AIJA Commissions Month

20 October – 20 November 2020

In these unprecedent times when the whole world has gone “online” and has been extremely difficult to cope with the challenges of the shift in everyday life, thanks to the generously granted scholarship by the International Association of Young Lawyers (AIJA), I had the opportunity and privilege to participate in the “Commissions Month”, an amazing and exceptionally insightful online event organised by AIJA, that took place from 20 October to 20 November 2020. The event was comprised of the discussions, presentations and panels on the pressing, important and very interesting legal issues from different areas of law through twenty-one different commissions.

I am a lawyer qualified in Croatia, my professional specialisation areas are Data and Privacy Protection, Intellectual Property, Competition and Corporate Law, and my interests lie specifically in the intersection of these and technology. Thanks to the flexibility of the AIJA Commissions Month which provided a “passport” to all organised commissions, I was able to participate in ones that perfectly match my areas of work and my career interests. From the vast array of commissions, I have participated in the following ones: SCILL Commission, T.R.A.D.E Commission, Antitrust Commission, IP/TMT Commission and Labour Law Commission. I can completely identify with the flexible approach that AIJA has taken in organisation of this event, as I firmly believe that lawyers, and especially young lawyers in their pursuits of becoming future legal experts, always need to see the bigger picture and understand the interconnection between different areas of law. I recognised early on this importance by training in the small market and jurisdiction, due to which I daily deal with different legal matters, from privacy law to commercial and competition law, and I am regularly required to handle different and, at first glance, distant areas of law, which are in fact very related.

I found the Commissions Month amazingly insightful, educational, and interesting and would confidently say that the event indeed addressed the “hot” legal topics. Through listening discussions, advice, and presentations of the outstanding participating legal experts, I have deepened my knowledge and learned very useful things for my everyday work as a third-year associate in a globally present law firm, and especially for the independent research I very much enjoy.

The first webinar I took part in was the “Innovation – Legal Tech development” in the SCILL Commission. From my perspective of a young lawyer with a longstanding interest in law and technology, who is aware of both the positive and negative impacts thereof, I have found this webinar extremely insightful for several reasons. Technology is influencing literally all aspects of everyday life, and it seems that we have only seen the beginning of it. I often encounter that legal professionals are “afraid” of Legal Tech substituting them, while, in my opinion, it is quite the opposite. Legal Tech software and other tools aim to support the legal industry in providing legal services and aim to provide solutions for lawyers to handle a large amount of cases more efficiently, which was emphasised and exemplified during this webinar in cooperation with the European Legal Tech Association. I particularly enjoyed the presentation of Ms. Joyce Pitcher, a French lawyer, who presented three different Legal Tech projects she is involved with, and I found her work very inspiring, especially having in mind the lack of diversity in Legal Tech.

The third project she presented relates to helping both the passengers whose flights were cancelled for COVID-19 reasons, and the lawyers to collect cases more easily. It is a platform through which a passenger fil the form by answering questions related to his or her case, poses his / her demands for lawyers, price, and ultimately signs the form and pay for legal support, after which a lawyer receives the signed legal contract and payment and can start supporting the client. This example is the perfect embodiment of the Legal Tech definition provided by Mr. Grégoire Miot during the webinar – that the Legal Tech has a two-fold approach: helping people get access to legal services more easily (B2C approach) and providing proactivity and assisting tool to legal professionals (B2B approach), which I fully agree with.

The next commission I have participated in is the T.R.A.D.E. (which stands for Trade, Retail, Agency, Distribution, E-commerce) Commission. My daily practice includes a vast array of trade matters, specifically related to the e-commerce, and often interrelated with other legal areas. The content of the webinar "Hot topics in international commercial contracts" epitomised how lawyers advising clients in commercial contractual matters must be skilled in other areas as well, such as intellectual property and private international law. The structure of this webinar, and the whole T.R.A.D.E. Commission, aimed to combine the commercial law with complementary specialisations (e.g. IP/IT, litigation, arbitration, antitrust, consumer law and corporate law) through identifying different contractual clauses that need attention of lawyers. The respected speakers, Ms. Marika Devaux, Mr. Alessandro Paci and Mr. Gustavo Papeschi focused on presenting a selection of sensitive clauses in international commercial contracts – intellectual property, liquidated damages, and choice of law clauses, and stressed out how there is not just one way to draft contractual clauses, but rather they have to be adapted to the needs of the specific contract and parties involved. Ms. Marika Devaux provided very insightful advice on how to improve IP rights clauses and protect IP rights both during the contract term and post termination. IP rights clauses benefit from a two-pronged approach: they must be precisely defined but still left open by trying to anticipate the IP rights which may originate in future. I found very useful the acknowledgement about the importance of defining geographical area for IP protection – to include bot the registered territory and the territory in which IP rights have not yet been registered. Likewise, through analysis of the Elephant Bleu Case, Ms. Devaux exemplified the importance of extending IP protection to third parties. For example, in franchising contracts, as the buyer of the business is not a party to the franchising contract, and the franchiser is not a party to the sale of business contract, the franchisee executing the dead of sell with the buyer should refer the same IP protection clause from the franchising contract it is bound by in the deed to the buyer. If the new buyer infringes the IP clause, the franchisor can, in this way, defend its rights with the help of a franchisee who respected its IP protection obligation from the franchising contract.

Furthermore, the speakers provided extremely useful and thoughtful drafting techniques and stressed out how being creative as a lawyer is very important. I have learned a lot about diversity and originality in drafting techniques from Mr. Alessandro Paci who addressed liquidated damages clauses. These clauses are very relevant because they deal with the liability, and with money, and it is very important to negotiate and constantly improve liquidated damages clauses for the benefit of the client. Liquidated damages clauses effectively stipulate a sum of money in the event of non-performance or late / incomplete performance of a contractual obligation, with a purpose of indemnification. Mr. Paci stressed out the importance of taking into consideration the applicable law and provided examples for calculation of damages. I found particularly insightful and interesting the "tips & tricks" of Mr. Paci on how to draft the liquidated damages clause depending on if you are representing a buyer or a seller. For example, if a lawyer represents the seller, it should aim to define the maximum amount of damages in case of late delivery, and to specify the reasons when the seller should not be

deemed liable (e.g. for reasons attributable to the buyer of force majeure); conversely, if a lawyer represent the buyer, it should aim to combine liquidated damages with other remedies, such as entitlement to terminate the agreement, in case of late performance. These are the approaches I take in my everyday practice, and I was very glad to get the “confirmation” of these being good practices by the respective expert. Equally important and interesting for me was the presentation of Mr. Gustavo Papeschi on the choices of law, one of the most relevant clauses in international agreements. Croatia has a very specific commercial legislation that is similar only to the German one, and what I learned through working in a globally present law firm, often encountering agreements drafted in foreign law but intended to be executed in Croatia with Croatian counterparties, is that the contractual clause, no matter how important for the parties might be, must primarily be enforceable. Croatia has a lot of necessity forum provisions and strict commercial law, which is why many foreign legal provisions normally included in commercial agreements would not be enforceable in Croatia.

As part of the T.R.A.D.E. Commission and through “Doping through the sole” webinar, I had an opportunity to listen to the Interview with the General Counsel from the famous sports fashion brand “On”, Mr. Christian Lenz, who elaborated on how life of in-house counsel has changed during COVID-19 and how On deals with diversity and innovation. I was specifically interested in learning on the use of Artificial Intelligence in On’s business, and how they use AI to prevent fraud, and mostly to answer certain customer queries. It was very interesting to find out about their experience and efforts of combining both the AI and “person-to-person” communication for communicating with their customers, as customers are often dissatisfied when communication with AI only, even though they can receive the reply faster from the AI.

Although my work in the competition law area is specifically focused on the merger control in tech sector, I found very useful and exciting the presentation of Ms. Susanne Kingma on the sustainability and competition law in the “Hot topics in Antitrust” webinar, as part of the Antitrust Commission. I have myself witnessed the sustainability efforts of companies and law firms, but I have never thought of the intersection of the prohibited agreements and sustainability. Ms. Kingma presented the new policy of the Dutch Competition Authority, which aim to promote sustainability in relation with the application of the Article 101(3) TFEU, which addresses the exemptions for prohibited agreements. Namely, the exemption in the case of agreements confirmed to be achieving climate goals, and thus, according to the new Dutch policy, the exemption assessment would not only take into account the benefits for the users of the specific products, but also the benefits for the public in general, i.e. the entire effect. Furthermore, the policy would also change the assessment of the other qualifying factor: in case of combined market shares 30% or less, besides exempting where it is obvious that the advantages outweigh the disadvantages which is also known as a “quantitative substation”, the qualitative substation will be taken into account – due to the types of environmental effects which cannot be quantitively expressed, such as animal welfare. It was very interesting to find out about this and other new sustainability initiatives within the EU, and especially to see the interpretation of how sustainability falls within the exemption of prohibited agreements.

Finally, the Commission that is closest to my everyday work and interests was the IP/TMT Commission, composed of four panels on the Data Protection and Intellectual Property. The first webinar covered the implications of the ECJ’s “Schrems II” decision as of 16 July 2020, which declared the "EU-US-Privacy Shield" invalid. Consequently, transfers of personal data to the US can no longer be based on the Privacy Shield. To say that this decision caused implications in practice would be an understatement. Since this decision, I have been working on solutions for my clients within the law firm I work for and finding such solutions is extremely difficult, as it practically presumes identifying alternatives to US data transfers. The majority of EU companies use US-based service providers. Of course, transfers may be based on EU

standard contractual clauses, but only provided that an adequate level of data protection can be guaranteed by complementary measures. However, having in mind that the reason why ECJ declared Privacy Shield invalid is the US surveillance law – precisely, Section 701 and 702 of the Foreign Intelligence Surveillance Act, which is extremely privacy-dangerous as, according to this Act the surveillance is not subjected to individual judicial authorisation and is not determined based on probable cause, but allows the authorities to target any foreign national on foreign soil to obtain foreign intelligence information. Having this in mind, it is questionable what the additional safeguard measures could be that would protect the EU citizens from the envisaged surveillance in case of data transfer to the US. The discussion of Mr. Johannes Struck and Ms. Rim Ben Ammaron on the ECJ's decision was very interesting and has provided me with some very interesting thoughts. I found very insightful the impact of the decision on the work and standpoints of other Data Protection Authorities, such as French CNIL, which expressed that companies (at least in its jurisdiction) cannot use Microsoft services. Instead, the CNIL proposed alternative solutions, such as finding the EU partner, or licensing products to EU partners. In my opinion, this will have a tremendous effect on the international trade, and licensing practices.

The equally insightful and interesting webinar in the IP/TMT Commission was "Sensitive health data: can we afford to "close the eyes" towards data protection law in light of extreme situations?", the review of which I will here combine with the webinar "COVID-19 – health Concerns and Privacy Issues" from the Labour Law Commission. Both webinars covered matters I have been extensively working on, researching, and aiming to find solutions for: massive virus-influenced health data processing as a method to combat the virus. I have addressed the privacy implications of the Croatian contact tracing application, the lack of cybersecurity measures to protect data security threatened by the increased cyber-attacks due to the remote work, legal basis for health data processing, and health data inferences. Croatia has not had a particular response to the COVID-influenced privacy peril, and the Croatian Data Protection Authority has been quite silent on these. Considering the employer's general obligation to protect employees' health and safety at work, which is also a part of the Croatian legal systems, I have encountered a lot of practical questions of what the employer can and cannot do during the current crisis, including employees' temperature checks, collecting and processing of symptoms data, test results, travel history, and contacts, which is why, as a practicing lawyer in this area, I have cherished the opportunity to hear experiences, opinions and overviews of measures from the UK, US, Netherlands and Switzerland. These webinars explored the effects of COVID-19 from a data privacy perspective and evaluated when the processing and sharing health data can be proportionate to the global health crisis. Data plays a central role in coping with the pandemic, while the GDPR is drafted in the data subject centric way. I found particularly useful the scenario part where respective speakers - Ms. Cabell Clay from the US, Mr. Philipp Haymann, from Switzerland, Ms. Ailie Murray from the UK and Ms. Chantal Bakermans from Netherlands discussed if the employer can ask employee where has he or she been (i.e. ask about his / her travel to "risky" countries). It was very interesting to find out that, in the UK, not quarantining after being in the high-risk location is a criminal offence, which is why employers have reasonable grounds to ask employees about the travel history. For instance, the Croatian authorities have not adopted a "red" list of high-risk countries, or any similar list, and thus there is no such legitimate ground in the Croatian legal system. The panellists further discussed if employers could ask employees if they have COVID-19 symptoms, and or have undertaken a test. Dutch Data Protection Authority does not allow that employees are asked about a symptoms and employers are not allowed to register this information if employees voluntary provide it. Ms. Chantal Bakermans well stressed out that processing a suspicion of infection (e.g. sending employees home if employers suspect that they are infected) is a grey area. I completely agree with Ms.

Bakermans, as I have been addressing the threat of health data inferences, under which a suspicion of infection would be considered health data, and have been advocating for the update of the EU legislation to include data inferences. The US, on the contrary, is quite flexible with respect to processing health data and employers can collect health data of their employees, serve them with health questionnaires, require them to go and take the test, etc. I found very captivating that, although seems flexible in terms of health data processing, the US have a strong genetic data protection and that the definition thereof is broad enough to make asking about employees' family members health status unlawful. All these observations clearly illustrate how hard is to balance the interests of privacy and public health, and how important is to envisage privacy-friendly ways of combating the virus, which is why I consider webinars "Sensitive health data: can we afford to "close the eyes" towards data protection law in light of extreme situations?" and "COVID-19 – health Concerns and Privacy Issues" among the most insightful ones in the Commissions Month.

Overall, participation in AIJA's Commissions Month has provided me with new and significant knowledge, legal thoughts, ideas for my further research, and with very beneficial insights into topics of my interest and specialisation directly from experts in these fields, and I enjoyed the event very much. I am delightful to say that AIJA is indeed the association fully devoted to young lawyers: it has provided me with an outstanding opportunity to network, learn and develop by granting me the scholarship to attend the Commissions Month, and I am extremely grateful for this experience.

Alina Škiljić