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Trends and Developments
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2021

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Brexit – Broadcasting and Video On-demand Services

The Audiovisual Media Services Directive

As of 1 January 2021, the UK is no longer part of the EU, and this has consequences for the broadcasting and video on-demand services from and to the EU. The Audiovisual Media Services Directive (AVMSD) sets out a country-of-origin principle, where providers of broadcasting channels and video on-demand services based in one country are only subject to the set of rules and regulations from that country of origin; in the other countries of the EU, the broadcasts or video on-demand services are not subject to secondary control.

The AVMSD and the country-of-origin principle in general no longer apply to services under UK jurisdiction broadcast into the EU.

Broadcasting and video on-demand services from the UK to the EU may, however, still qualify for the AVMSD, even if the head office is located in the UK. A service provider is deemed to be established within an EU country (Article 2 (3) AVMSD) when its head office is located in the EU and the editorial decisions for a service are taken within an EU country. If the head office is in one location but the editorial decisions are taken in another EU country, establishment is based on the location of the office where a significant part of the workforce is located. If the editorial decisions related to the broadcasting or video on-demand services are taken in an EU country and a significant part of its employees are located in that country, the provider of these services will be deemed to fall under the jurisdiction of that country.

If the broadcasting or video on-demand service does not have a significant workforce within an EU country, the AVMSD may still apply if a service is provided via a satellite uplink in an EU country or satellite capacity appertaining to an EU country. In such event, jurisdiction would fall to that country (Article 2 (4) AVMSD).

European Convention on Transfrontier Television

In the event the AVMSD does not apply anymore, the broadcasting or video on-demand services may rely on the European Convention on Transfrontier Television (ECTT) which came into force in 1993. Not all EU countries are a party to the ECTT, but 21 of the countries are. EU countries that have signed and ratified the ECTT are Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. The UK is also a party to the ECTT.

ECTT guarantees freedom of reception between parties to this convention and sets out that they must not restrict the retransmission of compliant programmes within their territories. (However, ECTT sets out that EU countries should apply the AVMSD not ECTT between each other. This means that even the EU countries who have signed ECTT observe only AVMSD rules inside the single market.)

The EU Satellite and Cable Directive

The EU Satellite and Cable Directive provides a country-of-origin principle for licensing of copyright material in cross-border satellite broadcasts. This means that when a satellite broadcaster transmits a copyright-protected work – for example, music or a film – from one EEA (European Economic Area) state to another, they are only required to obtain the copyright-holder's permission for the state in which the broadcast originates. This avoids satellite broadcasters having to secure individual licences for every EU country in which their broadcasts are received.

UK broadcasters no longer benefit from the country-of-origin principle for broadcasts into the EEA from 1 January 2021. They need to obtain additional right-holder permissions covering the EEA states to which they broadcast.

In the UK, the country-of-origin principle will continue to be applied to broadcasts from any country. Legitimate satellite broadcasts of copyright protected works transmitted into the UK from abroad will not need specific right-holder permission for the UK, except where the broadcast is commissioned or uplinked to a satellite in the UK and it originates from a country that provides lower levels of copyright protection.

New EU Initiatives for Regulation of Platforms

On 15 December 2020, the European Commission published two new legal initiatives, the Digital Services Act and the Digital Markets Act. Both initiatives aim to create a safer digital environment where the rights of its user are protected while, at the same time, innovation and competitiveness in the European Single Market is fostered.

Digital Services Act

The Digital Services Act covers a wide range of digital service providers, such as intermediary services, hosting services, online platforms, and very large online platforms that pose specific risks in the "dissemination of illegal content and societal harms".

All different types of service providers must comply with the new act, though the obligations will depend on their ability and size to do so.

The new obligations include:

- mechanisms to act against illegal goods, services or content online – for example, via mechanisms with which users can flag such illegal content and so that platforms can co-operate with these users;
- practical safeguards for users, which also entails the option to challenge platforms' content moderation decisions;
- transparency obligations for online platforms for a wide range of issues, including on the algorithms used for recommendations;
- measures taken by very large platforms, with the aim of preventing misuse of their systems and taking pro-active action – for example, via independent audits of their IT systems; and
- access to key data for independent research of the very large platforms, in order to understand how online risks evolve.

Digital Markets Act

The Digital Markets Act aims to regulate gatekeeper platforms and restore balance to digital markets. Gatekeepers are platforms that have a strong economic and intermediation position and a durable position in the digital market. For gatekeepers, far-reaching obligations will apply in order to create a fairer and more competitive market. The relevant obligations can be divided into dos and don'ts.

Dos

The dos include allowing third parties to interoperate with the platform's own services in specific situations as well as providing companies that advertise on their platform with tools and information required to verify and review their advertisements. Business users must also be allowed to promote and conclude contracts with their own customers outside of the platform. In addition, platform users must be allowed access to the data that they generate in their use of the gatekeeper's platform.

Don'ts

The don'ts include preventing consumers from connecting with businesses outside their platforms and preventing users from uninstalling pre-installed software or apps if they wish to do so.

Next steps

At the time of writing this article (January 2021), both acts are under discussion by the European Parliament and the member states and it may take a number of years before they are adopted as regulations. If adopted, they will become directly applicable throughout the European Union.

Security

Cybersecurity continues to be a top priority. The SolarWinds attack sent shivers down the spine of the security community due to its sophistication and widespread effects, which did not leave Dutch entities untouched. It once more became evident that state actors are growing their cyber-arsenal and do not shy away from employing such weapons. However, attacks by private actors should not be underestimated, and neither should the need for effective cybersecurity practices. This was painfully demonstrated last October by a Dutchman that discovered that the password for Trump's Twitter account was "maga2020!"

In December 2020, the European Commission launched its EU Cybersecurity Strategy for the Digital Decade. A key legal development is the revised Directive on Network and Information Systems (NIS Directive). The proposal aims to address the deficiencies of the existing NIS Directive and future-proof it. Going forward, the revised NIS Directive will include new sectors and classify entities either as essential (for the sectors of energy, transport, banking, financial market infrastructures, health, drinking water, waste water, digital infrastructure, public administration and space), or important (for the sectors of postal and courier services, waste management, manufacture, production and distribution of chemicals, food production, processing and distribution, manufacturing and digital providers).

The revised NIS Directive includes a clear size cap: all medium and large enterprises (as defined under EU law) that operate within these sectors will fall within its scope. Explicit governance requirements are introduced that require management of in-scope entities to supervise security risk management measures and to educate themselves through security training. The revised NIS Directive further expands reporting obligations and harmonised administrative fines up to the higher of EUR10 million or 2% of the total worldwide annual turnover.

New Advisory Committee for the Dutch State's IT Projects

In 2014, a parliamentary committee published a report about the Dutch state's grip on ICT projects. The conclusions were shocking: the Dutch state did not have sufficient control over large IT projects, many projects therefore failed and around than EUR15 billion was being wasted every year. The word "chaos" was used to describe the situation.

As a result, a committee (BIT) was established that would review the state's IT projects. The BIT was dissolved on 31 December 2020. In January 2021, the government announced that a new Advisory Committee for IT has been established (*Adviescollege ICT-Toetsing*). All ministries must give notice to the Advisory Committee of all projects of which the IT component is higher than EUR5 million. The Advisory Committee will assess the risks and chances of successful completion prior to the start of the project.

However, the Advisory Committee may also proactively publish its opinion about IT matters. Later this year the government will send a proposal to Parliament to give the Advisory Committee a proper legal basis. This legislative proposal will contain more detail about the Advisory Committee's role and powers.

In the meantime, the Dutch state's IT projects continue to cause debate – Bits of Freedom, the privacy organisation, published a report on the basis of internal investigations by the Dutch police, in which the police concluded that none of their 36 mission-critical IT systems comply with the GDPR.

Bringing the Entire Application Landscape to the Cloud

In 2021, many companies will bring their entire IT environment, or the better part of it, to the cloud. We have seen such projects in 2020, but there are many more to come. COVID-19 has accelerated the convergence to online sales and the cloud is indispensable in terms of service levels, flexibility, volume-based pricing, capacity and security. These projects can be very challenging since several existing applications cannot be brought to the cloud and will need to be replaced. This may therefore require a partial overhaul of the application landscape. Only the best IT suppliers will be able to undertake these complex projects and we note their stance that it is often impossible to give a binding hard stop date for completion, since there will always be unexpected problems and delays.

Solving these problems requires a partnership approach and an agile way of working and contracting. This means that new contracting models will appear, in which governance and partnership are more important than specifications, binding dates and pricing. It also means that there may be more failed projects and disputes, especially if the supplier is mediocre and not really up to these complex projects or in case the realistic partnership approach is not agreed or, if agreed, is not complied with.

Landmark Case: District Court Overturns Decision of the DPA

On 23 November 2020, the Dutch District Court Midden Nederland rendered an important decision about a fine of EUR575,000 that was awarded under the EU General Data Protection Regulation 2016/79 (GDPR) by the Dutch Data Protection Authority (DPA).

The decision concerns the platform VoetbalTV, a company initiated by the Royal Dutch Football Association and Talpa Network. VoetbalTV is a video platform for amateur football. VoetbalTV makes video recordings of games in amateur football on behalf of football clubs. In 2020, 153 clubs joined VoetbalTV and about 2,500 to 3,000 matches were recorded and broadcast monthly. VoetbalTV also offers an app with which football moments can be watched, analysed and shared with others. VoetbalTV's own editorial team also collects and displays "highlights" such as goals.

The DPA held the view that with these recordings the right to privacy of the individuals involved (eg, underage soccer players) was infringed as there was no legal basis for the processing of the related personal data. The legitimate interest of monetisation argued by VoetbalTV was not deemed valid by the DPA. The DPA was of the opinion that such interest must be designated as a legal interest in the relevant laws.

The "legitimate interest" is one of the six legal bases for the processing of personal data under the GDPR. The legitimate interests of a controller or of a third party may provide a legal basis for lawful processing, provided that the interests or fundamental rights and freedoms of the data subject do not outweigh this legitimate interest. In this regard, the reasonable expectations of the data subject based on his or her relationship with the controller should be taken into account. As this legal basis leaves room for interpretation, the extent of it continues to be a puzzle that must be assessed on a case-by-case basis.

The DPA's reasoning, however – that the absence of a legal basis in relevant laws means the legitimate interest does not apply – entailed a strict interpretation of the legitimate interest. Indeed, this excludes all interests that are not specifically included in the relevant laws. The DPA also took the view that purely commercial interests cannot, in any case, be legitimate.

In the administrative appeal proceedings, VoetbalTV argued that this strict interpretation was not in line with the GDPR. The District Court Midden Nederland agreed with VoetbalTV and ruled that a correct interpretation of the legitimate interest entails a different test; if an envisaged interest is not illegitimate or against the relevant laws, it qualifies as legitimate interest under the GDPR. In this respect, it does not matter whether this interest is of a commercial nature.

This decision is expected to have a major impact on the use of the legitimate interest legal basis for the processing of personal data in the Netherlands. A win not only for parties such as VoetbalTV, but also for data subjects more broadly? This remains to be seen.

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Greenberg Traurig, LLP is an international law firm with approximately 2,200 attorneys serving clients from 40 offices in the USA, Latin America, Europe, Asia, and the Middle East. The firm's dedicated TMT team consists of more than 100 lawyers, of which seven are in Amsterdam. The firm's attorneys structure and negotiate a full spectrum of services for clients, from standard transactions to highly complex multinational transactions.

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Herald Jongen has more than 30 years of experience and focuses his practice on technology transactions, outsourcing, strategic relationships and private M&A. He has particular expertise in leading complex multi-jurisdictional projects, in the technology sector and in the financial industry. He goes where the deal is, which took him to New York, Silicon Valley, London, Paris, Brussels, Stockholm, Berlin, Frankfurt and other internal business centres.

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Willeke Kemkers focuses on a broad range of intellectual property issues, including proceedings and the drafting of commercial contracts. Willeke also provides companies with comprehensive and practical guidance to meet their regulatory obligations pursuant to the GDPR and the recently adopted California Consumer Privacy Act (CCPA). She has worked at the GT San Francisco and GT Miami offices to obtain a deeper knowledge of the CCPA and to further develop the global mindset appreciated by international clients.

Nienke Bernard has advised a wide variety of clients on data and technology-related transactions and issues, including data protection compliance, licensing and outsourcing. She also has a strong background in financial regulatory law, particularly within the context of services agreements and fintech.

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