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30TH EDITION



GLOBAL INTELLECTUAL PROPERTY NEWSLETTER
IP TOPICS FROM AROUND THE GLOBE
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30TH EDITION GLOBAL IP NEWSLETTER

Introduction

Welcome to the 30th edition of the Clifford Chance Global IP Newsletter.

Fortunately, increasing vaccination rates significantly promote the fight against the COVID-19 pandemic. However, as the supply with vaccines is still limited, especially poor and middle-income nations struggle to obtain sufficient vaccine, leading to a global supply gap, which gives rise to the question of a fair global distribution system of vaccines. IP is at the centre of this public discussion as some nations argue that a waiver of IP rights, in particular patent protection, would further enhance the global distribution process. Our Spanish team takes a look at the proposal submitted to the TRIPS Council by India and South Africa, aiming at “inactivating” the obligations of WTO Member States relating to IP rights.

With progresses made in the fight against the pandemic, trade shows are slowly back on the agenda, especially this year's Mobile World Congress as the world's most influential exhibition for the connectivity industry. This year's MWC will take place in a hybrid form, both in person and virtual, which lead the Commercial Court of Barcelona and the European Union Trade Mark Court of Alicante to adapt their fast-track protocol for dealing with MWC-related IP proceedings.

New technologies continue to have a significant impact on IP law. Given the increasing significance of algorithms for business models, our German team sheds light on how algorithms are treated under German copyright, patent and trade secret law. Our Italian team provides an overview of two decisions regarding Artificial Intelligence (AI), which take a closer look at how AI software works so that the exploitation of AI is unbiased, ethic and explainable.

In addition, our Italian team discusses a recent decision by the Italian Competition Authority, who fined two Italian companies an overall amount of EUR 2,000,000.00 for misleading consumer practices perpetrated using the app “Telepass”, and analyses the Italian Recovery Plan including its consequences for digitalisation of Italy's private and public sectors.

This Edition concludes with an overview about recent IP case law: The General Court of the European Union has smoothed out discrepancies in case law, clarifying the protection afforded by the exclusive right to a trademark for slogans. Thus, our Polish team analyses the steps that can be taken to protect a slogan as a trademark. Finally, our German team discusses two decisions by the German Federal Constitutional Court ruling that, in general, the defendant must be granted the right to be heard in interim injunction proceedings before a court may issue such injunction.

As always, we hope you enjoy reading this edition. We look forward to receiving your feedback. Take care and stay healthy!

Your Global CC IP Team

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BARCELONA

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COVID-19 AND INDIA AND SOUTH AFRICA'S ATTEMPT TO REOPEN THE TRIPS PANDORA'S BOX¹

The proposal submitted to the TRIPS Council by India and South Africa in October 2020, if approved, would “inactivate” the obligations of WTO Member States relating to copyright, industrial designs, patents and undisclosed information (e.g. know-how) until the Covid-19 pandemic is over. Although the proposal is unlikely to be approved, it has further raised awareness within WTO circles of the need to take additional steps to ensure that Covid-19 vaccines are promptly available to everyone, everywhere.

The Waiver Proposal

On 2 October 2020, India and South Africa submitted a proposal to the Council for Trade-Related Aspects of Intellectual Property Rights (“**TRIPS Council**”) that has rippled the waters of Lake Lemán, the fairy-tale location of the World Trade Organization (“**WTO**”), which had remained relatively calm since the introduction of Article 31bis of the TRIPS Agreement. The document, entitled “Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of Covid-19” (“**Waiver Proposal**”), proposes a “blanket” waiver that would release all WTO members from the obligation to apply Sections 1 (“Copyright and related rights”), 4 (“Industrial Designs”), 5 (“Patents”) and 7 (“Protection of Undisclosed Information”) until an unspecified date. The idea is that such sections would be “inactivated” until the Covid-19 pandemic is under control.

The legal basis of the proposal is Article IX (paras 1, 3 and 4) of the Agreement Establishing the World Trade Organization (“**WTO Agreement**”), which, as an exceptional measure, allows a member to apply for a waiver (i.e. please “give me a break”). For readers who are not GATT (General Agreement on Tariffs and Trade)/WTO aficionados, it might be helpful to clarify that, within the GATT/WTO legal system, a waiver of compliance with a specific obligation may be granted if the applicant justifies a need based on exceptional circumstances, subject to the condition that the waiver must be lifted as soon as such circumstances cease. In short, it is a sort of “escape clause” aimed at temporarily inactivating a specific obligation when the applicant provides justification that such exceptional circumstances prevent the member in question from complying with that obligation. In theory, a waiver could be approved by a three-fourths majority of the members. In practice, as reported by Professor Bob Hudec in his legendary *The GATT Legal System and World Trade Diplomacy*, since the very early days, members have always sought to approve decisions by consensus, a

Brief description

The proposal submitted to the TRIPS Council by India and South Africa in October 2020, although unlikely to be approved, has at least increased awareness within WTO circles of the need to take additional steps to ensure that Covid-19 vaccines are promptly available to everyone, everywhere.

Key issues

- India and South Africa submitted a Waiver Proposal to the TRIPS Council aimed at “inactivating” the obligations of WTO Member States relating to copyright, industrial designs, patents and undisclosed information (e.g. know-how) until an unspecified date.
- The Waiver Proposal raises a number of interesting legal issues, four of which are briefly examined in this article.
- Elementary principles of solidarity require that Covid-19 vaccines be made readily and affordably available to everyone, everywhere, but it is doubtful whether the Waiver Proposal is the right approach.
- However, although the Waiver Proposal it is unlikely to be approved, its submission has not been in vain, as it has raised the awareness of the WTO of the need to further consider how to use the WTO to take initiatives fostered by other international organisations, such as the WHO, to the next level.

¹ The original version of this article was published in the *European Intellectual Property Review* in May 2021.

practice that goes back to 1947, when the then 23 parties to GATT were a small club of good friends.

The Waiver Proposal was discussed at the meeting of the TRIPS Council held on 15 and 16 October 2020 where, not surprisingly, it did not go through. It was supported by a wide group of developing and least developed countries ("LDCs") but was opposed by developed members such as the EU, the US, Switzerland, Japan and Brazil. The view of the latter group is best summed up by the words of the UK's delegate, who called the proposal "*an extreme measure to address an unproven problem*"². On 1 March 2021, the TRIPS Council reported to the WTO General Council that the former had not yet finished considering the waiver request and that it would continue discussions and report back to the WTO General Council in due course. Indeed, at a meeting held on 10–11 March 2021, the TRIPS Council continued its consideration of the waiver request, including looking at how to structure future discussions.

Legal issues raised by the Waiver Proposal

The Waiver Proposal raises a number of interesting legal issues, four of which will be briefly examined below.

The first relates to whether two members (in this case, India and South Africa) have the right to apply for a waiver on behalf of all members of the WTO, including those who oppose it (the EU, the US, etc.) and those who do not need it in the first place, such as LDCs. It should be noted that the proposal has since then been co-sponsored by Kenya, Eswatini, Mozambique, Pakistan, Bolivia, Venezuela, Mongolia, Zimbabwe, Egypt, the African Group and the LDCs Group. In this regard, it is a bit of a paradox that the main supporters of the Waiver Proposal are LDCs that, owing to the transitional periods applicable to them under Article 66.1 due their status as "least developed country", are not obliged to comply with the pharmaceutical-related provisions of the TRIPS Agreement. As mentioned above, historically, the rationale of waivers within GATT's legal and institutional milieu has been to "give a break" to members who demonstrate that, owing to exceptional circumstances, they are temporarily unable to comply with a specific legal obligation. The proposition that a waiver may be requested by or on behalf of members who are not bound by such an obligation in the first place appears to be at odds with the logic of the system.

The second aspect that raises the eyebrows of the legal analyst is that the extraordinary breadth of the Waiver Proposal, unprecedented in GATT's history, is inversely commensurate to the narrow justification put forward by the applicants. The first sentence of para. 9 of the Waiver Proposal states that "[t]here are several reports about intellectual property rights hindering or potentially hindering timely provisioning of affordable medical products to the patients". However, the only document cited to justify this statement is a short news piece published by Bloomberg regarding the Kentucky governor's call on 3M to waive its patent rights so that other companies may manufacture N95 respirators, which actually reports that the alleged problem had

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² "UK statement to the TRIPS Council under Item 15: Proposal for a waiver from certain provisions of the TRIPS agreement for the prevention, containment and treatment of COVID-19" (Geneva: UK Mission to the WTO, UN and Other International Organisations, 16 October 2020).

already been fixed³. This anecdotal evidence falls short of the type of justification required by the WTO to approve even much more focused and limited waivers.

Thirdly, following up on the foregoing, the “blanket” nature of the proposal, which would affect even products unrelated to Covid-19, is not easy to reconcile with the exceptional nature of this type of waiver. In fact, it is even questionable whether the type of measure proposed can technically be called a waiver. Instead, it appears to be closer to a temporary suspension of four sections (Sections 1, 4, 5 and 7 of Part II) of an international treaty without following the procedure set out in Article 57 of the Vienna Convention on the Law of Treaties 1969, which, to suspend the application of an international treaty, requires the consent of all the parties to the treaty.

Finally, was the proposal necessary in the first place? According to John-Arne Røttingen, the chair of the World Health Organization (“WHO”) Solidarity Trial of Covid-19 treatments, the Waiver Proposal is the “*wrong approach*”⁴. In his view, the main barriers for accessing medicines related to Covid-19 are not IP-related but have to do with the complexity of biological medicines such as vaccines, healthcare infrastructures and production facilities. It could be added that the TRIPS Agreement already contains the necessary legal armamentarium to address the concerns expressed by the Proposed Waiver, for example: Article 31bis establishing waivers for exports to countries lacking production facilities, which is precisely one of the factors that, as mentioned, may limit access to Covid-19 treatments. The countries looking to have the Proposed Waiver approved contend that following the Article 31bis procedure would be cumbersome and time-consuming. However, no evidence is cited to support that proposition. The fact that this procedure, originally subject to years of fierce negotiations, has only been used once, has nothing to do with the alleged cumbersome nature of its requirements, which are actually akin to those envisaged by national laws for similar procedures, such as applications for compulsory licences.

The TRIPS Agreement already contains the necessary tools to address the needs arising from Covid-19

Clearly, elementary principles of solidarity require that Covid-19 vaccines be made readily and affordably available to everyone, everywhere. It is time to embrace vaccine solidarity, not vaccine nationalism. But, for the reasons outlined above, it is doubtful whether the Proposed Waiver is the right approach. The practice followed by countries like Germany illustrates that the TRIPS Agreement, as it stands, is already fit for purpose. In addition, corporate social responsibility should of course play a very prominent role in these difficult times.

Notwithstanding the aforementioned drawbacks, the submission of this proposal has not been in vain. It did make WTO members see the need to further consider how to use the WTO to take initiatives fostered by other international organisations, such as

³ Morgan Watkins, “Kentucky Gov. Andy Beshear calls on 3M to release patent for N95 respirator amid pandemic”, Louisville Courier Journal available at: <https://eu.courier-journal.com/story/news/2020/04/03/beshear-calls-3-m-release-patent-n-95-respirator-amid-pandemic/5112729002/> [Accessed 6 May 2021].

⁴ Ann Danaiya Usher, “South Africa and India push for COVID-19 patents ban” (5 December 2020) available at: [https://doi.org/10.1016/S0140-6736\(20\)32581-2](https://doi.org/10.1016/S0140-6736(20)32581-2) [Accessed 6 May 2021].

the WHO, to the next level. In this regard, less than two weeks after India and South Africa tabled the Waiver Proposal, the WTO Secretariat reacted to this move by publishing an information note dated 15 October 2020 (the "**Note**") entitled "The TRIPS Agreement and COVID-19". This document, which has gone relatively unnoticed, illustrates that the TRIPS Agreement already contains the necessary legal tools to address the needs arising from Covid-19. The Note also reports on the measures already adopted by some WTO members to cope with the situation created by the pandemic. For example, the Note explains that some countries, such as Brazil and Russia, have introduced accelerated patent examination procedures for applications related to Covid-19. Likewise, some patent offices have introduced measures aimed at easing requirements, such as formalities and the payment of fees. Also, some WTO members such as Canada, Germany, Hungary, Israel and New Zealand have approved rules based on Article 31 (*"other use without the authorization of the right holder"*) of the TRIPS Agreement to allow the granting of compulsory licences in emergency situations if necessary. Depending on how things unfold, it will be interesting to see how the courts interpret the contours of Article 31, a provision with the typical convoluted flavour of provisions adopted by consensus.

Conclusion: Although unlikely to be approved, the Waiver Proposal has not been in vain

All in all, the lack of use of grand reforms such as Article 31bis illustrates that discrete smaller steps within the current legal framework are more useful than high-profile proposals, such as the Waiver Proposal, which is not likely to get anywhere in its current form. But, as mentioned, the Waiver Proposal was not submitted in vain, as it has served to ripple the waters of Lake Lemman and further raise the awareness of the WTO and its members of the need to ensure that the invaluable solutions offered by intellectual property promptly reach everyone, everywhere.

BARCELONA

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COVID-19 FORCES ORGANISERS TO ADAPT THE FORMAT OF THE MOBILE WORLD CONGRESS (MWC) 2021 TO THE "NEW NORMAL" AND THE COURTS TO ADAPT THE FAST-TRACK PROTOCOL TO PROTECT INTELLECTUAL PROPERTY RIGHTS (IPRS) WITH EFFECT FOR THE LONG TERM

Unlike last year, the COVID-19 pandemic will not result in the cancellation of the 2021 edition of the MWC, the world's most influential exhibition for the connectivity industry, which will take place in Barcelona from 28 June to 1 July 2021. At least not as things stand today. Its format, however, will be different from previous editions, as it will be held both in person, under rigorous security measures to minimise the risk of contagion as much as possible, and – for the first time ever – virtually.

This new hybrid format of the MWC 2021 has inevitably meant that the Commercial Court of Barcelona and the European Union Trade Mark Court of Alicante have had to adapt their fast-track protocol for dealing with MWC-related IP proceedings, i.e. to cover the virtual dimension of the event, which is gaining momentum as its opening date approaches.

The MWC and its new format for the 2021 edition

The MWC is not just an event. Over the last few years it has become one of the world's leading congresses in its sector, attracting the attention of millions of people every year. The event takes place over four days and generates enormous expectations, with the presence, at least in the last editions, of around 100,000 professionals (including thousands of CEOs) from some 200 countries, thousands of accredited journalists and millions of people who follow the presentations and news generated by the congress through multiple media. In the last few years, it has occupied an area of more than 100,000 square metres, accommodating more than 2,000 exhibitors, generating around 13,000 jobs and an economic impact of close to 500 million euros.

Brief description

The fast-track protocol for dealing with MWC-related IP proceedings has been updated by the Commercial Court of Barcelona and the European Union Trade Mark Court of Alicante to adapt it to the new semi-virtual format of the MWC 2021.

Key issues

- The Commercial Court of Barcelona and the European Union Trade Mark Court of Alicante have updated their fast-track protocol for dealing with MWC-related IP proceedings to adapt it to the new format of the MWC 2021.
- The protocol is a combination of measures already included in previous versions of the same and new measures, the latter specifically focused on covering conflicts that may arise due to activities undertaken online or through virtual platforms provided by the MWC organisers.
- The protocol covers infringement of technological patents and industrial designs relating to products exhibited during the MWC 2021, as well as infringement of trademarks, copyrights, trade secrets, and also acts of unfair competition and unlawful advertising regarding products and materials displayed at the event.
- Preferential treatment is given to urgent applications for interim injunctions, pre-trial examination and "saisie-style" applications connected with both the on-site and the virtual part of the MWC 2021.

This year, however, the MWC 2021 is far from being the event it has been in recent years. The restrictions in place due to COVID-19 and the decision by industry giants not to participate in person at the event have made it necessary to rethink its format and bring it into line with the so-called "new normal". Thus, this year's edition will be held not only for those attending in person, as had been the norm, but – for the first time in history – also virtually.

Although evaluations will have to be made after the event has taken place, this new semi-virtual format – introduced in a somewhat desperate attempt to prevent the event from being cancelled again – seems to have been well received by the participating companies. In fact, as we get closer to the event, more and more companies are jumping on the bandwagon of an exclusive virtual presence in the event to ensure that neither workers nor assistants are put at any risk. This is the case for giants such as Samsung, Intel, Ericsson, Nokia, Sony, Lenovo, Nvidia, Google and Xiaomi.

Whatever the format of the MWC 2021, participating companies will doubtless have an opportunity to present their new proposals related not only to mobile telephony and wireless communication, but also to artificial intelligence, robotics, virtual reality, augmented reality, drones and all kinds of software and hardware. And conflicts related to the infringement of IPRs connected to the products and services promoted or displayed at the fair trade, either on-site or virtually, may of course also arise. And most likely they will arise, which is not surprising considering that during the event a very large number of technical innovations are being presented for the first time, including the latest achievements in wireless telecommunications and mobile technology, new applications and next generation software, design innovations for mobile devices, and so on.

Foreseeing potential conflicts between the companies participating in the MWC 2021, the Commercial Court of Barcelona and the European Union Trade Mark Court of Alicante, doing their best to help make the event as successful as possible, have jointly agreed to adopt and apply their fast-action protocol for dealing with MWC-related IP proceedings (the content of which has been adapted to the new hybrid format of the event) throughout the month of June 2021 and for the duration of the MWC 2021.

The adapted fast-track protocol for dealing with MWC-related IP proceedings

The fast-action protocol for the MWC 2021 was adopted on 5 May 2021 by Commercial Court of Barcelona – for the seventh consecutive year – and the European Union Trade Mark Court of Alicante – for the third consecutive year – with a view to establishing effective procedural measures to avoid, to the extent possible, adopting interim injunctions based on IPRs on an *ex parte* basis and also to ensure that effective measures are adopted to protect IPRs.

The protocol contains measures that were already included in the version of the protocol approved for the 2020 MWC, which did not take place, and new measures focused on covering the virtual part of the event. Let us take a closer look at these measures.

- Protective letter submissions are allowed by the protocol to reduce the risk of *ex parte* interim injunctions.
- Prompt court decisions: 24 hours to admit/reject protective letters; 48 hours to decide on "saisie-style" applications, pre-trial examination applications and *ex parte* interim injunction applications; and a maximum of ten days to hold a hearing and hand down a decision on applications for interim injunctions where a protective letter was previously submitted.
- Measures will be instigated to protect trade secrets in proceedings in which they must be considered to resolve the case.
- Promotion of virtual hearings of the opposing party in the event of interim injunctions.
- If necessary, the police's IT unit will enforce the urgent measures included in the protocol.
- Judges will supervise the enforcement and resolve incidents by phone.
- Immediate execution by the Barcelona Commercial Courts of urgent measures ordered by the European Union trademark and Community design courts in Alicante to guarantee prompt and effective decisions on IPRs.

Standard measures included in the protocol

The measures included in this year's protocol that were already included in previous versions are as follows:

- Giving preferential and priority treatment to urgent applications for interim injunctions (whether or not the defendant is heard), pre-trial examination applications (*diligencias preliminares*) and "saisie-style" applications (*diligencias de comprobación de hechos*) related to technology patents and industrial designs of products to be exhibited at the MWC 2021, acts of trademark and copyright infringement, and acts of unfair competition and unlawful advertising in relation to products and materials to be promoted or displayed physically or virtually at the event.
- Committing to handle the pre-trial examination applications, the "saisie-style" applications and the *ex parte* interim injunctions within a two-day period (48 hours) from their receipt by the court; and to resolve interim injunctions with a hearing within a maximum period of ten days, provided that a protective letter has been filed.
- Within the framework of a potential conflict with another company regarding IPRs and in light of the reasonable fear of being subject to an application for an *ex parte* interim injunction, ruling on the admission of a protective letter (*escrito preventivo*) within the same day (24 hours) of its filing at court. The admission of and immediate decision on such protective letters is aimed at avoiding *ex parte* interim injunctions to the extent possible, and therefore allowing the defendant firstly to put forward their arguments and secondly to express their willingness to appear at court immediately to be heard in case any request for *ex parte* interim injunctions against it is filed at court.
- To assess the urgency of adopting *ex parte* interim injunctions, the protocol indicates that the prior conduct of the applicant and the speed with which such applicant has reacted after becoming aware of the potential infringement shall be decisive. This means that the holder of IPRs who have prior knowledge of the potential infringement should not unjustifiably refrain from filing the application until shortly before the MWC to create artificial urgency that could have been avoided simply by filing the application earlier. Whenever possible, the interim injunction application will be deemed to have been filed in good faith with such notice as not to impede the hearing of the defendant.
- Ordering, *ex officio* or at the request of a party, the implementation of any measures necessary to protect the confidentiality of information that may constitute a trade secret in proceedings in which they must be considered to resolve the case.
- And, finally, the immediate enforcement by the Barcelona Commercial Courts of preliminary injunctions and/or urgent measures ordered by the European Union trademark and Community design courts in Alicante within the scope of their specific competence, thereby guaranteeing prompt and effective decisions in relation to these specific IPRs.

Clifford Chance Spain

- Legal 500 – Tier 1 Patents
- Legal 500 – Tier 1 Copyrights
- Legal 500 – Tier 3 Trademarks

Clifford Chance Spain

- IP Stars 2021 – Tier 1 Patent Contentious

New measures made necessary by the new semi-virtual format of the MWC 2021

The new measures included in this year's protocol that are specifically aimed at adapting to the hybrid format of the MWC 2021 in the light of the COVID-19 pandemic are as follows:

- Interim injunctions and other urgent measures filed will be extended to cover not only those activities undertaken in person in Barcelona, but also those carried out online or through any type of virtual platform provided by the MWC organisers.
- Promotion of virtual hearings of the opposing party in the case of interim injunctions.
- If necessary, the police's IT unit will enforce the interim injunctions or other urgent measures, always under the supervision of the judges.
- The judges will supervise enforcement and resolve any incidents by phone.

The Barcelona office is ready to make our clients' participation in the MWC 2021 a success!

Based on our experience, MWC 2021 could be a busy trade fair in terms of IPR-related disputes and urgent actions to be taken. This is borne out by the 2019 Results Report handed down by the Commercial Court of Barcelona and the European Union Trade Mark Court of Alicante on 4 March 2019.

According to this Report, a total of 50 matters were admitted and resolved in 2019 during the application of the protocol for the MWC 2019, an increase of 42.8% over 2018. In particular, the number of protective letters filed and admitted increased by 50% (36 compared to 24 in 2018) and the number of "saisie-style" applications increased by 66% (5 compared to 3 in 2018), whereas the number of *ex parte* interim injunctions filed remained unchanged (7 both years), likewise interim injunctions with a hearing (1 both years).

For the cancelled MWC 2020 edition, the report predicted an increase in the number of matters filed, especially of protective letters, "saisie-style" applications and interim injunctions. We will see if this is the case this year or if the new semi-virtual format of the MWC 2021 will somehow undermine this forecast.

In any case, we are ready to make our clients' participation in the MWC 2021 a success!

DÜSSELDORF

Dr. Florian Reiling / Niklas Blatz

IP-RELATED RISKS AND PROTECTION OF ALGORITHMS

Every time you press the search button on google, the search engine scans millions of websites in a few milliseconds and displays the results you are looking for. All of this is made possible with the help of an algorithm. In fact, we encounter algorithms almost everywhere, they decide what we see on social media, which films are suggested to us on Netflix or which route we take by car. They are also a key component of many modern digital products. The terms digitisation, Industry 4.0, Artificial Intelligence or Big Data have one thing in common: they describe the evaluation of large amounts of data using intelligent algorithms. Examples are self-driving cars, autonomous robot systems, medical diagnostic systems or the Internet of Things.

While the significance of algorithms is increasing and they are becoming relevant for a growing number of business models, the important question from an IP point of view is whether the respective national IP regime offers suitable means for protecting algorithms. This article sheds light on how algorithms are treated under German copyright (I.), patent (II.) and trade secret law (III.).

What is an algorithm?

Despite its widespread use and importance, there is no universal definition of an algorithm. In simple form, however, it is a finite, abstract, effective, compound control structure, imperatively given, accomplishing a given purpose under given provisions.¹ Algorithms can also be categorised based on their various control structures, e.g. sorting, searching or predictive algorithms.

I. Copyright law

In terms of copyright law, algorithms themselves are not to be included under the work categories in section 2 (1) German Copyright Act ("**GCA**") unless a computer program in its entirety is categorised as an algorithm. However, there are technical arguments against this, given that a computer program consists of the implementation of algorithms in programming language on a processor. Furthermore, section 69a (2) GCA specifies that all expressions of a computer program are protected, however ideas and principles are not. Therefore, it is questionable whether an individual algorithm as a mathematical logical chain of processing instructions can constitute a "work" beyond its concrete implementation in the programming language. So far, it has only been recognised that the specific application and linking of algorithms in a program and the way in which they are implemented can be protected by copyright.²

II. Patent law

Turning to patent law, it would be wrong to say patent protection for algorithms is excluded per se. However, obtaining patent protection for an algorithm is often rather tricky. In particular, from a legal perspective it is questionable whether an algorithm has

Brief description

While the significance of algorithms is increasing and they are becoming relevant for a growing number of business models, the important question from an IP point of view is whether the German IP regime offers suitable means for protecting algorithms. This article sheds light on how algorithms are treated under German copyright, patent and trade secret law and demonstrates that in many cases there are convincing strategic reasons for protecting algorithms as trade secrets. Although such protection does not require registration or payment, it is advisable to prepare for challenges.

Key issues

- While the significance of algorithms is increasing, the important question from an IP point of view is how algorithms can be protected under IP law.
- There is often some degree of uncertainty as to whether algorithms themselves enjoy copyright and patent protection. However, the requirements for protection as a trade secret are generally met.
- Trade secret protection does not require registration or payment. Nevertheless, companies looking to protect an algorithm as a trade secret protection need to be prepared for challenges.

¹ See comments by Hill in "What an Algorithm Is" (2016), published in 29 PT 35, p. 35-47.

² See comments by Scheja in "Schutz von Algorithmen in Big Data Anwendungen" (protection of algorithms in Big Data applications), published in CR 2018 (8).

the technical character of an invention – as required under section 1 (1) German Patent Act ("**GPA**"). Algorithms generally contain instructions that enable work processes to be carried out step-by-step according to defined rules. Their goal is usually the solution of problems by means of logic alone; the help of the forces of nature is only used in their actual implementation. Therefore, in principle, not the algorithm itself, but in most cases its use in the context of a specific program may be patentable if this specific use is linked to or otherwise makes use of natural forces.

Moreover, it is often rather risky to file a patent application for an algorithm, given that such patent filing requires the comprehensive disclosure of the invention, and therefore of the algorithm. Even if patent protection were to be obtained, it would only be given for the specific use in the respective application. Such protection does not prevent third parties from using the algorithm in the context of another program, which is a strong argument against the protection of algorithms as patents in most cases.³

III. Trade secret law

For algorithms themselves, there are still no prospects of copyright protection at the moment. In the case of patent applications, the disclosure of the algorithm is particularly problematic. However, many believe that trade secret protection is the best option for the protection of algorithms. In this respect, *Nirwani* states that in today's "increasingly complex, highly competitive, hyperconnected world, some things that might ordinarily be traditional IPRs (...) are best kept secret".⁴ To do this, an algorithm would have to meet the requirements of a trade secret (**1.**). In addition, a company would have to secure the ownership of such trade secret (**2.**).

Let us have a look at both the legal requirements and the practical measures that should be taken.

1. Trade secret requirements

Section 2 (1) of the German Trade Secret Act ("**GTSA**") defines information as a trade secret which is:

- only accessible to a limited group of people and is therefore of commercial value,
- subject to appropriate confidentiality measures; and for which
- a legitimate interest in confidentiality exists.

Regarding the accessibility to a limited group of people, persons who usually deal with the type information in question must be taken into account. They should not know the exact arrangement and composition of the algorithm and it should not be easily accessible to them. The criterion of commercial value is to be understood in a broad manner and hence a commercial value can generally be assigned to algorithms. In short, if an algorithm is not revealed, it usually meets the first requirement.

Claudia Milbradt

- *IP Stars 2021: Claudia Milbradt ranked as Patent star and Trademark star*

³ See comments by Scheja in "Schutz von Algorithmen in Big Data Anwendungen", published in CR 2018 (8).

⁴ See comments by P. Nirwan in "Trade Secrets: the Hidden IP Right", published in WIPO Magazine December 2017 https://www.wipo.int/wipo_magazine/en/2017/06/article_0006.html.

The appropriateness of confidentiality measures depends very much on the individual case. There are various criteria that can be taken into account when assessing appropriateness, for example the size of the company, the development costs or the importance of the secret for the company. Especially for small and medium-sized companies that do not have sophisticated IT security structures in place, these topics are new and require effort and investments.

In principle, however, a zero-trust approach should be adopted for everyone who has access to the algorithm. Most importantly, the algorithm should be stored in a special virtual vault. Access should require a second factor of authentication. Companies must ensure that the number of employees with access to the project or algorithm is reduced to a minimum. In addition, every employee with access to the vault should sign a confidentiality agreement and should be obliged not to continue using the algorithm once they have left the firm.⁵

2. Ownership of a trade secret

If an algorithm meets the criteria of a trade secret, however, requirements regarding ownership must be observed. In order to be a "trade secret holder", which can be any natural or legal person, a party must lawfully control a trade secret, as required by section 2 (2) GTSA. Legal control is attributed to the person who (i) has de facto power over the respective information and (ii) is legally entitled to own it.

Therefore, if an algorithm is developed in-house, it is important that employers ensure that grant of rights clauses apply to all employees who participate in the processing and development of an algorithm. Furthermore, even in the event of theft, ownership of an algorithm can be ensured, e.g. by means of technical measures. For example, IBM embedded digital watermarks into the deep neural networks in AI, similar to the multimedia concept of watermarking digital images. Depending on the type of algorithm, there are different technical options here, all of which offer additional security for protecting ownership.

IV. Conclusion

Protection of algorithms is not any easy task for companies that are involved in the relevant technological sectors. However, German IP law offers various means of ensuring adequate protection of algorithms. In this context, trade secret protection is the most promising, and also the most suitable means of protection available. However, despite all statutory legal protection options, it should be noted that companies have the destiny of their "corporate crown jewels" in their own hands and bear the ultimate responsibility, e.g. for taking industry standard know-how protection measures, adopting the aforementioned zero-trust approach or establishing an appropriate confidentiality regime.

⁵ <https://www.csoonline.com/article/3565195/how-to-protect-algorithms-as-intellectual-property.html>.

MILAN

Andrea Tuninetti Ferrari / Shadia Obaidi

THE ITALIAN COURTS LEAD THE WAY ON EXPLAINABLE AI

The *Deliveroo* case: "Blind" AI leads to discrimination

Following the Italian trade unions' claim that Deliveroo discriminates riders through its algorithm, the Court of Bologna investigated how Deliveroo allocates deliveries among the riders who apply through the dedicated app.

It emerged that Deliveroo provides its riders with a "flexible self-service booking service" ("**SSB**") with which they book work sessions as follows:

- To apply for deliveries, riders access the SSB every week in order to make themselves available for that week by selecting the windows during which they will be available to make deliveries;
- To make themselves available, riders access the SSB every Monday during three different time slots, i.e. 11 a.m., 3 p.m. or 5 p.m.. The earlier a rider accesses the SSB, the more chance they have of finding suitable deliveries windows. So, for example, a rider has a greater chance of being allocated deliveries on a Saturday night (when Deliveroo's customers are more likely to order food deliveries) in a given week if they log into the SSB at 11 am on Monday, rather than at 5 p.m., because at 5 p.m. there are less delivery slots available for that week;
- Each rider, however, is allowed to access the SSB only in one of the aforementioned three Monday slots, depending on their "reputation ranking" as calculated by 'Frank', Deliveroo's algorithm. The reputation ranking is a score that combines two different variables, as follows:
 - The "reliability index", which is in inverse proportion to the number of times the rider failed to attend a work session they had applied for on the previous Monday; and
 - The "peak participation index", which is proportional to the number of times the rider made themselves available for deliveries during the high demand delivery windows, i.e. the windows between 8 p.m. and 10 p.m. on Fridays, Saturdays and Sundays, when Deliveroo's customers are most likely to require food deliveries.
- The reputation ranking is materially affected if the rider:
 - Makes a "late cancellation" of a delivery window that the SSB had assigned to them: Riders can withdraw from a delivery window only until 24 hours before that window starts, otherwise a late cancellation (occurring less than 24 hours before the start) will have a significant negative impact on that rider's reputation ranking;
 - Fails to log into the Deliveroo app at least 15 minutes before the start of the delivery window the SSB had allotted to them.
- Based on the reputation ranking, the SSB then allows riders to access on Mondays as follows:

Brief description

In two recent groundbreaking decisions the Italian courts have taken a close look at *how* artificial intelligence software works, with the aim of ensuring that the exploitation of AI is unbiased, ethic and explainable.

- In the *Deliveroo* case, the Court of Bologna granted the Italian trade unions' claim that the algorithm used by delivery platform Deliveroo to rank riders and allocate deliveries is discriminatory since the app downranks riders simply because they failed to make a delivery, irrespective of whether the rider in question had justifiable reasons for their absence (e.g. health reasons, child care, exercise of a worker's right to strike).
- In the *Mevaluate* case, the Court of Cassation stated that, when a web platform providing reputation ranking services relies on an algorithm to produce reputation scores, users cannot be deemed to have been fully aware when they granted privacy consent if they had no knowledge of the key logic and key elements of the algorithm. Hence the privacy consent is not valid.

- 11 a.m.: 15% of riders, i.e. those having the best reputation ranking;
- 3 p.m.: 25% of riders with the second-best ranking; and
- 5 p.m.: The remaining 60% of riders.

Consequently, riders who access the SSB at 11 a.m. have more job opportunities than the others.

As a result of the foregoing, the Court of Bologna found that the Deliveroo working system shows an intrinsic discriminatory character, because the way 'Frank' the algorithm calculates the reputation ranking is *blind* to the reason for a rider's delay in cancelling a delivery window 24 hours beforehand, or logging into the app 15 minutes before the window begins.

The Court concluded that Frank's *blindness* is discriminatory to the riders, because it deprives them of some of their basic rights in their capacity as employees. For example, Frank treats in the same way – by simply lowering the reputation ranking – cases that are in fact very different, e.g. that of a rider who unjustifiably fails to login, and that of a rider who failed to login for objective and legitimate reasons (e.g. health reasons, child care, exercise of a worker's right to strike).

The Court also commented that it would have been possible for Deliveroo to train Frank not to discriminate, considering that – at the time of the decision – Frank already fixed rankings in two cases, i.e. in the case of an injury on consecutive shifts (provided that there is evidence that it has in fact prevented the continuation of the work) and a technical problem of the site, such as an app crash. In the Court's opinion, this showed how the Deliveroo decision to treat riders who were absent from work for legitimate reasons and riders who did not have valid excuse in the same way was totally deliberate, hence Deliveroo was obliged to fix Frank.

The Mevaluate case: privacy consent is void if the user does not know how AI works

This case concerns the provision of a reputational rating service, whereby users could access a web platform made available by a non-profit organisation, Mevaluate, in order to obtain an impartial assessment of their reputational ranking. For example, a job candidate may have used this service in order to show their prospective employer a third party's assessment of their reputation.

In 2016, the Italian DP Authority issued a ban preventing Mevaluate from processing personal data through its web platform, because the processing was inconsistent with the principles of the then applicable Italian Privacy Code, such as lawfulness of processing and data minimisation, data subject's consent, processing of sensitive data.

Mevaluate successfully appealed the decision before the Court of Rome, according to which – in the absence of a regulatory framework governing the provision of reputational rating services – the provision of that kind of services is left to the initiative of service providers like Mevaluate, and the users' use of the platform and of the resulting rating are based on the users' consent to the processing of their personal data through the platform.

Links

- *Deliveroo* decision: Court of Bologna's ruling of 31 December 2020 (docket no. 2949/2019) <https://riders.deliveroo.it/it/support/pagamenti/scarica-il-pdf>
- *Mevaluate* decision: Court of Cassation's ruling no. 14381 of 25 May 2021 (docket no. 17144/2018) <http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=./20210525/snciv@s10@a2021@n14381@tO.clean.pdf>
- Draft AI Regulation: <https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence-artificial-intelligence>

Key issues

- Businesses relying on AI solutions must ensure that AI is unbiased, ethical and explainable
- Algorithmic transparency can be tackled from a number of standpoints, e.g. employment law, privacy law
- Italian courts embrace the risk-based approach envisaged in the draft AI Regulation

Following the Italian DP Authority's appeal, yesterday the Court of Cassation overturned the Court of Rome's decision on the following grounds:

- The key issue is whether – before using the rating platform – the user is sufficiently informed about how the algorithm calculates the rating;
- To solve that key issue one has to assess not only whether the user gave their consent to the algorithm-based processing, but also whether that consent was lawfully granted, i.e. the user was fully informed about all aspects of the subsequent processing (consistently with the then applicable data privacy law implementing the Privacy Directive);
- It is the duty of the data controller (the service provider) to provide evidence that the consent given by the user was suitable to cover the actual processing, in this case, that the consent covered the logic underlying the algorithm's calculation of the ranking;
- The lower court's decision does not deny that the algorithm lacked transparency. The Court of Rome concluded that transparency was not an issue, because it is market recognition that ultimately determines whether a product is worth buying (in other words users end up buying digital services that 'work well', but do not necessarily need to reverse engineer them to know how the algorithm works);
- The Supreme Court rejected the lower court's reasoning, and concluded that by agreeing to use a web platform, the user cannot be deemed to have agreed to be bound to an algorithm the underlying logic of which is totally obscure to them.

Conclusion

While the decisions above take two different approaches – in the *Deliveroo* case the Court of Bologna considers the use of AI from an employment law perspective, while in the *Mevaluate* case the Court of Cassation tackles AI from a privacy angle – they are quite consistent as to the premises on which they are based and their conclusions.

The starting point to both decisions is the view that there is an information asymmetry between the business deploying AI (*Deliveroo*, *Mevaluate*) and the user (the *Deliveroo* riders, the *Mevaluate* users). It is therefore imperative to prevent the business from taking unfair advantage of that asymmetry. And to avoid that risk, both Italian courts deemed it necessary to first identify the capacity in which users use the AI-based solution: The Court of Bologna's decision starts by saying that riders are to all effects employees; the Court of Cassation takes it for granted that reputation defines and identifies an individual to such an extent that reputation-related data qualifies as personal data, thereby triggering privacy laws.

Both decisions are also based on the assumption that the use of AI significantly infringe certain fundamental individual rights, consistent with the risk-based approach envisaged in the draft AI Regulation currently being discussed by the EU institutions. The two decisions are quite ahead of the curve in this respect because they flag a risk in cases where (i) the algorithm does not take into account all relevant information (e.g.

Deliveroo's Frank valued app bugs, but not the rider's justifiable absences) when rectifying a rider's ranking, (ii) the algorithm processes sensitive data (such as an individual's reputation), and/or (iii) the algorithm's decision making is not transparent, so that the user cannot understand the logic behind the algorithm's decision.

Put into the wider context of the EU institutions' approach to AI, the Italian decisions call for greater focus on all aspects of AI development and compliance, hence the following actions should be taken into account by all businesses intending to use AI-based solutions:

- Identifying all potential risks arising from the use of AI. Environmental, social, governance drivers to be considered alongside the pure business ones;
- Promoting internal governance and compliance systems aimed at ensuring that AI can be explained (e.g. to users, authorities), and to show how AI pursues algorithmic transparency, data cleanliness, ethics;
- Identifying remedies (e.g. insurance policies) aimed at limiting the risks associated with the use of AI.

MILAN

Iolanda D'Anselmo

THE ITALIAN COMPETITION AUTHORITY FINED TWO COMPANIES OF THE TELEPASS GROUP FOR UNFAIR COMMERCIAL PRACTICES

Introduction

In its decision no. 28601 of 8 March 2021, the ICA imposed a EUR 2 million fine on Telepass S.p.A. and its subsidiary, Telepass Broker S.p.A. (hereinafter, “**Telepass**”) for unlawful commercial practices in violation of Articles 21 and 22, paragraphs 1 and 2, of the Italian Consumer Code.¹ The unlawful practices consisted of the lack and inaccuracy of information provided to customers regarding (i) the collection and use of the customers’ data for commercial purposes; (ii) the identification of the relevant insurance companies; and (iii) the criteria adopted by Telepass to select the fee quotes for car insurance services provided to drivers. To use wording familiar to privacy practitioners, the ICA found the companies liable for lack of transparency.

The case

The activity investigated involved the distribution of motor liability insurance policies through the app *Telepass* to customers holding its mobility service cards called “Telepass Family” and “Telepass Viacard” (the “**Service**”). More specifically, through the app, Telepass provides its customers with a selection of quotes, offering them the possibility to take out a motor liability insurance policy. Once the customer selects the quote to take out the policy, the entire process is managed by Telepass through the app, including the applicable information duties under privacy and insurance laws.

According to the ICA, the information provided to customers (through the app and Telepass’ website) to promote the Service was limited to emphasising the easiness, speed and economic benefits of the procedure,² without properly informing customers that (i) their personal data was collected by Telepass from the insurance companies and/or from a shared database of the Telepass’ companies and that (ii) their personal data was used by Telepass not only to provide customers with insurance policy quotes, but also for Telepass’ commercial purposes. The information regarding the processing of data for marketing purposes was just included in the privacy notice and therefore provided to customers at a later stage.

Moreover, according to the ICA’s decision, customers were not able to identify the insurance companies offering the insurance policies, as Telepass just displayed the partners’ logos on the app, without specifying that some of them were mere intermediaries acting as agents on behalf of unidentified insurance companies.

Lastly, Telepass did not clarify the criteria and parameters used for the selection of the proposed quote.

Brief description

In a recent decision, the Italian Competition Authority (*Autorità Garante per la concorrenza ed il mercato*, “**ICA**”) fined two Italian companies belonging to the Atlantia Group an overall amount of EUR 2,000,000.00 for misleading consumer practices perpetrated using the app “*Telepass*”.

Key issues

- Data as an asset having economic value and as part of the service
- Data as a means to determine the conditions of the service
- Lack of transparency is an issue under both privacy and consumer laws
- Compliance with privacy laws is not sufficient to ensure compliance with consumer and competition laws

¹ I.e. the Italian legislative decree no. 206 of 6 September 2005.

² Customers could benefit from a discount if they took out a policy through the Telepass app.

According to the ICA, the above conduct constitutes commercial practices which are unfair towards customers, as the lack and inaccuracy of the information displayed on the Telepass app and website resulted in a commercial decision by the customers which was taken in the absence of the information which would have been necessary for customers to make a conscious and responsible choice.

Legal insights

For the second time in a year,³ the Italian authority recognised that data has economic value and therefore made clear that data processing is not only a “privacy affair” but also enjoys the protection of competition and consumer law.

The economic value of personal data is primarily a matter of consumer law as the way and the purposes for which it is used form an integral part of the customers’ decision-making process before entering a contract. In the Telepass case, the data customers provided to Telepass was used not only to provide them with insurance policy quotes, but for Telepass’ own marketing purposes.

We are used to thinking about information duties in respect of the processing of data merely as privacy obligations (falling within the scope of the transparency principle under the GDPR). That is why it is not surprising that one of the defences raised by Telepass in the case in question was that the privacy notice delivered to customers clearly stated that their personal data was used also for the purpose of Telepass’ marketing activities and that customers could object to this processing. However, compliance with privacy duties was not deemed sufficient by the ICA. The Authority clarified that *“the possibility offered to customers to refuse marketing communications (such as email address included in the privacy notice or the link <<unsubscribe>> at the bottom of emails) are ancillary aspects which just relate to consumers’ rights on the processing of their personal data, but they do not refer to nor replace vendors’ duties to correctly and transparently inform customers of the commercial use of their personal data by the vendors before entering into service agreements. Privacy duties come after commercial information duties”*.

In summary, according to the ICA, transparency duties provided for by privacy laws do not replace those set out by consumer/competition laws to ensure customers’ awareness and responsibility when making commercial decisions. When personal data is used for purposes other than the performance of a contract (such as commercial purposes), the processing of data also constitutes a commercial practice and must comply with consumer laws and regulations.

Conclusions

Compliance with privacy regulations is not sufficient to avoid complaints and fines for unfair commercial practices. As stated previously, this is not a brand new principle, but it pushes companies to pay more attention: handling personal data itself can be deemed as a commercial practice, regardless of the reason underlying data collection

³ Another important decision in this field was issued by the *Tribunale Amministrativo Regionale* for Lazio in its decision no. 261 published on 10 January 2020 (Facebook v. Italian Competition Authority), whereby the Court stated that a digital service is not provided “for free” even if the consideration for the service only consists of the use of personal data for marketing purposes.

(that in the majority cases is the performance of contractual obligations vis-à-vis customers).

The decision of the ICA, together with the one in the Facebook case, suggests that Italian authorities are moving closer to the EU approach to data,⁴ whereby in a digital economy consumer and privacy laws can no longer belong to “different worlds”. Data is a crucial asset of many data-driven consumer products and services and collecting and processing data as part of offering services to consumers will become even more relevant with the development of the Internet of Things.

⁴ See, for example, the opinion issued by the European Data Protection Supervisor available at https://edps.europa.eu/data-protection/our-work/publications/opinions/privacy-and-competitiveness-age-big-data_en

MILAN

Andrea Andolina / Greta Negro

ITALIAN RECOVERY PLAN: DIGITALISATION AND IP STRATEGY FOR 2021-2023

In the context of the Next Generation EU package, Italy will receive EUR 191.5 billion, which will be used according to the investment plan prepared by Italian government, *Piano Nazionale per di Ripresa e Resilienza ("PNRR")*, to fuel the recovery after the pandemic crisis. The PNRR is based on six pillars which are the "missions" pursued and areas of intervention:

1. digitalisation, innovation, competitiveness and culture;
2. green revolution and ecological transition;
3. infrastructures for sustainable mobility;
4. education and research;
5. inclusion and cohesion;
6. health.

Each mission is further divided in sub-categories and includes the reforms necessary to achieve the respective objectives. Here, we will focus on digitalisation and innovation, the **1st Mission**, aimed at (if fully pursued) radically changing the competitive landscape of the Italian market through investments in digital infrastructure and reform of industrial property law.

A (truly) digital environment

The 1st Mission allocates about EUR 40.73 billion in order to "innovate the country and to bring about deep structural changes along the lines of a new digital paradigm". In other words, the PNRR aims at fostering Italy's competitiveness and making the country more attractive for private investments.

To this end, establishing an effective and functional digital environment is perhaps the enabling factor and therefore infrastructure, networks and cloud storage top the list of priorities of the PNNR.

(i) Very high-capacity networks

Firstly, it is crucial for Italy to finish building its high-capacity network so the whole country has a fast internet service.

In line with the European Digital Compass objectives, the PNRR adopts a **neutral** approach to reach this objective, pursuing the expansion of the digital networks in Italy by several different means.

In particular, the planned reforms will involve the following areas:

- high ultrabroadband coverage by means of either fixed or fixed wireless access (FWA) systems;

Brief description

The Italian government has approved the investment plan setting out the objectives and the courses of action to be implemented by Italy in the context of the Next Generation EU package.

Links

- PNRR: https://www.mef.gov.it/en/focus/documents/PNRR-NEXT-GENERATION-ITALIA_ENG_09022021.pdf
- Public consultation launched by the Minister of Economic Development (in the Italian language): <https://www.mise.gov.it/index.php/it/198-notizie-stampa/2042268-proprieta-industriale-consultazione-sulle-linee-di-interventostrategiche-2021-2023>
- Guidelines for the IP Strategy 2021-2023 (in the Italian language): https://www.mise.gov.it/images/stories/documenti/Linee_di_intervento_sulla_Proprieta_industriale-29_aprile_2021.pdf

- fibre optic coverage, also in public areas considered to be a priority (e.g. in the academic, healthcare and cultural sectors);
- 5G fibre coverage (also in extra-urban communication routes) and initiatives to promote 5G and to inform the public about the safety of 5G.

(ii) Digital infrastructure in public administration: cloud services

The PNRR accelerates the migration of various public administration bodies to cloud services in order to guarantee the effectiveness of the digitalisation process and make the services provided to companies and citizens are more efficient. The migration will occur either to the national cloud infrastructure called "*Polo Strategico Nazionale*" (PNL) or to public safe clouds to be provided by private entities winning public tenders.

Local data centers, with low performance and security standards, will be closed and data silos between different public administration bodies erased to ensure more efficient and citizen-oriented services. By way of example, the PNRR mentions the "once only" approach, the purpose of which is to ensure that citizens are not required to communicate the same data to public administration bodies more than once. In practical terms, the reform will further develop and increase the use of digital identity, establish the use of electronic health records and foster cybersecurity in line with the Cybersecurity Act and the Italian "cybersecurity perimeter" defined in the Decree Law no. 105/2019.

(iii) Digitalisation in public administration: ITC contracts and the public NewCo

In order to ensure the spread of technology and the use of digital systems in the public sector, the PNRR provides simplified means for acquiring ICT, e.g.: (i) the ICT related to the PNRR will be "fast tracked" to avoid the cumbersomeness of public tenders; (ii) a "white list" of trusted and preferred providers for ICT-related tenders will be created; (iii) a list of the certified providers will ensure an easy and comparative selection among the applicants.

A particular innovation is the creation of a public NewCo, which will assist the process of digitalisation of public administration bodies by providing know-how and technical capabilities for software development and operations.

In general, the PNRR approach to digitalisation envisages a near future where more data will be available, in particular personal data. The new flow of data mainly regarding users (primarily private individuals) may constitute a huge opportunity for the data company and the market in general as well as a potential red flag that will pose regulatory issues and ethical dilemmas: data protection and security, certainly, but also discussion about the criteria, the extent and limits for the business and private exploitation of this extremely powerful dataset.

IP strategy for 2021-2023: the public consultation launched by the Ministry of Economic Development

Another notable part of the PNRR is the reform of industrial property law, based on the policy understanding that the IP system is crucial to increasing the competitiveness and productivity of the Italian market.

Key issues

- The Italian government's investment plan for the Next Generation EU public funds includes the digitalisation of Italy's private and public sectors
- Italy's digitalisation process will open up opportunities for private investments in the public sector and for business involving a wealth of new personal and non-personal data
- The Italian Minister for Economic Development set forth the courses of action for the IP Strategy 2021-2023, collecting the input of private entities such as companies and banks through a public consultation
- The IP Strategy 2021-2023 takes into account to the growing relevance of intangible assets

A good reform needs a good strategy behind it. For this reason, the Italian Ministry of Economic Development (the authority responsible for the IP system) launched a public consultation aimed at **collecting market and professional input to drive the reform of Italian industrial property system.**

The consultation called for comments and proposals on the position paper prepared by the Ministry that outlined the approach to be pursued in designing the IP reform and strategy in 2021-2023 based on the following five "challenges":

1. improving the protection of IP rights by introducing simplified and more efficient procedures and adapting the existing rules to digital products and services (e.g. granting design protection to graphical user interfaces and augmented reality);
2. promoting access to IP, in particular for small and medium-sized companies and researchers and revising the criteria for evaluation of intangible assets (criteria intended also to be used for the credit ratings relevant for access to loan and investments by bank and financial institutions);
3. improving access to patents and spreading their knowledge by making it possible to access IP also during times of crisis and exploring the possibility of affording patent protection for AI and AI products;
4. stepping up the fight against counterfeiting, piracy and black market activities;
5. strengthening Italy's role in the international context.

The consultation ended on 31 May 2021 and the Ministry is now collecting the input and comments received. The next step will be the publication of the consolidated and revised version of the position paper and the timeline for the initiatives and reforms.

WARSAW

Marcelina Sługocka

A SLOGAN AS A TRADEMARK – NEW DECISION OF THE GENERAL COURT OF THE EUROPEAN UNION

Introduction – protection of the way customers relate to the brand

Developing the most effective means of protecting the way in which new customers are attracted and existing ones retained through advertising campaigns requires an appropriate legal structure. One way to facilitate competition in a mature market, increase product popularity and enhance consumer choice is to protect any powerful indications in respect of these products, including slogans, by registering them as a trademark. Trademark registration gives the owner a powerful legal monopoly and the right to take legal action against third parties using a similar mark for similar goods or services.

A company slogan is a short message, a motto expressing the company's attitude or key values. Together with a name and a logo, it can form a harmonious trio that successfully brings customers closer to the branded goods or services. Nevertheless, a slogan must meet legal criteria to be successfully registered and protected as a trademark, since slogans themselves are not necessarily understood by courts as an indication of origin, rendering the assessment of the mark's distinctiveness in the context of a registration difficult.

Challenges to a slogan as a trademark

A trademark has distinctive character within the meaning of Article 7 (b) of the European Union Trade Mark Regulation (Regulation 2017/1001) only if it can be directly perceived as indicating the commercial source of the goods or services in order to enable the relevant public to distinguish, without any likelihood of confusion, the goods and services of the trademark proprietor from goods and services of a different commercial origin. The indication of origin is a fundamental criterion for the registration of a trademark, primarily because of the need to guide consumer choice towards goods or services satisfying their demands and to avoid those they do not want, and to assure consumers that products will be of the same quality as they expect on the basis of their previous experiences or other factors.

The nature of slogans makes it difficult to assess distinctiveness as a condition for registration, particularly in view of the fact that slogans describe products, often

Brief description

In its recent decision, the General Court of the European Union has smoothed out discrepancies in case law, clarifying the protection afforded by the exclusive right to a trademark for slogans (*case T-253/20*¹). Based on its assessment, the protection of intellectual property may be greater than previously envisaged. With reference to the new decision, this article analyses what positive steps can be taken to protect a slogan as a trademark.

Key Issues

- The purpose of a trademark is to facilitate competition in a mature market and to guide consumer choices in respect of the goods or services of the trademark owner, while safeguarding the owner's rights.
- In practice, the conditions for trademark registration are slightly stricter for slogans, but the solution is to incorporate an ingenious element of surprise or controversy.
- An eye-catching slogan can significantly improve the perception of products, going far beyond the typical benefits of a trademark.

¹ Judgment of the European Union General Court dated 20 January 2021, case T-253/20, (Oatly AB)

referring to them specifically by name and therefore the impossibility of distinguishing these products from those of other companies. Slogans could be perceived by the relevant public as a promotional statement, rather than as an indication of the commercial origin of marketed and sold goods or services.

The practice and case law of the European Union Intellectual Property Office (“**EUIPO**”), the General Court of the European Union (the “**EGC**”) and the Court of Justice of the European Union (“**CJEU**”) are inconsistent as in each case they focus on a different element when determining the distinguishability of the sign/slogan and interpret it differently. Hence, while not impossible, seeking trademark protection for slogans in the European Union can prove difficult. Although some slogans have been successful, most are unlikely to meet the requirements for trademark registration.

In the case at hand, with regard to the slogan ***IT’S LIKE MILK, BUT MADE FOR HUMANS***, the EGC has elaborated on how users should tackle this issue, by shedding light on what conditions a slogan should meet to be effectively registered and protected by trademark law.

Background to the dispute

Oatly AB filed an application to register a trademark related to dairy alternatives made from oats and to goods such as briefcases and clothing. The EUIPO refused to register the trademark in respect of certain product groups in class 29 (milk substitutes), class 30 (oat-based products) and class 32 (oat-based beverages) of the Nice classification. In doing so, the EUIPO indicated that the trademark was devoid of any distinctive character in respect of these products, which Oatly challenged.

It’s like milk but made for humans.

The Board of Appeal of the EUIPO upheld the decision that the mark applied for was devoid of any distinctive character, since “the first part of the mark applied for (*IT’S LIKE MILK*) indicated that the goods marketed were or contained milk substitutes and the second part of that mark (*BUT MADE FOR HUMANS*) made clear that they were more apt for human consumption”², and hence it would in fact be perceived by relevant public as a promotional slogan and not as an indication of the commercial origin of the goods in respect of which registration is sought. It stated that the slogan was only suitable for indicating the positive aspects of the goods in question, namely the fact that they are similar to dairy products but, unlike them, are specially produced and intended for human consumption and not for the offspring of the mammals from which milk comes from.

² Decision of the Fifth Board of Appeal of the EUIPO dated 7 February 2020, case R 2446/2019-5 (Oatly AB)

EGC decision

Oatly appealed this decision, submitting that the Board of Appeal had erred in its assessment of the distinctive character of the mark applied for and therefore also in its examination of public identification. In its decision of 20 January 2021, the EGC took a broad view of requirements for the registration of a slogan as a trademark, mostly by smoothing out discrepancies in case law.

The EGC stated that the registration of trademarks consisting of advertising slogans, indications of quality or incitements to purchase the goods or services covered by the mark is not excluded by their use for advertising purposes. Slogans can be registered as trademarks if they meet the required criteria applied to all trademarks. These are that the slogan must be distinctive, and it must not be descriptive or generic in the context of the goods or services for which it is used. The distinctive character must be assessed, first, by reference to the goods in respect of which registration has been applied for and, secondly, by reference to the relevant public's perception of the mark concerned.³

As regards the relevant public, the laudatory connotation of a word trademark does not preclude it functioning as a consumer guarantee for the origin of the goods or services which it covers. The EGC stated that "such a mark can be perceived by the relevant public both as a promotional formula and as an indication of the commercial origin of goods or services". Therefore, a trademark consisting of an advertising slogan might have a distinctive character if – along with its promotional function – it may be immediately perceived by the relevant public as an indication of the commercial origin of the goods and services.

Consequently, the EGC corrected the argument put forward by the Board of Appeal by pointing out that the mark *IT'S LIKE MILK, BUT MADE FOR HUMANS* has a distinctive character, since the conjunction 'but' in the middle of the sentence gives the idea of an opposition between the first part of the trademark (*IT'S LIKE MILK*) and the second part of the trademark (*MADE FOR HUMANS*). Therefore, this mark conveys "not only the idea that the goods at issue, which are foodstuffs, are akin to milk and are intended for human consumption, but also the idea that milk itself is not". The trademark at issue contests the commonly accepted idea that milk is a key element of the human diet. Factors such as habits, accepted rules and standards also relevant in terms of the notion of 'relevant public'. Hence, the trademark conveys to the relevant public a message that is easy to remember and capable of distinguishing the applicant's goods from goods that have another commercial origin. Aided by evidence of controversy, the mark was deemed to have at least a minimum degree of distinctive character capable of identifying Oatly's goods.

Practical considerations

Meeting the requirements for distinctiveness can be rather difficult in the case of slogans. One obstacle to the registration of a slogan as a trademark is a sufficiently direct and specific connection between the understood meaning of the slogan and the goods or services to enable the public concerned to detect immediately, without

³ Judgment of the Court of Justice of the EU dated 21 January 2010, case C-398/08 P (Audi)

further reflection, a description of the goods or services or one of their characteristics. However, an advertising slogan can have the necessary distinctive character needed to constitute a trademark if it is seen as more than an ordinary advertising slogan. Thus, if the slogan is memorable, surprising, unexpected, or is a pun, it will probably have the necessary distinctive character to be regarded as a trademark.

The present case is ground-breaking in that it relates to a slogan that refers directly to the goods being sold. This has been regarded by the authorities as grounds for refusing to register such a sign. However, the specificity and not insignificant controversiality of this slogan, as well as its contradiction with the accepted principles of society, argue in favour of granting the trademark legal protection. In the ruling in question, the EGC stated that even a direct reference to goods sold under a given sign, if it is sufficiently surprising or, as in this case, controversial and inflammatory, may be registered as an EU trademark.

The ruling is surprising because it justifies the registration of the slogan by its controversial nature, but given the meaning of the slogan, it may not necessarily be distinctive and suitable for indicating commercial origin. This is primarily because the slogan applies to all 'milks' that do not come from animals. However, the slogan is intended to contradict accepted nutritional practices, pointing that out that they may not be true, which is put in a very emphatic way. Incidentally, the justification for this decision might also be the high-profile advertising campaign and the contention of the applicant, who was the first to speak out so vociferously on the unsuitability of animal-derived milk for humans.

This case also demonstrates another issue – the incorporation of world views or lifestyle preferences. The decision at hand concerned veganism and environmental protection. In this context, it is worth mentioning that the rise in popularity of vegan diets and plant-based food products is fuelling a rapidly growing market, no less than for goods claiming to benefit the environment. The trademark *IT'S LIKE MILK BUT MADE FOR HUMANS* is a catchy slogan due to increased interest and the debate undermining dairy as a dietary staple. Unsurprisingly, companies are trying to increase their share of the sector with catchy or controversial slogans not only to highlight the quality of their products, but also to get closer to customers by arousing curiosity. Combining a catchy slogan with a current social issue, and framing it in a controversial way, can raise both awareness of an existing problem and bring the audience closer to the brand, as well as focusing attention on the brand itself.

Conclusion

The key function of trademarks is to indicate the commercial source of the branded goods or services. Therefore, trademarks must not directly refer to the goods or services they cover. Slogans, as an advertising tool of an entrepreneur, rarely make no reference to the products themselves or are based on typical sayings. Assessing the perception of the relevant public and the distinctiveness or descriptiveness of a slogan are among the challenges faced when determining the registrability of such a sign. However, the Oatly case sheds new light on the issue of registering slogans, even those referring to the goods being sold, by showing that the keys to this registration are the originality, ingenuity and provocation of the slogan.

DÜSSELDORF

Dr. Florian Reiling / Constanze Guyenz

INTERIM INJUNCTION PROCEEDINGS AND THE RIGHT TO BE HEARD

On 30 September 2018, the Federal Constitutional Court of Germany ("FCCG") emphasised in two separate decisions¹ (the "**Decisions**") that, in general, the defendant must be granted the right to be heard in interim injunction proceedings. The judges based the Decisions on the principle of equality of arms and the fundamental right to a fair hearing.² Both Decisions were confirmed by two further judgments handed down by the FCCG in 2020. The judges had to rule on the lawfulness of the granting of two interim injunctions which had been issued without the opposing party having a chance to be heard in the course of the oral hearing.³

This article sheds light on how the Decisions influence(d) the legal practice of granting interim injunctions, especially in the field of intellectual property law.

A. Legal practice prior to the Decisions

Before the Decisions were issued by the FCCG, interim injunction proceedings in trademark law and patent law were generally handled as follows:

Courts regularly issued interim injunctions without hearing the opposing party and hence were able to issue a so-called *ex parte* injunction. Particularly in trademark law cases, many courts developed an approach whereby injunctions could be issued without oral proceedings and thus without the participation of the opposing party.⁴ However, in patent law, most courts, for example the Higher Regional Court of Düsseldorf,⁵ issued an *ex parte* injunction only in straightforward cases where the infringement and the validity of the patent to be enforced were sufficiently clear or in such cases where a rapid decision was required to avert irreparable damage. In these cases, an *inter partes* injunction would usually have come too late.

B. How the Decisions influenced the handling of interim injunction proceedings

As outlined above, in the Decisions the respective defendant was not granted a right to be heard in the first instance proceedings.⁶ Therefore, the FCCG had to discuss the legality of such procedural approach and used the Decisions to set out the rules for the participation of the opposing party in general. Furthermore, the FCCG emphasised the distinction between the participation of the opposing party in an oral hearing and in a pre-trial situation (where various possibilities exist for the defendant to be "heard").

Brief description

On 30 September 2018, the Federal Constitutional Court of Germany emphasised in two separate decisions that, in general, the defendant must be granted the right to be heard in interim injunction proceedings. The judges based the decisions on the principle of equality of arms and the fundamental right to a fair hearing. If the right to be heard is not granted, a judicial decision could be regarded as being unconstitutional.

Key issues

- On 30 September 2018, the Federal Constitutional Court of Germany ruled in two decisions that, in general, the defendant must be granted the right to be heard in interim injunction proceedings.
- A distinction must be made between oral proceedings and the participation of the opposing party. There are different possibilities for the defendant to be granted a right to participate in the court's hearing/decision-making process.
- The impact will presumably be more significant for trademark law cases. In contrast, the impact on the field of patent law is likely to be more limited, as *ex parte* injunctions have already been the exception in the past.

¹ Whereas the first decision relates to the right of free speech (ruling of 30 September 2018 – 1 BvR 1783/17), the second concerns press law (ruling of 30 September 2018 – 1 BvR 2421/17).

² Federal Constitutional Court, ruling of 30 September 2018 – 1 BvR 1783/17; Federal Constitutional Court, ruling of 30 September 2018 – 1 BvR 2421/17.

³ Federal Constitutional Court, interim measure of 3 June 2020 – 1 BvR 1246/20; Federal Constitutional Court, interim measure of 17 June 2020 – 1 BvR 1380/20

⁴ Comments by Danckwerts published in AnWB Online 2020, 20 (21); comments by Mantz published in WRP 2020, 416; comments by Lerach published in jurisPR-WettbR 11/2018 note 1; District Court of Hamburg, ruling of 21 September 2018 – 315 O 292/18; Higher Regional Court of Hamburg, ruling of 30 July 2013 – 5 W 52/13.

⁵ Higher Regional Court of Düsseldorf, decision of 18 May 2009 – I-2 U 140/08.

⁶ Federal Constitutional Court, ruling of 30 September 2018 – 1 BvR 1783/17, para. 3, 18; Federal Constitutional Court, ruling of 30 September 2018 – 1 BvR 2421/17, para. 16.

I. The approach after the FCCG's Decisions

The Decisions emphasised that the opposing party generally has the right to be heard by the court in interim injunction proceedings. This is based on the principle of equality of arms in accordance with Article 3 (1) of the Basic Law for the Federal Republic of Germany ("**BLG**") in conjunction with Article 20 (3) BLG. This fundamental right is related to the principle of the right to be heard pursuant to Article 103 (1) BLG.⁷ Although this principle was not developed on the basis of the Decisions, the FCCG used the context of the Decisions to re-emphasise this constitutional mechanism.

II. "Special" consequences of the Decisions

A distinction must be made between the participation of the opposing party in the course of oral proceedings on the one hand and other means of participation on the other hand. A judgment can be delivered without oral proceedings if the matter is particularly urgent, cf. section 937 (2) of the German Code of Civil Procedure ("**GCCP**"). The FCCG grants the courts a wide margin of discretion to decide whether a matter is urgent or not.⁸ However, waiving oral proceedings does not automatically result in the other party being generally kept out of the proceedings until a decision is made. It is crucial that the legal view of the defendant be taken into account in the injunction proceedings. Still, the specific nature and the timing of the exercise of the right to be heard must be assessed based on the circumstances of the individual case.⁹

There are different possibilities for the defendant to react to an application for an interim injunction in a pre-trial situation. In particular, the defendant can respond to a warning letter or proactively file a protective writ.¹⁰ If the opposing party was given the opportunity to present its defence arguments to the applicant prior to the beginning of the proceedings, a further opportunity is less likely to be granted. However, the right to be heard is only deemed to have been adequately granted if, in case of a warning letter and a subsequent protective writ, the scope of the pre-trial warning is identical to (i) the application for interim relief and the operative part (Tenor) of the interim injunction subsequently issued. Further, these documents and arguments must have been made available to the court prior to reaching a decision, otherwise the court's decision would not be based on a complete set of arguments and it would have to schedule oral proceedings.¹¹

Accordingly, an ex parte decision could now even be more likely in those cases where the opposing party has actually filed a protective writ and therefore had a chance to (i) present its arguments¹² and (ii) be heard in accordance with the guidelines presented in the Decisions.

III. Exceptions from the general right to be heard

An exception of the general right to be heard applies if a hearing would make the purpose of the interim injunction proceedings more or less obsolete. This is especially true in those cases where it is important that the decision be accompanied by a

⁷ Federal Constitutional Court, ruling of 30 September 2018 – 1 BvR 1783/17, para. 14.

⁸ Federal Constitutional Court, ruling of 30 September 2018 – 1 BvR 1783/17, para. 19.

⁹ Federal Constitutional Court, ruling of 30 September 2018 – 1 BvR 1783/17, para. 21.

¹⁰ Federal Constitutional Court, ruling of 30 September 2018 – 1 BvR 1783/17, para. 22.

¹¹ Federal Constitutional Court, ruling of 30 September 2018 – 1 BvR 1783/17, para. 23.

¹² Comments by Danckwerts published in AnwBl Online 2020, 20 (22).

"surprising effect", which is of particular significance in attachment proceedings (*Arrestverfahren*) within the meaning of the GCCP, orders for detention under investigation (*Anordnungen von Untersuchungshaft*), house searches (*Hausdurchsuchungen*), seizure of goods (*Beschlagnahme von Waren*) and inspection claims (*Besichtigungsverfahren*).¹³ For proceedings in the field of intellectual property law, the seizure of copied goods, for example, is of particular importance.

C. Transferability of the Decisions to intellectual property law

Since the Decisions concerned cases of press law and the right of free speech, it is questionable whether they were also meant to apply to cases that involve intellectual property law matters. Given that the Decisions did not specifically relate to IP law, it remains uncertain how the courts will interpret the FCCG's rulings.

It may be argued that, in contrast to press law, in trademark, design and patent law interim injunction proceedings are often aimed at obtaining a claim for provisional seizure of the infringing goods, and a prior involvement of the defendant could lead to the prior disposal of the stocks in question (in particular on the basis of a warning letter), and thus frustrate the purpose of the seizure.

However, in its ruling the FCCG did not explicitly limit the scope of its rulings to press law and right of free speech cases.¹⁴ Thus, at first glance the Decisions do not seem to be limited to such matters. This is also supported by the fact that the FCCG primarily based its decisions on considerations of fundamental rights which apply to a wide variety of cases. Moreover, the FCCG and the Higher Regional Court of Düsseldorf have already ruled that the Decisions also apply to competition law cases.¹⁵ Therefore, it seems rather likely that the Decisions are to be interpreted in a more generalist way, so their fundamental statements are to be applied to intellectual property law cases as well.

D. The influence of the Decisions on various procedural constellations

According to the Decisions, there are various constellations in which it is advisable for the defendant to file a protective writ. In particular, a distinction should be made between the consequences for cases in which the applicant has received a warning letter and cases in which no such pre-trial exchange has occurred between the parties.

If the defendant responds to a pre-trial warning letter, it is nevertheless recommended to file a protective writ as well. The difference between a protective letter and a pre-trial statement is that by filing a protective writ the sender of such writ is generally regarded as having been granted the right to be heard as the responsible court is obliged to check – prior to issuing an interim injunction – whether a protective writ has been deposited in the relevant online database where all protective writs which have been filed are centrally stored (*Schutzschriftenregister*). Unlike the mere statement in response to a warning letter, which could potentially be concealed by the applicant of an interim injunction, any protective writ filed will most likely be identified by the responsible court and therefore taken into account.

¹³ Federal Constitutional Court, ruling of 30 September 2018 – 1 BvR 1783/17, para. 15.

¹⁴ Federal Constitutional Court, ruling of 30 September 2018 – 1 BvR 1783/17, para. 18.

¹⁵ Federal Constitutional Court, ruling of 27 July 2020 – 1 BvR 1379/20; Higher Regional Court of Düsseldorf, decision of 27 February 2019 – I-15 U 45/18.

In cases where a third party is likely to file an application for a preliminary injunction and where no warning letter has been received it is often advisable to file a protective writ. This is particularly useful when the opposing party can provide relevant arguments against the injunction. Therefore, it is important that the protective writ is not seen only as a risk but rather as an opportunity for the defendant – although obviously such risk assessment depends on the circumstances of the individual case.

Once again, it should be emphasised that the protective writ "replaces" an oral hearing (and hence a right to be heard is deemed to have been granted) only if the application for an interim injunction or the operative part of the interim injunction is not changed in comparison to the assertions made in the context of the pre-trial warning and does not add further allegations or facts to the dispute. Otherwise, the court is legally obliged to grant the respondent a further hearing to ensure procedural equality of arms even if a protective writ has previously been exchanged between the parties. If the protective writ has been filed without having received a warning letter in advance, the court may, at its own discretion, decide whether it can hand down a judgment on the basis of the information provided in the protective writ and the application for an interim injunction.

E. Outlook

Should the courts apply the key message of the Decisions to intellectual property law cases, which seems to be likely at present, it can be assumed that the consequences will be rather different for trademark and patent law cases: The impact will presumably be more significant for trademark law cases, as various courts have developed the practice of deciding on injunction proceedings without the participation of the opposing party. In contrast, the impact on the field of patent law is likely to be more limited, as *ex parte* injunctions have already been the exception in the past.

Further, it should be noted that the Decisions have not fundamentally changed the importance of the filing of a protective writ under intellectual property law. This is still advisable, especially if the opposing party expects an infringement and has convincing arguments for its defence. However, it should also be emphasised in any protective writ that the Decisions of the FCCG have strengthened the general right to be heard, and hence the court should be reminded that this fundamental principle could easily be violated if a decision were to be reached without scheduling an oral hearing.

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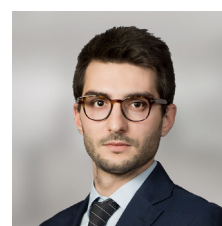
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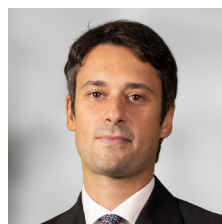
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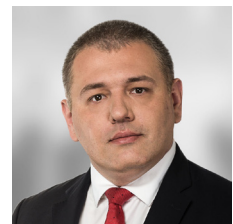


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