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A B S T R A C T

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This article tracks developments at the national level in key European countries in the area of IT and communications and provides a concise alerting service of important national developments. It is co-ordinated by Herbert Smith Freehills LLP and contributed to by firms across Europe. This column provides a concise alerting service of important national developments in key European countries. Part of its purpose is to complement the Journal's feature articles and briefing notes by keeping readers abreast of what is currently happening "on the ground" at a national level in implementing EU level legislation and international conventions and treaties. Where an item of European National News is of particular significance, CLSR may also cover it in more detail in the current or a subsequent edition.

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1. Belgium

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No contribution for this issue.

2. Denmark

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2.1. Limitation of liability with respect to sanctions under the GDPR

The General Data Protection Regulation ("GDPR") entitles National Supervisory Authorities to impose administrative fines for infringement of certain provisions of the GDPR. However

administrative fines are not recognised under Danish law and are considered to be a penal sanction, which require either the liable party's approval of an authorised fine notice or the involvement of the Danish prosecuting authority in order to be legally binding.

As a consequence of the extensive digitalisation of society and rapid development of data generating and data dependent technologies (including for example internet of things and artificial intelligence technologies), the use of third party service providers to process personal data has dramatically increased. Given the shift in approach to sanctions for infringement of personal data under the GDPR and the uncertainty around the enforcement of such sanctions, it becomes increasingly important for contracting parties to address the questions of (i) the validity of parties contractually limiting liability for fines incurred and (ii) insurance coverage for the same.

Whilst criminal liability cannot generally be contractually transferred, the issue of whether rights of recourse can be contractually agreed between parties and enforced and whether insurance can be obtained to cover financial loss for payment of a fine remains unresolved under Danish law.

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As imposition of fines requires that a basis of liability is established, i.e. negligence or intent with respect to the infringement, and considering that the punitive purpose may be significantly diluted by agreements to indemnify for fines incurred (whether in data processor agreements or through insurance coverage), it appears that a liable party cannot validly in whole or in part be indemnified against a fine incurred under the GDPR.

If and to what extent insurance coverage may be obtained with respect to derived financial effects of a fine is uncertain and remains to be clarified under Danish law.

3. France

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5. Italy

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5.1. The Cambridge Analytica scandal triggers allegations of unfair commercial practices against Facebook

On 6 April 2018, the Italian Antitrust Authority (“Antitrust Authority”), which is the Italian authority in charge of combating unfair commercial practices under Directive 2005/29/EC, announced an investigation into Facebook Inc. (“FB”) in connection with the following practices:

- 1) FB’s information notice to users at the point of registration, in particular in relation to the way it collects users’ data and the use of such data for commercial purposes, including user information generated by the use of third party web sites/apps; and
- 2) the automatic exchange of data from and to third party operators each time FB’s users access or use third party websites or apps, without users’ prior consent, save only for the possibility to exercise an opt-out by ticking an ad hoc box.

The Antitrust Authority believes that the above behaviours may qualify as unfair commercial practices in violation of Articles 20, 21, 22, 24 and 25 of the Italian Consumers’ Code, which correspond to Articles 5 (Prohibition of Unfair Commercial Practices), 6 (Misleading Actions), 7 (Misleading Omissions), 8 (Aggressive Commercial Practices) and 9 (Use of Harassment, Coercion and Undue Influence) of Directive 2005/29/EC.

In particular, the Antitrust Authority alleges that:

- 1) FB does not immediately and fairly inform users of its collection and use of their data for commercial purposes upon the activation of an account; and
- 2) FB exercises undue influence on signed-in users who, in exchange for FB’s services, inadvertently and automatically provide consent to the collection and use of their personal information (such as profile data, consumer inclinations and personal experiences on third party websites and apps) due to default consent options, so that FB may avoid limiting the use of its services in case of de-selection of default options by users.

This is a very important development since an allegation of unfair commercial practices under Directive 2005/29/EC is independent from the assessment of infringements of Italian and EU provisions which are directly aimed at protecting personal data, which are under the remit of the Italian Data Protection Authority. The allegations of unfair commercial practices are instead aimed at assessing whether FB’s practices outlined above are likely to materially distort the economic behavior of FB’s users.

The Italian Consumers’ Code provides that for any infringements of the prohibition on carrying out unfair commercial practices, the Antitrust Authority may apply fines up to 5 million Euros.

6. The Netherlands

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