[16] Ducos-Ader, Robert. *Le droit de réquisition: théorie générale et régime juridique*. Vol. 4. Librairie générale de droit et de jurisprudence, 1956, p. 83.

[17] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1024

use traditional unilateral powers of the State, and to reach a new stage of data articulation between the Government and the private sector.

Other developments
European Union

Return to Sender: The Right of Withdrawal for Contracts for the Supply of Digital Content

By Sebastian Pech

The Consumer Rights Directive (2011/83/EU) from 2011 provides for a right of withdrawal for distance contracts not only for digital content distributed on a tangible medium (e.g., DVD, Blu-ray), but also for digital content supplied without a data carrier, e.g., downloading or streaming. The Consumer Rights Directive was modified in 2019 by the Enforcement and Modernisation Directive ((EU) 2019/2161). The amendments were to be transposed into national law by the member states by November 28, 2021; the provisions are to be applied as of May 28, 2022.

The Directive on Contracts for the Supply of Digital Content and Digital Services ((EU) 2019/770), that also dates from 2019, governs further aspects of contract law regarding the supply of digital content to consumers, such as in particular the requirements for providing digital content in conformity with the contract, as well as remedies. The respective implementations in the member states are already applicable from January 1, 2022.

This contribution provides an overview of the right of withdrawal for contracts for the supply of digital content under the new regulations.

The right of withdrawal in a nutshell

The right of withdrawal aims to provide the consumer with an opportunity to test the goods, since unlike a retail store, a distance contract does not allow the consumer to examine the goods before the contract is concluded.

Therefore, the consumer can withdraw from a distance contract within a period of 14 days, without giving any reason (Article 9 (1) Consumer Rights Directive). As a result, the contracting parties are freed from the obligations under the contract (Article 12). In case of a withdrawal, the trader must reimburse all payments received from the consumer (Article 13 (1)), and the consumer must return the received goods to the trader (Article 14 (1)). The consumer must pay compensation for a loss of value of the goods only if it is caused by handling of the goods which was unnecessary for examining the goods (Article 14 (2)).

Distinctive aspects of contracts for the supply of digital content

Digital content differs from other products since it can be copied as often as desired without any loss of quality. In some cases, such as movies and series, digital content is often purchased for one-time consumption only. These special aspects must also be considered in the context of the right of withdrawal. Otherwise, the consumer could abuse this right by consuming the content before withdrawing or retaining a copy and thereby appropriating its economic value.

Digital content supplied on a tangible medium

Therefore, the Consumer Rights Directive provides for an exception of the right of withdrawal if the consumer unseals a sealed medium containing digital content (Article 16 (i)).

In the case that the right of withdrawal is not excluded, the consumer can withdraw within a period of 14 days after receiving the tangible medium form the trader (Article 9 (2) (b)).

Even if the value of digital content is not usually tied to the physical media holding it, a return by the consumer is in the interest of the trader. They can ensure that the consumer does not continue to use the digital content stored on the medium. Additionally, the trader can potentially resell the medium to another customer. If the medium is sealed, checking the integrity of the seal is necessary to confirm the right of withdrawal.

If the consumer has made a copy of the digital content contained on the medium, for example by installing software on his device, they could continue to use the content even after returning the medium. Therefore, in the event of withdrawal from the contract, Article 14 (2a)'s new provision forbids the consumer, e.g., through deletion of copies, from using the digital content and from making it available to third parties.

Digital content supplied on an intangible medium

In the case, that the digital content is supplied on an intangible medium, Article 16 (m) provides for an exception of the right of withdrawal when the trader has initiated the performance of contract. In addition, it is required that (i) the consumer has provided prior express consent to initiate the performance, (ii) the consumer has acknowledged that they thereby lose the right of withdrawal, and (iii) the trader has provided confirmation in accordance with Article 8 (7).

The Enforcement and Modernisation Directive has added the last requirement to inter alia confirm (where applicable) the consumer's prior express consent and acknowledgment in accordance with Article 16 (m) that was missing in the old version of the Consumer Rights Directive.

In case the right of withdrawal is not excluded, the consumer can withdraw within a period of 14 days from the day of the conclusion of the contract (Article 9 (2) (c)).

The trader will usually have no interest in the consumer returning the downloaded data, for example by e-mail; new customers can download their copy from the master copy on the server. If the content is retrieved directly from the server, as in the case of streaming, there is no permanent storage on the consumer's device. The decisive factor for the trader is preventing the consumer's continued use of the content after exercising the right of withdrawal. The consumer must refrain from using the digital content and making it available to third parties in the event of withdrawal from the contract (Article 14 (2a)). If the consumer has downloaded digital content, they are obliged to delete it. In the case of direct server retrieval, the obligation to refrain from using the digital content pertains to the consumer not accessing the content any further.

In the event of withdrawal from a contract for the supply of digital content on an intangible medium, the consumer must pay no compensation for the use of the digital content before the withdrawal. This results from Article 14 (4) (b) in combination with Article 14 (2), (3), and (5). The reason for not requiring compensation is that digital content transmitted via the Internet does not degrade. In addition, the trader can decide to exclude the consumer's right of withdrawal with beginning of the performance of the contract in accordance with Article 16 (m).

Provision of data by the consumer in return for the supply of digital content

The new provision of Article 3 (1a) introduced by the Enforcement and Modernisation Directive states that the Consumer Rights Directive also applies to contracts for digital content supplied on an intangible medium where the consumer provides personal data to the trader instead of paying a price. Even if the consumer is not obliged to use the content in the case of "payment with data", the consumer may still wish to be able to terminate the contract easily by means of a withdrawal, without being bound, e.g., by notice periods.

The performance of the contract or statutory provisions often requires provision of personal data (e.g., name, e-mail address) of the consumer, so that the trader cannot gain any independent economic advantage from the data provided. Therefore, Article 3 (1a) excludes these cases from the scope of the Directive, provided that the trader performs the data processing exclusively for this purpose.

According to Article 16 (m), the right of withdrawal is excluded with beginning of the performance of the contract for contracts that do not oblige the consumer to pay a price.

Conclusion

The Consumer Rights Directive distinguishes between digital content distributed on a tangible medium and digital content distributed on an intangible medium. Depending on the type of digital content, different regulations apply to the prerequisites and legal consequences of the right of withdrawal.

The Enforcement and Modernisation Directive contains several modifications to the Consumer Rights Directive; the extension of the scope of application to contracts in which the consumer pays in data instead of paying a price is most significant. This creates a concurrence with the Directive on Contracts for the Supply of Digital Content and Digital Services which also applies to contracts where the consumer provides personal data, instead of money, to the trader.