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Intellectual Property

Trademarks

Distinctiveness acquired through use in the Benelux; secondary meaning in entire Benelux

On 18 August 2009, the Court of Appeal of Amsterdam rendered its judgment in a case regarding secondary meaning of a Benelux trademark¹. The question in this case was whether the Benelux trademark Eurocommerce acquired distinctiveness through use for several services in the area of commerce.

With reference to the judgment of the European Court of Justice in the *Europolis* case² the Court of Appeal ruled that in order for the Benelux trademark to acquire distinctiveness through use it should be proven that the trademark obtained secondary meaning in the whole area of the Benelux, meaning the French *and* Dutch-speaking part of the Benelux. As regard to the Dutch-speaking part of the Benelux, the Court of Appeal clarified that it is not enough if the trademark acquired distinctiveness through use in the Netherlands. According to the Court of Appeal, the Dutch-speaking part of Belgium, Flanders, cannot be neglected.

In this particular case the Court of Appeal established that the trademark Eurocommerce did not acquire distinctiveness through use in the Benelux since the trademark Eurocommerce was only used in the Netherlands.

AG's Opinion: No trademark infringement by Google AdWords



On 22 September 2009, Advocate General Maduro delivered his opinion in joined cases C-236/08, C-237/08 and C-238/08 of trademark owners versus Google.

¹ [Court of Appeal of Amsterdam 18 August 2009, B9 8106 \(Holding B.V. / Eurocommercial Properties B.V.\)](#).

² [ECJ 7 September 2006, C-108/05 \(Bovemij Verzekeringen / BOIP\)](#).

These three cases were referred from the French Cour de Cassation, asking guidance on the legality of the use of keywords corresponding to trademarks in the AdWords advertising system. AdWords is a service offered by Google, where advertisers can select certain keywords which trigger a sponsored link or advertisement when they are entered into Google's search engine. In these cases, entering keywords corresponding to the trademarks triggered the display of ads for sites offering counterfeit versions of the products covered by the trademark and similar products of competitors.

The questions before the ECJ are if: (i) trademark proprietors can prevent the use of keywords which correspond to their trademarks in AdWords and (ii) Google can benefit from the liability exemption for hosting services in the E-commerce Directive.

The AG answered the first question in the negative. He contended that internet users will not be confused about the origin of the products in the ads: users will not confuse the counterfeit or competing products with the trademarked products based solely on the fact that those ads are displayed in response to keywords entered into the search engine. Furthermore, he argued that trademark proprietors should not have an absolute right of control over their trademarks as keywords. On the contrary, absolute control would jeopardise freedom of information and even the particular nature of the internet, as keywords are (one of) the main instrument(s) by means of which the information on the internet is organised and made accessible to users. Therefore, he concluded that there can be no trademark infringement by Google.

Secondly, the AG considered whether Google qualifies as a hosting provider and can thus benefit from the exemption of liability for trademark infringements provided for under the E-commerce Directive. The AG held that a service provider wishing to benefit from this exemption should remain neutral regarding the information they host. Although this may be the case with the Google search engine, which applies objective criteria when generating a list of the most relevant sites to the query, that is not the case with AdWords, where Google has a direct (financial) interest in

users clicking on the ad's links. Consequently, the liability exemption in the E-commerce directive does not apply to the content featured in Google AdWords.

If this opinion were to be followed by the ECJ, it would seem to be a victory for Google. However, Google AdWords would not get a free pass as a hosting provider and its liability would remain a matter for national law to determine. Even under European trademark law trademark proprietors would not be left completely defenceless. They would still be able to take action against an advertiser when the use of their trademarks in the ads themselves, or on the sites advertised, results in trademark infringement.

Copyright

BREIN v Mininova; facilitating uploading of copyright-protected works prohibited

Court orders closure of Mininova B.V. in the Netherlands



In a court case initiated by copyright organisation BREIN, the District Court of Utrecht ruled in its decision of 26 August 2009³ that Mininova B.V., one of the largest BitTorrent index sites in the world, should permanently remove all "torrents" – links that refer to information stored elsewhere – from its website www.mininova.org in as far as there are "reasonable doubts" that such torrents do not refer to copyright-protected works.

The court held that although Mininova does not directly infringe the Copyright Act 1912 nor the Neighbouring Rights Act, it has acted unlawfully against copyright holders affiliated with BREIN by

facilitating, stimulating and benefiting from the uploading of copyright-protected works.

The court disagreed with Mininova's argument that it would be impossible for Mininova to identify those torrents that refer to copyright-protected works. The court held that it is common knowledge that recent movies, TV series, games and music are protected by copyright. With respect to torrents referring to such content, Mininova should have reasonable doubts as to their legitimacy. Furthermore, the court provided a practical solution: Mininova should in any event permanently delete torrents referring to titles featuring on a continuously updated list to be provided by BREIN.

Finally, the court held that the Notice and Take Down ("NTD") Procedure which was used by Mininova, was not sufficient to avert the injunction, as it had proven unsuitable for permanently deleting torrents. Pursuant to this NTD procedure, if torrents were uploaded again after their initial removal, the right holders had to submit a new notice.

Mininova has been granted three months to comply with the judgment. From then on, internet users will no longer be able to download copyright-protected music, films and games via Mininova.

It will be interesting to see whether or not this case will be appealed and whether the right holders will institute claims for damages.

BREIN v The Pirate Bay; a second victory for the Dutch rights holders organisation

On 22 October 2009, Stichting BREIN – represented by Joris Van Manen and Douwe Groenevelt of De Brauw – again obtained an injunction against the three Swedish administrators of the world's largest BitTorrent website The Pirate Bay.

In July of this year, the preliminary relief judge of the Amsterdam District Court issued a default judgment against the three, ordering them to effectively shut down their website for the Netherlands, after they failed to appear at the hearing despite having been served through – inter alia – Facebook and Twitter. Shortly thereafter, the administrators

³ [District Court Utrecht 26 August 2009, BJ 6008 \(BREIN / Mininova\)](#)

initiated opposition proceedings in order to set this default judgment aside. A new hearing was scheduled, at which the administrators were represented by a Dutch attorney. These proceedings again ended in a judgment on BREIN's behalf, with the preliminary relief judge dismissing their claim to set the earlier judgment aside, and ordering them to remove all illegal 'torrents' from their website within three months of the judgment, on penalty of EUR 5,000 per torrent to a maximum of EUR 3 million.

The primary line of defence put forward by the administrators was that they no longer had any control over The Pirate Bay. According to their submission, the current and sole owner and administrator of The Pirate Bay is a company named Reservella, located on the Seychelles. The judge dismissed this argument as implausible, pointing amongst others to the failure of the three to explain and substantiate how the ownership of the website – which they admitted having had at some point – was transferred from them to this other party.

The court ruled that The Pirate Bay in any event acted unlawfully by structurally facilitating and stimulating the copyright infringements of its users. Interestingly, as to the question of whether The Pirate Bay itself directly infringed (which was argued by BREIN), the court ruled that this might have been the case if it had been evident that The Pirate Bay was also running a BitTorrent Tracker. The judge, however, found that the preliminary nature of the proceedings was not suitable for carrying out the necessary factual research to establish whether The Pirate Bay actually (still) ran a Tracker.

The judgment marks another important victory, and the first truly international one, in BREIN continuing to win against websites providing illegal content. It will be interesting to see whether the administrators will appeal the judgment.

Dutch Cabinet announces ban on illegal downloading.

The Dutch Cabinet announced on 30 October 2009 that a ban on downloading of movies and music from 'illegal sources' will be imposed over the next three years. The measures are a response to the recent

recommendations of a parliamentary working group on copyright.

A condition for the ban is that sufficient alternatives will be available to the consumers for downloading legal content. The Minister of Justice explained that one should – for example – think of licences that allow consumers to listen to music or exchange data via the Internet for a fixed monthly fee.

Parallel with the ban, the Cabinet aims to abolish the private copying levy on blank CDs and DVDs. It also wants to strengthen the supervision of collecting societies and improve the contractual position of authors and performers.

The Cabinet has emphasised that the ban on illegal downloading is not intended to 'frustrate' individual internet users, but to challenge large-scale illegal activities of commercial parties.

European Commission will discuss copyright system in Europe and digitisation of books



By means of "Google Book Search" Google started to digitalise all the books in the world and making parts of the books available through its website. US authors and publishers started legal proceedings stating Google infringed their copyrights. Parties agreed on a settlement in which authors and publishers agreed on the digitisation and Google agreed to pay copyright holders 63% of the revenues earned from the commercial use Google makes of the books⁴.

Following this settlement – which only applies in the US – two EU Commissioners issued a joint statement setting out the important cultural and economic stakes of book digitisation in Europe (since a "US like" solution is not available in Europe). According to these Commissioners orphan works and out-of-print books should in any case be given a "new lease of life". To boost

⁴ This settlement still has to be ratified by a US court

digitisation of books in Europe they welcome public-private partnership (as in the Google Book Search settlement), but stressed the fact that copyright rules should be fully respected. Their aim is to find a European solution in the interest of the European consumer. Therefore it is necessary to critically examine the current copyright system in Europe. It might be necessary to adapt Europe's very fragmented copyright legislation to the digital age.

The European Commission have agreed to discuss the current system and the possibilities of digitising books in Europe with stakeholders, the European Parliament and the Council of Ministers.

EC Communication on enhancing the enforcement of intellectual property rights in the internal market

The European Commission, having regard to the increase in counterfeiting and the economic decline, fears that the harmful effects of counterfeiting may well become more problematic in the future. Therefore, the Commission proposes to complement the existing framework for the enforcement of intellectual property rights (IPRs), consisting of the IPR Enforcement Directive and the EU Customs Regulation, with additional non-statutory measures.

The Commission is therefore working on a three-pronged programme to enhance the enforcement of IPRs in the internal market, by:

- establishing an EU Counterfeiting and Piracy Observatory;
- fostering administrative cooperation throughout the internal market; and
- facilitating voluntary arrangements between stakeholders.

To facilitate the development of a purposeful course of action, the Commission is establishing an Observatory, which will centralise the gathering, monitoring and reporting of information and data related to all IPR infringements. In the future this Observatory must develop into a platform, where representatives from national authorities and (private) stakeholders will exchange their ideas and expertise on best practices, develop joint enforcement strategies and make

recommendations to policymakers. The Observatory should in particular:

- improve the gathering of independent, reliable information and data;
- promote and spread best practices amongst public authorities; and
- spread successful private sector strategies.

Furthermore, the Commission seeks to improve the cooperation between the various authorities entrusted with the enforcement of IPRs and private stakeholders both between and within the Member States. To that end a European network of national contact points should be established and the Member States will be asked to appoint national coordinators with a firm mandate to synchronise issues concerning the enforcement of IPRs between their respective national enforcement agencies. The national intellectual property offices are expected to play an important role in this respect. These national offices and other IPR enforcement authorities should in addition have access to an electronic network, enabling them to:

- share 'real time' information on goods and services infringing IPRs in the internal market;
- quickly exchange alerts concerning specific products, trends and potential threats; and
- provide facilities to overcome language barriers for national authorities.

The Commission is currently analysing how this system could be designed.

Finally, the Commission aims to facilitate the conclusion of voluntary arrangements between stakeholders. A preliminary example of this approach is the current dialogue on the sale of counterfeit goods via the internet, which may result in a memorandum of understanding concerning issues such as prevention, identification and removal of infringing offers (e.g. Notice and Take Down procedures) and sellers from internet platforms. If no voluntary arrangements can be agreed, the Commission will have to consider

legislative solutions, in particular in the context of the IPR Enforcement Directive.

The Communication can be found on [this website](#).

ECJ to rule on copyrights regarding the transmission of TV signals via satellites



The Brussels Court of Appeal referred its questions regarding copyrights related to the transmission of TV signals via satellites to the European Court of Justice.⁵

Airfield (TV Vlaanderen, part of the Canal Digital group) is a provider of satellite TV. It receives the TV signals from the original broadcasters and transfers this signal to its customers by satellite. Agicoa is a collective management organisation for copyrights and neighbouring rights.

Agicoa claims that Airfield's activities constitute a "communication to the public" (as referred to in the Satellite and Cable Directive⁶), for which Agicoa's permission is needed (i.e. payment is due). According to Airfield, only the primary transmission by the broadcasters constitutes such communication to the public. The broadcasters already compensate the right holders for this disclosure of their works. Therefore, no permission of the collective management organisations should be necessary for further transmission of the TV signal to consumers.

The Court of Appeal's questions distinguish between two situations: one in which the broadcasters transmit their TV signals to Airfield's ground station, the other in which they transmit their TV signals to Airfield's satellite directly.

⁵ Court of Appeal Brussels, 27 October 2009 (Airfield/Agicoa & Airfield/Sabam) No. 2008/AR/1758

⁶ Council Directive 93/83/EEC, 27 September 1993, on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

Copyright protection threshold harmonised European law

On 16 July 2009, the ECJ rendered judgment in the *Infopaq* case⁷. The most interesting element in this decision is that the ECJ is of the opinion that the threshold for copyright protection is harmonised European law. For all kinds of works the requirement for copyright protection in any number of works is that the work is original in the sense that it is the author's own intellectual creation. This is derived from the Berne Convention for the Protection of Literary and Artistic Works, the Copyright Directive, the Software Directive and the Database Directive. This would imply that from now on questions concerning the interpretation of the requirement of originality can be referred to the ECJ. It also means that, at least theoretically, the threshold for copyright protection is the same throughout Europe.

Patents

Broadening the Dutch patent box regime: introducing the innovation box

Current arrangement: the patent box

With a view to encouraging investment in technical research and development ("R&D"), Dutch legislators introduced the "patent box" in 2007. This special tax regime applies to innovative profits: each taxpayer (either a person or a company based in the Netherlands) which patents self-developed know-how may opt for this patent box regime. Furthermore, if a taxpayer does not patent its R&D (e.g., in case it consists of software and trade secrets), he may apply for a special R&D arrangement. In both cases, the taxpayer will be granted a special arrangement to the extent that the profits derived from the intangible assets are taxed at a rate of 10% as far as they exceed the development and/or improvement costs. The total amount of profits that can be taxed in the patent box against the lower tariff is capped at four times the accumulated costs for development and/or improvement.

⁷ ECJ 16 July 2009, C-5/08 (*Infopaq*)

Amendments as of 1 January 2010: the innovation box

In order to stimulate innovation even more, a number of amendments have been made to the above reduced tax regime. These include:

- (1) The patent box will be renamed innovation box.
- (2) The tax rate as of 1 January 2010 will be lowered from 10% to 5% on net earnings (instead of the regular general corporate income tax rate which is currently 25.5%). One of the conditions for a taxpayer to be eligible for the innovation box is that earnings should result from the exploitation of certain qualifying assets.
- (3) The cap of four times the accumulated costs for development and/or improvement will be cancelled. This will result in a broader scope of the regime. More companies will then potentially be eligible to profit from this regime.

Pharma

Refund action for pharmaceutical products permitted

In a decision dated 17 September 2009, the Board of Appeal of pharmaceutical self-regulatory body CGR ruled on a system whereby Pfizer refunded the individual contribution payable by the patient for prescription drugs.

In the past, CGR has taken a very restrictive approach vis-à-vis refund systems. In the present case the Board found that there was no prohibition on pharmacists' advertising, nor on prescribing doctors. Doctors were not involved in the execution of the system, and the mere fact that they were likely to become aware of its existence was not considered to (decisively) influence how they prescribe medications. In this regard, the Board took into account that refund systems also existed for almost all other products falling within the same cluster in the Drug Reimbursement System. The system was also not considered to constitute prohibited public advertising. In various previous matters, the mere existence of a refund system for prescription drugs was sufficient to qualify it as prohibited public advertising.

Can goods (medicines) in transit be detained by Dutch Customs?



“The transit of generic medicines to developing countries should not be unnecessarily impeded”, replied Dutch State Secretary for Economic Affairs, Heemskerk, on 6 September 2009 to questions raised by the Dutch Parliament (to be found [here](#), in Dutch only). Dutch Customs Authorities were heavily criticised by India, Brazil and a number of other countries for detaining generic medicines (such as HIV/AIDS drugs) based on the European Anti-Piracy Regulation (Regulation (EC) 1383/2003, “APR”), because these medicines were merely transiting the Netherlands from one country outside the EU to another country outside the EU. India and Brazil lodged complaints about the actions of Dutch Customs with, *inter alia*, the World Trade Organization, for violation of the principles of, for example, the [Doha Declaration](#) on public health.

Heemskerk's response to the criticism was that a balance must be struck between the unhampered transit of generic medicines to developing countries and the combat of infringements to intellectual property rights. This balance must be regained by adapting legislation on a European level. In the meantime, awaiting changes in EU legislation, the Dutch government will implement a practical solution to ensure prompt transfer of generic medicines to developing countries. This solution will take into account the 'explanatory memorandum' on the scope and practical application of the APR, which will be published on the internet by the European Commission shortly.

Heemskerk further announced that Dutch Customs will publish on its website a list with companies that filed an application for action. The list is to state the name and address of the applicant and the intellectual property right the applicant invokes.

Interestingly, a [judgment](#) was rendered in the UK by Justice Kitchen in a dispute between Nokia and British Customs concerning whether or not the APR allows customs authorities to detain goods in transit. Justice Kitchen concluded that the APR does not apply to goods in transit. He argued, briefly stated, that goods in transit do not satisfy the requirement for infringement since they are not placed on the market. This is only different if there is an actual risk of the goods being put on the market in the Community (the *Montex/Diesel* exception). Nokia had also found support for its claim in a ruling by a Dutch court (*Sosecal v Sisvel*), in which the court allowed customs to apply the APR to goods in transit. Justice Kitchen did not follow Nokia in this argument and concluded that the Dutch court had misinterpreted the APR.

So the debate continues on whether or not the APR applies and should apply to goods in transit, medicines and other goods. So far nothing has changed, but the practice of Dutch customs may not be sustainable after publication of the 'practical solution' of the Dutch government.

Other news

Nutrition claims should meet Claims Regulation



Nutrition claims on packaging and in advertisements should meet the requirements of the European Claims Regulation. Products labelled with texts such as 'light' and 'more fibres' must have specific components for producers to be allowed to use a nutrition claim, such as for example '30% less fat than comparable products'. On 31 July 2009, the transitional period for implementation in national law expired. This means that, although the Claims Regulation has not been implemented in Dutch law yet, all packaging and advertisements with nutritional claims should now be in line with the Claims Regulation. Recently, the Dutch Food and

Consumer Product Safety Authority (VWA) has investigated whether producers have anticipated the Claims Regulation. The outcome was disappointing: 57% of the labelling is still not in accordance with the Claims Directive. Therefore, the VWA has announced that it will monitor this very strictly. When the VWA encounters a product that violates the Claims Regulation a written warning will follow immediately.

Member States may bar foreign internet-gambling providers; Dutch e-gaming advisory committee



In the case *Bwin v. Santa Casa*⁸, the ECJ ruled that Member States may prohibit companies from offering games of chance via the internet (e-gaming), even if such company can legally offer e-gaming in its home country.

The ECJ asserts that such prohibition constitutes a restriction on the freedom to provide services. However, this restriction may be justified by overriding reasons relating to the public interest, such as the protection of consumers against criminal activity, fraud, addiction, etc.

The prohibitions imposed by the Member States should be suitable to achieve the objectives involved and may not go any further than necessary to achieve those objectives. Furthermore, the restrictions should be applied without discrimination.

This ruling is the last in a series of judgments from the ECJ confirming the permissibility of national gambling monopolies and further supports the arguments made by Dutch gambling licensee "De Lotto" in its pending proceedings before the ECJ against Betfair and Ladbrokes.

⁸ ECJ 8 September 2009, C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*.

On a related matter the Dutch Cabinet has appointed an advisory committee⁹ to investigate how e-gaming may be regulated. Currently all e-gambling is prohibited in the Netherlands and no licences have been issued.

Special considerations will be given to the sustainability of the Dutch gambling policy, the nature and extent of illegal gambling, the granting of licences, the protection of vulnerable consumers and similar developments in other Member States.

EU countries not allowed to make bilateral arrangements on the protection of geographical indications



On 8 September 2009, in *Budějovický Budvar* (C-478/07), the ECJ answered preliminary questions of an Austrian court with respect to the protection in a Member State of a geographical indication of provenance of another Member State (in this case the designation 'Bud'). In 1976 the former Czechoslovakia and Austria had concluded a treaty providing that solely the Czech brewer Budvar was authorised to sell beer named 'Bud' in Austria. This was meant to obstruct the US competitor Budweiser. 'Bud' was not protected in accordance with the European Regulation No. 510/266 that provides for European protection of geographical indication of provenance. The ECJ held that this Regulation is exhaustive in nature. It thus precludes the application of a system of protection laid down by agreements between Member States, which confers on a designation protection in another Member State, despite the fact that no application for registration of that designation of origin has been made in accordance with the Regulation.

New Dispute Resolution Regulations for .nl domain names

As from 2 October 2009 new .nl domain name Dispute Resolution Regulations will enter into force. The main changes concern the introduction of a mediation service and the language of the proceedings. Both have been effected in cooperation with the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO).

The new mediation process will be free of charge, confidential and optional. During the mediation period a specially trained mediator of the Dutch Foundation for the Registration of Domain Names SIDN will contact both parties several times by telephone to gather information, identify possible points of agreement and facilitate a compromise. SIDN will report the result of the mediation to the WIPO. If the mediation was successful, the WIPO will thereupon terminate the procedure. If unsuccessful, the WIPO will appoint an adjudicator, who will give judgment in the case.

A new regulation of the language of the proceedings is introduced. The proceedings will be in Dutch if both the claimant and the respondent are resident of or established in the Netherlands. If the claimant or the respondent is resident or established abroad the proceedings will be in English. In both cases the adjudicator may, under special circumstances, decide that the language of the proceedings will not be Dutch, but English, or vice versa. The adjudicator may also decide that the claimant or the respondent may submit documents in English or in Dutch. More information and the full Dispute Resolution Regulations, both in English, can be found on the [website of SIDN](#).

⁹ Advisory committee "Games of chance via the internet", under the chairmanship of Mr G.J. Janssen.

Unlawful Competition – interpretation of concerted practice



In the case *NMa v Dutch mobile operators* (C-8/08), regarding fines imposed by the Netherlands Competition Authority (NMa) on such operators for reasons of concerted practice, the Trade and Industry Appeals Tribunal (*College van Beroep voor het Bedrijfsleven*) referred three questions on the interpretation of article 81(1) EC to the ECJ for a preliminary ruling.

On 4 June 2009, the ECJ ruled that:

- A concerted practice (*onderling afgestemde feitelijke gedraging*) pursues an anti-competitive object for the purposes of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.
- In examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice - a connection which must exist if it is to be established that there is concerted practice within the meaning of Article 81(1) EC - the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection established in the ECJ's case law, according to which, where they remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors.

- Insofar as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion.

Electronic Communications / Internet

DTA withdraws 0900 numbers due to waiting time

On 8 July 2009, the Dutch Telecommunication Authority (DTA) withdrew two premium rate 0900 numbers, the *Juristenfoon* and the *Makelaarsfoon*, after consumers complained of long waiting times. During initial investigation, the DTA made calls to both phone numbers. One call was answered after a waiting time of 30 minutes. In another call, the connection was severed after a waiting time of 50 minutes.

According to the Universal Services Decree, a waiting time of more than 10 minutes on a 0900 number provides indication of abuse. On the basis of this indication of abuse, the DTA temporarily suspended access to the 0900 numbers and started a detailed investigation of the call records to the 0900 numbers.

This investigation showed that (i) in a large number of phone calls, the connection was severed after long waiting times, (ii) calls outside of office hours were being put on hold, with no warning that the calls would not be answered and (iii) a waiting message falsely stated that there was only one caller ahead of the present caller. The DTA subsequently decided to permanently withdraw the 0900 numbers. The DTA's decision can be found at the [website of OPTA](#).

DTA reminds 0900 number providers and operators of obligations; announces enforcement

On 6 July 2009, the DTA sent a letter to all providers and users of 0900 phone numbers. In the letter, the DTA reminded providers and operators of 0900 numbers that the actual costs

charged should not exceed the announced rate.

The DTA also noted that calls that cost more than 15 cents per minute (i) should start with an unambiguous announcement of the call rate, and

(ii) such announcement should be provided free of charge.

In the letter, the DTA emphasised that it has already been actively enforcing the obligation to inform callers of the call rate since 1 October 2008 and that it has recently started active enforcement to ensure that the costs charged do not exceed the announced rate. The DTA's letter can be found at the [website of OPTA](#).

DTA imposes fines on sender of SPAM

On 27 July 2009, the DTA announced that it had imposed total fines of EUR 250,000 on a sender of unwanted e-mail messages and had also imposed a penalty of EUR 5,000 per e-mail for future violations, subject to a maximum of EUR 100,000.

The person was a sole proprietor and sent over 21 million e-mails to promote his company's websites. The e-mail messages were sent without obtaining prior permission from the recipients and did not contain valid opt-out information. The DTA had issued a written warning to the person in 2005, but the person had continued sending unwanted e-mail.

In its decision, the DTA noted that it considered the high fines justified considering (i) the high number of complaints it received, (ii) the exceptional number of e-mails sent, (iii) the duration of the violations and (iv) the fact that the person was fully accountable for the violations.

Data Protection

Code of Conduct for Processing Personal Data by Financial Institutions

On 30 July 2009, the Dutch Data Protection Authority (DDPA) announced that it intends to approve a new code of conduct for the

processing of personal data by financial institutions. The proposed code of conduct was submitted by the Dutch Banking Association (NVB) and the Dutch Insurers Association (VvV) and will apply to their members and members of the Rabobank cooperative.

Codes of conduct are sets of data processing principles that intend to clarify the Dutch Act on the Processing of Personal Data for a certain industry or business sector. Codes of conduct are generally drafted by trade organisations and subsequently sent to the DDPA for approval. After approval, the members of the relevant trade organisation may rely on the code of conduct in their processing of personal data. Pending approval, stakeholders may submit their comments and objections to the DDPA.

The code of conduct for financial institutions is intended to replace a former code of conduct, which expired on 4 February 2008. The new code of conduct includes several changes. Most notably, the new code of conduct (i) allows financial institutions to create an incident register in which personal data regarding incidents that may affect the security and integrity of the financial sector are registered; (ii) allows for the processing of personal data relating to criminal behaviour for various purposes, such as client assessment and investigation. The proposed code of conduct can be found at the [website of CBP](#).

First BCR approval under Mutual Recognition Procedure

On 23 September 2009, the Information Commissioner's Office, the UK's data protection authority, issued a press release announcing the approval of the Hyatt Hotels Corporation's binding corporate rules ("**BCR**") under the new mutual recognition procedure. Hyatt is the first UK applicant to receive approval under the mutual recognition procedure and the fifth overall BCR approval in the UK.

BCRs are a set of contractual arrangements and internal policies that allow a company's personal data to be transferred legitimately to other entities

within the company group. The mutual recognition procedure has been developed to accelerate the process of BCR approval by the Data Protection Authorities ("**DPAs**"). Under the mutual recognition procedure, one EU Member State's DPA – being a DPA of a country the relevant company is closely tied with – acts as the lead authority on a company's BCR application. Once approved by the lead authority, the other participating members of the procedure automatically approve the BCR application.

A total of 18 DPAs have now agreed to participate in the mutual recognition procedure and this number is steadily increasing. Countries that participate include France, Germany, Italy, Luxembourg, Spain, the Netherlands and the UK.

FTC Safe Harbor Enforcement action

On 31 July 2009, the US Federal Trade Commission ("**FTC**") obtained a temporary restraining order from the US District Court for the Central District of California against a company that allegedly claimed to have self-certified to the U.S. Safe Harbor program.

The FTC's complaint claimed that the company misled consumers by inaccurately representing that it had self-certified to the U.S. Department of Commerce that it was Safe Harbor compliant. It marks the first time the FTC has brought an enforcement action with respect to the Safe Harbor program.

This first action was followed by further enforcement action of the FTC. On 6 October 2009, the FTC announced proposed settlement agreements with six other companies concerning charges that they falsely claimed membership in the Safe Harbor program. In six separate complaints, the FTC alleged that the six companies deceived consumers by representing that they maintained current certifications to the Safe Harbor program when such certifications had previously lapsed. The terms of the proposed settlement agreements prohibit the companies

from misrepresenting their membership in any privacy, security or other compliance program. The European Union Data Protection Directive requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU unless the EU has determined that the laws of the recipient jurisdiction provide "adequate" protection for personal data (i.e. are substantially equivalent to EU laws). Because the EU has determined that laws of the United States do not meet its adequacy standard, the U.S. Department of Commerce and the EU developed the Safe Harbor framework. The Safe Harbor program allows participating U.S. companies under the jurisdiction of the FTC or the U.S. Department of Transportation to import personal data lawfully from the EU. To join the Safe Harbor program, a company must self-certify to the U.S. Department of Commerce that it complies with seven principles that have been deemed to meet the EU's adequacy standard.

Draft Code of Conduct for Processing Personal Data by Private Investigators

On 14 August 2009, the Dutch Association of Private Investigators (VPB) submitted a draft code of conduct for the processing of personal data by private investigators. The DDPA is currently reviewing the draft code of conduct. The draft code of conduct is not only interesting for private investigators, but also for companies and professional services firms. If the DDPA approves the draft code of conduct, the procedures and restrictions discussed in the draft code of conduct could potentially also be used as guidelines for conducting internal audits and internal investigations.

The most notable part of the draft code of conduct is the chapter "Methods of Data Collection". It sets forth procedures and restrictions that private investigators will need to follow during their investigation, such as covert camera observation, listening in on and recording (telephone) conversations, interviewing suspects and witnesses and investigation of computers and e-mail messages. It is especially interesting that the draft code of conduct (i) prohibits investigation of a

computer used to work from home and (ii) requires an investigator to maintain the integrity of the investigated data during the investigation. The draft code of conduct can be found at the [website of CBP](#).

Guidelines for publication of government information

On 13 August 2009, the DDPA published guidelines for the publication of personal data by the government on the basis of the Dutch Government Information Public Access Act (PAA). According to the guidelines, a public body that is considering making personal data public should establish whether the person involved has unambiguously consented to such publication. If the person did not provide consent, the public body should strike a balance between the interest that the information is publicly available and the privacy interest of the person involved.

The DDPA notes that in situations where a public body is required to make personal data public, it should also establish whether it should publish such information on the internet. The DDPA sets forth that publishing personal data on the internet carries great risks, such as identity theft. According to the DDPA, some information should only be published with the consent of the person involved, while other information should not be published on the internet at all. If a public body publishes personal data on the internet, it should also comply with all requirements of the APPD, such as the requirement to inform the person involved. The guidelines can be found at [website of CBP](#).

DDPA investigates public-private camera surveillance

On 8 October 2009, the DDPA released an investigatory report regarding camera surveillance on a business park in Vianen. The report is interesting because it illustrates under what circumstances camera surveillance by public-private partnerships is allowed.

The cameras on the business park had been placed by the public private partnership Stichting

Beveiliging Bedrijventerrein Vianen (SBBV) and were being used to monitor the public roads of the business park. In principle, only municipalities can use camera surveillance to monitor public roads.

However, in this case the DDPA found that the camera monitoring could be performed by SBBV, because the Municipality of Vianen was a member of the board of SBBV and the municipal responsibility for SBBV was clearly defined in its articles of incorporation.

The DDPA also found the use of the surveillance cameras to be proportional. The cameras were only used to register the licence plates of vehicles on the business park and to register how many vehicles were on the business park, for the purpose of responding to intruder or fire alerts. SBBV had consulted residents of company houses on the business park before placing the cameras. The cameras could not be used to identify persons. The camera images could only be viewed by police officers on a password-protected terminal. SBBV had not placed more cameras than strictly necessary. Finally, the cameras only operated during certain periods of the day. The investigatory report can be found at the [website of CBP](#).

The DDPA did find that SBBV violated individuals' access rights to camera footage. SBBV had stated to the DDPA that it would only release camera images to a Public Prosecutor and not to individuals. According to the DDPA, individuals have a right to access all camera footage relating to them, unless an exception applies. In response to this finding, SBBV has drafted a protocol for the release of camera footage to individuals.

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