

# IP, ICT and Data Insights



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# Andersen Global

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Andersen Global Chairman and Andersen CEO  
Mark L. Vorsatz, Andersen (U.S.)

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### Transparency

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### Seamless

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# Context

Welcome to the **Andersen** IP, ICT and Data Insights Newsletter, 1st Edition.

This edition highlights new and revised laws and regulations introduced primarily in 2024, as well as landmark jurisprudence related to IP & ICT in various member countries. It also explores the novel legal aspects presented by the Artificial Intelligence phenomenon and its impact on today's brand and IP owners.

Specific issues addressed in this edition include whether Vehicle Identification Numbers (VINs) are considered personal data, violations by governmental bodies using large IT systems to manage migrant data, the implications of 3D trademark protection related to packaging, and the protection of events celebrated as part of UNESCO's Intangible Cultural Heritage list.

The Andersen IP, ICT and Data Practice is a brand and creator 'go-to' partner for navigating such complexities of local, European and international IP, ICT and Data laws and customs. We help clients plan their IP strategies while retaining competitiveness in the global economy.

The Andersen IP, ICT and Data Practice is the go-to partner for navigating the complexities of local, European, and international IP, ICT, and Data laws and customs. We help clients plan their IP strategies while retaining competitiveness in the global economy. Our team comprises specialist lawyers and IP and tax advisors who proactively guide individuals and domestic and international companies of all sizes through their IP, ICT, and Data challenges.



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# Austria

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## CASE LAW

### Noyb Files GDPR Complaint Against OpenAI

Noyb, an Austrian non-profit organization, has filed a complaint against OpenAI with the Austrian Data Protection Authority. According to Noyb, OpenAI has failed to ensure the accuracy of the personal data processed by its large language model (LLM) thereby breaching the General Data Protection Regulation (GDPR).

At the heart of the complaint lies the allegation that ChatGPT is unable to correct or selectively block information, resulting in the spread of false information. In this particular case, the false information was the complainant's date of birth. Allegedly, ChatGPT did not "know" the correct date of birth, but - when asked about it in a prompt - tried to infer it. This was possible because the (anonymous) complainant (represented

by Noyb) is a public figure in Austria and therefore, other information to infer from was available. Despite this, the date of birth provided by ChatGPT was incorrect.

The complainant filed an erasure request asking OpenAI to erase his incorrect date of birth, as well as an access request seeking information on what data had been used to train ChatGPT's underlying algorithm. As he considered OpenAI's responses to be inadequate he filed the complaint.

This case is of particular significance as it addresses the technical aspects of LLMs and their compliance with data protection regulations. It underscores the challenges of ensuring data accuracy and individual rights in the context of advanced AI technologies.



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At the heart of the complaint lies the allegation that ChatGPT is unable to correct or selectively block information, which results in false information being spread.

# REGULATORY UPDATES

## Austrian Draft Legislation for NIS-2-Directive Published

The NIS-2 directive, an EU-wide regulation aimed at enhancing cybersecurity, must be transposed into national law by Member States by October of this year. Member States have some flexibility, particularly regarding the definition of management bodies. While the directive stipulates that management shall be held personally liable in cases of non-compliance, it does not provide a specific definition. Therefore, it is up to each Member State to determine which actors qualify as “management” within their jurisdiction.

The recently released draft of Austria's transposition law includes such a definition. It encompasses, at a minimum, an entity's management and supervisory board. However, depending on the circumstances of the individual case, its scope could be much broader and include actors beyond the immediate management level. This is especially relevant for group companies: it is conceivable that, due to the chain of command, the group management of an entity could end up being personally liable for infringements by affiliated companies. Therefore, and also because of the severe administrative sanctions that can be imposed, compliance is of utmost importance.

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While the directive stipulates that the management shall be held personally liable in cases of non-compliance, it does not provide a definition.



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# Bosnia and Herzegovina

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## LEGAL COMMENTARY

### Bosnia and Herzegovina Revamps IP Laws to Align with EU Standards

Bosnia and Herzegovina is in the process of adopting a new set of laws in the field of intellectual property to harmonize its existing legislation with European Union regulations. This includes the introduction of new laws, such as the Law on Trade Secrets. Although Bosnia and Herzegovina adopted IP laws in 2010 that were in line with EU legislation at the time, numerous changes have occurred since then, necessitating updates to the legal framework.

Significant amendments are expected in the area of patent law to meet the compliance standards required for full membership in the European Patent Organization. Currently, Bosnia and Herzegovina holds "extended state" status in relation to this organization and the European Patent Convention. The upcoming changes aim to elevate Bosnia and Herzegovina's patent laws to the required level for full integration and compliance.

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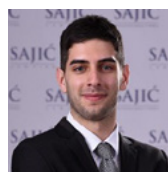
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## CASE LAW

### Latest Court Decisions in Bosnia and Herzegovina

In court proceedings initiated by the collective management organization for the protection and enforcement of the rights of authors of musical works (Association of Authors and Musical Composers) against users who have not entered into a contract, Bosnia and Herzegovina is seeing a growing trend of courts accepting claims and recognizing the right to damages equivalent to unpaid royalties.

Recent decisions from appellate courts indicate that the collective management organization successfully demonstrated the unauthorized use of musical works by presenting written records from inspections conducted by its representatives, along with witness statements from those who carried out the inspections



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# Germany

## Andersen in Germany

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## CASE LAW

### ECJ decision: Is the Vehicle Identification Number (VIN) Considered Personal/ Personally Identifiable Data?

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In its decision on November 9, 2023, the European Court of Justice (ECJ) ruled that whether a Vehicle Identification Number (VIN) is classified as personal or personally identifiable data depends on whether the person with access to the VIN has the technical means or additional knowledge to identify the vehicle's owner. The actual identification of the owner is not a determining factor.

#### Background

The case related to the truck manufacturer Scania's refusal to disclose the vehicle identification number (VIN) as repair and maintenance information to parts manufacturers and independent repair shops. The German Association of the Automotive Parts considered this to be a violation of European law, in particular Art. 61 of the Regulation 2018/858.

Since the VIN can be used to identify vehicle owners, it was vital for the Cologne Regional Court's decision to assess whether the VIN is deemed to be 'personal data' within the meaning of the GDPR. This assessment could affect whether its disclosure is permissible.

#### Decision

The ECJ ruled that the VIN is not personal data per se. However, it becomes 'personal data' if independent economic operators have the means to assign the VIN to a specific person ("Data Subject"). However, if the recipient of the data cannot make the identification, or if it is certainly impossible, the VIN is not considered as personal data under the GDPR. An actual allocation is not important.

With regard to the obligation to disclose the VIN by vehicle manufacturers pursuant to Art. 61 (1) Regulation 2018/858, the ECJ also clarified that this provision - insofar as the VIN is to be classified as personal data - establishes a "legal obligation" within the meaning of Art. 6 (1) lit. c GDPR to provide the VIN of the vehicles to independent economic operators as "controllers" within the meaning of Art. 4 No. 7 GDPR.

#### Practical Consequences

Going forward, it will be necessary to assess, on a case-by-case basis, whether the holder of a Vehicle Identification Number (VIN) has the means to link the VIN to a specific vehicle owner (Data Subject). This determination is not automatic. The previous position of German data protection authorities, which treated VINs as generally constituting personal data under the GDPR, can no longer be upheld.



## ECJ confirms: Unauthorized Advertising Mail Can Result in Non-Material Damages

In a clarifying ruling April 11, 2024 in Case C-741/21, the European Court of Justice (ECJ) has stated that a mere violation of data protection rights is not sufficient to justify recoverable non-material damages under Art. 82 GDPR. Rather, a concrete damage must be proven, which can also consist of the "loss of control" regarding the own data of a data subject.

### Background

The ECJ's decision was based on the following case: A lawyer in Germany objected to the continued sending of unsolicited advertising by the database operator Juris. Despite repeated objections and withdrawn consents, Juris continued to use the lawyer's personal data (postal address) to send him advertising by mail. The lawyer claimed non-material damages for the unlawful data processing. The case was originally pending before the Regional Court of Saarbrücken and was referred to the ECJ in relation to the interpretation of Art. 82 GDPR.

### Decision

The ECJ ruled that non-material damage caused by unlawful data processing is compensable under Art. 82 GDPR if concrete damage, such as the "loss of control" over one's own data, is proven. However, the mere violation of data protection rights is not sufficient.

In addition, the ECJ clarified organizational requirements for data controllers: companies cannot exculpate themselves from liability for data breaches by shifting the blame to individual employees.

## Practical Consequences

The decision is also likely to have a direct impact on advertising by electronic means - e.g. by e-mail (see E-Privacy Directive 2002/58/EC as amended by Directive EU 2009/136/EU). The sending of unsolicited commercial communications by electronic means without a proper legal basis should also give right to non-material damages, provided that a concrete damage, such as the "loss of control" over one's own data, is proven. In the case of such advertising measures, greater care must therefore be taken to ensure that there is an appropriate legal basis for such advertising measures (consent).

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In a clarifying ruling, the European Court of Justice (ECJ) has stated that a mere violation of data protection rights is not sufficient to justify recoverable non-material damages under Art. 82 GDPR. To claim non-material damage under Art. 82 GDPR, a concrete damage must be proven, which can also consist of the "loss of control" over a data subject's own data.



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# Greece

## Andersen Legal in Greece

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## CASE LAW

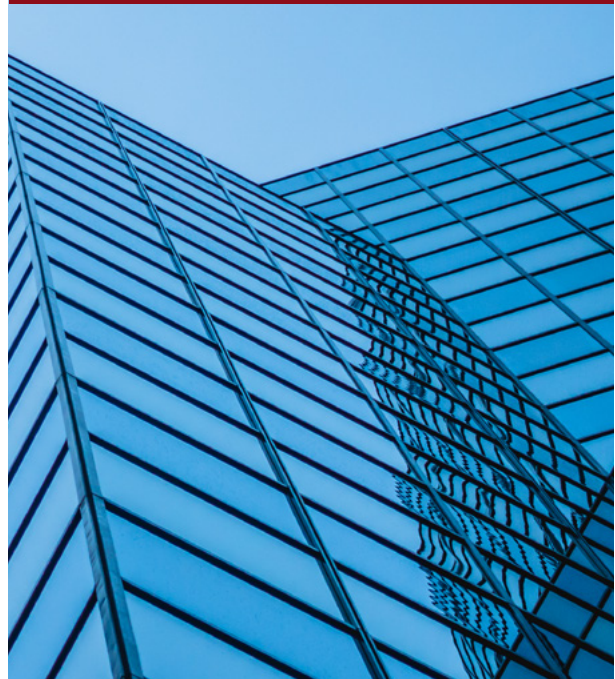
### Greece Fined €175,000 for Failures in Asylum Facility Electronic Control Systems

A governmental body in Greece, responsible for managing migrant facilities on Aegean islands through large IT systems, has been criticized for breaching data protection laws. These IT systems, which collect personal data through CCTV, drones, and fingerprint scans, were found to be in breach of regulations following an audit by Greece's Data Protection Authority (HDPa).

The identified issues included a lack of clear legal justification for data collection, failure to properly inform individuals about the process, and absence of proper contracts with data handling partners. Additionally, the governmental body did not maintain proper records of data processing activities, failed to conduct a sufficient impact assessment, and lacked a designated data protection officer. The HDPa also encountered difficulties during their investigation due to limited cooperation from the governmental body. Consequently, the HDPa imposed a total fine of €175,000 on the governmental body, with €100,000 specifically for the inadequate data protection impact assessment.

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Governmental Body in Greece fined € 175,000 for Omissions in the Electronic Control Systems placed in Reception and Accommodation Facilities for Asylum Applicants, with €100,000 specifically allocated for inadequate data protection impact assessment.



## LEGAL COMMENTARY

### Greek Postal Service Fined €2,995,140 for Data Breach Following Cyberattack

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A cyberattack on a major Greek Postal Service (PS) compromised personal data belonging to employees, customers, and pensioners. Following a comprehensive investigation, the Hellenic Data Protection Authority (DPA) imposed a substantial fine of €2,995,140 on PS for severe breaches of GDPR regulations.

The DPA's investigation uncovered critical security failings at PS. The company lacked essential safeguards to protect user data, making it vulnerable to unauthorized access. Inadequate access controls allowed hackers to penetrate the system, revealing significant weaknesses in PS's security framework. Additionally, the absence of a data breach response plan left the company unprepared for such incidents. Although PS made some efforts to recover lost data and enhance security post-attack, these measures were deemed insufficient by the DPA.

This incident underscores the critical need for robust cybersecurity measures and strict adherence to data protection regulations. By neglecting user privacy and data security, PS not only exposed millions to potential risks but also incurred significant financial penalties.

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The Hellenic Data Protection Authority (DPA) hit the Greek Postal Service (PS) company with a hefty fine of €2,995,140 for severe violations of GDPR regulations.



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## CASE LAW

### Physical and Logical Security for Proper Processing of Personal Data

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Italian courts are increasingly focusing on the effective protection of personal data and adherence to security measures outlined in Article 32 of EU Regulation No. 679 of 2016 (General Data Protection Regulation - GDPR).

In its ruling No. 28385 of October 11, 2023, the Italian Supreme Court reiterated that, to fulfil the principle of privacy by design, specified in Article 25 GDPR, which mandates a high level of data protection throughout all processing activities, data controllers and processors must implement appropriate technical and organizational measures to ensure robust user protection. To this purpose the court restated that data controllers must assess the risk during the planning phase of data processing. The assessment should consider the nature, scope, context, and purpose of the processing, as well as the likelihood and severity of risks to users' rights and freedoms. For Italian judges, safeguarding personal data is a fundamental right that requires increasingly stringent protection.



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## Italy

### Andersen in Italy

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## LEGAL COMMENTARY

### Risk & Compliance Management in Italy: focus on IP and ICT

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Legislative Decree No. 231 of 2001 introduced a specific form of criminal liability for companies and legal entities in Italy, which is officially termed “administrative liability arising from criminal offences.” Despite the term, this liability is essentially criminal in nature. If a manager or subordinate employee commits a crime in the interest or benefit of the company, both the individual and the company itself can be prosecuted in a criminal court. Relevant offenses under this regulation include copyright infringement, cybercrimes, and unlawful processing of personal data.

To mitigate this liability, companies must establish an effective organizational, management, and control system. This system should include policies and internal guidelines designed to prevent and reduce the risk of criminal conduct. Implementing a comprehensive compliance management system, as outlined in the UNI ISO 37301:2021 standard, is therefore essential. Such a system helps organizations minimize business risks, including those related to intellectual property (IP) and information and communications technology (ICT).



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## CASE LAW

### Historical Symbols: The Maltese Cross Registration Odyssey

In February 2021, the Bailiwick of Brandenburg of the Chivalric Order of Saint John of the Hospital at Jerusalem filed an application to register the 'JOHANNITER' mark as an EU trademark. The EUIPO objected to this registration, quoting Article 7(1)(h) of the EU Trademark Regulation, and mentioned a high level of similarity to the Maltese Cross.

It claimed that the latter is protected under Article 6ter of the Paris Convention for the Protection of Industrial Property ("Paris Convention"). The Paris Convention is an international treaty established in 1883 and administered by WIPO. Article 6ter is a significant provision that addresses the protection of several state-related symbols, namely, armorial bearings, flags, and state emblems and is critical in preserving and protecting sovereign symbols, preventing misuse, and fostering respect.

The Applicant countered this argument by asserting while Article 6ter of the Paris Convention is intended to guarantee the control of a state over the use of its own national emblems. It continued by stating that the Maltese Cross did not qualify as a

# Malta

## Chetcuti Cauchi Advocates

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The Board found no heraldic imitation of the historical symbol and noted the Order's historical use.

national emblem under the Paris Convention in that the cross's historical use by the Order predates Malta's adoption of the above Convention and also referred to the fact that the Order of St John had authorised the usage of this symbol even in Malta's Merchant Flag way back in 1965. Having said that, the Order had officially embraced the Maltese Cross in 1126 and resided in Malta from 1530 to 1798.

Despite this reasoning, the EUIPO still upheld its refusal.

The Applicant appealed, arguing against the need for authorization by the state of Malta and citing direct historical ties it had to the cross on its own account. They contended that Article 6ter did not apply as the Merchant Flag does not denote state authority. Additionally, they asserted that the

mark did not heraldically imitate the Maltese Cross as it featured distinct elements and prominent lettering.

The Board of Appeal agreed, finding no heraldic imitation, and noting the Order's historical use. They also determined Malta lacked authority to authorize the use of such symbol, as it did not really belong to it and originated with the Order itself. Additionally, they clarified that the Merchant Flag did not qualify as a state emblem.

Consequently, the Board allowed the trademark's registration, underscoring the complexities of trademark law involving historical symbols.

## LEGAL COMMENTARY

### The Malta Village Festa Achieves UNESCO's Intangible Cultural Heritage List

Celebrated in towns and villages across Malta, the festa is a traditional, Maltese annual celebration which runs from late April to early October and features fireworks, concerts, band parades, and traditional local food such as nougat, ftira, mqaret (date pies), and pastizzi (flaky pastries). The festa has its origins in purely religious celebrations but has now extended to cover social, artistic, and creative elements.

In December 2023, the eighteenth session of the UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage took place in Botswana and during this session, the Committee inscribed 6 elements on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding, and 45 elements on the Representative List of the Intangible Cultural Heritage of Humanity. The committee also selected four programmes for the

Register of Good Safeguarding Practices and granted one request for International Assistance. The Committee emphasized the crucial role of intangible cultural heritage in promoting inclusive social, economic, and environmental development. It also acknowledged progress in initiatives related to the economic aspects of safeguarding intangible cultural heritage, its protection amid climate change, and its preservation in urban areas.

In this same event, the Committee recognised Malta's Festa as a celebration that would become part of the UNESCO reputable list of Intangible Cultural Heritage ("ICH"), alongside other Maltese traditions like Għana (folklore singing) and ftira bread (traditional local style bread recipe), which were previously listed in 2021 and 2020, respectively.

ICH is vital for preserving cultural diversity amid modern globalization initiatives that have inundated the island. To aid individuals comprehend intangible cultural heritage,

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The UNESCO Intergovernmental Committee recognized Malta's Festa as a celebration that would become part of the UNESCO reputable list of Intangible Cultural Heritage

the UNESCO Convention describes this process in terms of five broad categories: oral traditions, performing arts, social practices, knowledge about nature, and traditional craftsmanship. The festa is a prime example, involving extensive community preparation, attended by parish members and bands, and culminating in processions led by clergy.

To uphold the vigour of intangible heritage, such act needs to remain pertinent within a culture, be constantly practiced, and passed down across generations. Youth engagement is crucial for the festa's continuity, with parishes organizing children's festas, where young participants learn to continue such traditions themselves through direct involvement.

Despite external secular influences, Malta remains committed to its cultural practices, making the festa's UNESCO recognition a testament to its cultural significance and resilience.

## REGULATORY UPDATES

### Malta Tax & Customs Commissioner Issues IP Deductions Notice

On 28 December 2023, the Commissioner for Tax & Customs (CfTC) announced new rules on accelerated deductions for income generated from intellectual property (IP) and intellectual property rights (IP rights).

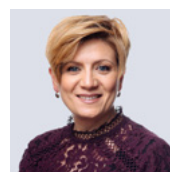
Previously, under Article 14(1)(m) of the Income Tax Act, Chapter 123 of the laws of Malta (ITA), capital expenditure on IP or IP rights had to be deducted over a minimum of three consecutive years, starting from the year the expenditure was incurred or the IP was first used to produce income.

Starting from the year of assessment 2024 (basis year 2023), the new CfTC notice allows, for full deduction of such expenditure in the year it was incurred or first used, at the taxpayer's option. This change permits immediate deduction rather than spreading the expense over three years.

This full expensing regime applies only to income produced using such IP or IP rights. Additionally, any unclaimed deductions on capital expenditure incurred before the year of assessment 2024 can be claimed in full in the 2024 assessment year.

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The new CfTC notice allows, for full deduction of such expenditure generated from IP



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# Poland

## Andersen in Poland

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## LAW COMMENTARY

### Poland Publishes Draft Law on Crypto Assets in Compliance with EU Regulation MiCA

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In February 2024, a draft law concerning crypto assets was published on the Government Legislation Centre's website. This draft law aims to implement EU Regulation 2023/1114 (MiCA) in Poland. It designates the Polish Financial Supervisory Commission (FSC) as the authority responsible for overseeing the cryptocurrency market and ensures that the FSC has adequate resources to protect investors effectively.

Of particular importance under the draft law, the FSC is granted powers to block bank accounts associated with suspicious transactions and to impose sanctions on entities and individuals involved in cryptocurrency activities. Additionally, the draft introduces criminal liability for operators within the cryptocurrency market.

The draft also outlines the obligations for cryptocurrency market operators, including civil liability rules, requirements for publishing information documents related to cryptocurrencies during public offerings, and regulations concerning professional secrecy. Most provisions of the draft law are set to come into effect by the end of June, 2024.

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The draft law on cryptocurrencies also regulates the obligations for cryptocurrency traders, including civil liability rules. The law also defines the range of persons responsible for publicizing information documents related to cryptocurrencies when conducting a public offer, as well as the scope and rules of professional secrecy.





The draft law primarily aligns the identification of essential and important entities to NIS2 through a self-identification mechanism and requires entities to register within the new system.

## Poland's Draft Law on Cybersecurity: Transposition of the NIS2 Directive and New Compliance Measures

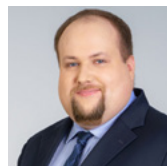
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In April 2024, a draft law concerning the Polish National Cyber Security System was released to implement the NIS2 Directive. This draft law aims to align the identification of essential and important entities with NIS2 standards through a self-identification mechanism and mandates that these entities register within the new system.

The draft maintains the maximum fines stipulated by NIS2 but revises the minimum fines to PLN 20,000 for essential entities and PLN 15,000 for important entities. Additionally, the bill addresses liability for multi-member boards by making all board members equally responsible if a designated member for cybersecurity issues is not appointed. The company head can face individual fines up to 600% of their salary, calculated according to holiday pay rules.



To avoid severe penalties, entities must accurately classify themselves as essential or important and implement robust cybersecurity risk management measures. The law is scheduled to come into force on 17 October 2024.



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## REGULATORY UPDATES

### Guidelines for Monitoring Individuals with Camera Devices on Residential Property

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The Office for the Protection of Personal Data of the Slovak Republic has issued Methodological Guidelines regarding the use of camera devices on residential properties. The Office advises individuals to install and operate these devices in a manner that ensures they record only within the boundaries of their own property. This approach helps avoid potential complaints and inspections by the Office.

When camera devices fall under the General Data Protection Regulation (GDPR), their legality is contingent upon a proportionality test and adherence to GDPR obligations. These include data minimization, storage limitation, transparency with data subjects, and maintaining records of processing activities. Failure to meet these requirements renders the data processing unlawful, necessitating the cessation of such activities and deletion of recordings.

For detailed guidance, refer to the Methodological Guidelines of the Office for the Protection of Personal Data of the Slovak Republic, No. 1/2023, dated May 24, 2023.

# Slovakia

**CLS Čavojský & Partners**

Collaborating firm of Andersen Global

## CASE LAW

### Slovak Supreme Court Rules on Disclosure of Personal Data from Live Judicial Proceedings

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The Supreme Court of the Slovak Republic has ruled that courts may deny requests for personal data from "live" judicial proceedings if disclosing such data would breach personal data protection laws, particularly when the data concerns natural persons involved in the proceedings.

When legal entities participate in the proceedings, courts must assess whether disclosing data about these entities could indirectly reveal information about identifiable natural persons. This requires applying a test of reasonable probability to determine if the data might be used to identify individuals.

The decision to disclose data will depend on numerous factors, including whether the data subject is, for example, a limited liability company with a single shareholder and managing director (who is the same person) or a larger, multi-person company. Each case must be evaluated individually based on its specific context.

This judgment is outlined in the Supreme Court's decision dated June 19, 2019, reference number 10 Sžik/2/2017.



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Disclosing personal data of individuals from live judicial proceedings may constitute a breach of personal data protection, including cases where legal entities are involved. Therefore, it is crucial for the court to carefully consider whether to release such data.

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The Office for the Protection of Personal Data of the Slovak Republic recommends to individuals to install and use camera devices on their property in such a way that they record only footage within the boundaries of their property.





## CASE LAW

### Supreme Court Overturns Patent Invalidation Ruling – Case of Extra Petita Inconsistency

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In its decision n. 1367/2023 dated October 4, 2023, the Supreme Court addressed a case where a patent had been invalidated by the Court of Appeal on grounds of lack of inventive step. The Supreme Court ruled that this was improper because the original lawsuit had only contested the patent's novelty, not its inventive step.

Novelty and inventive step are distinct criteria for patent validity. While both can lead to a patent being invalidated, the appeal focused solely on novelty. The Court of Appeal had ruled on the inventive step criterion, which was not part of the initial claim or evidence presented. This deviation from the original grounds for invalidity constituted an inconsistency with the extra petita doctrine, which prohibits adjudicating on issues not raised in the original proceedings.

The case highlights the importance of adhering to the specific grounds of claim presented in patent disputes.

# Spain

## Andersen in Spain

Member firm of Andersen Global

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This case underscores the necessity for companies to establish and enforce legal, IT, and physical protocols to safeguard trade secrets.

### Protection of Trade Secrets in Insurance Brokerage: Key Insights from WILLIS v. DEASTERRA, MARSH & Others

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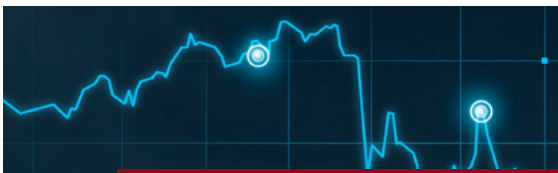
The judgment of the Provincial Court of Madrid n. 38/2023 issued on September 22, 2023, addresses issues of unfair competition related to trade secrets within insurance brokerage firms, specifically focusing on client policies, renewals, premiums, and claim rates. The court applied the criteria set out in EU Directive 2016/943 for the protection of trade secrets and concluded that:

- the information qualifies as a trade secret because it is not easily accessible.
- the information has commercial value, as it provides a competitive advantage to its holder.

- reasonable protection measures were not adopted.

when effective protection requires companies to establish and enforce legal, IT, and physical protocols to safeguard trade secrets.

This case underscores the necessity for companies to establish and enforce legal, IT, and physical protocols to safeguard trade secrets.



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The court considered that the holder of the contested mark possessed a family of trademarks, potentially affecting the likelihood of association.

## Supreme Court Reverses Appellate Decision on 3D Trademarks & Rejected on Functionality

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The Spanish Supreme Court, in its judgment on July 19, 2023, reversed an appellate court's decision concerning the distinctiveness of 3D trademarks, specifically for a cider bottle and an oil container.

3D trademarks often face challenges regarding distinctiveness. To be protected, the shape must differ significantly from common industry uses, though not necessarily in a substantial way. This

case focused on the nullity of a registered trademark featuring a bottle without any labeling or naming, arguing it was a shape necessary to achieve a technical result, which patents—not trademarks—should protect.

The court emphasized that it must be verified whether all aspects of the shape correspond to the product's technical function. The terms "exclusively" and "necessary" limit the scope of prohibition. However, in this case, the shape of the bottle identified the origin of the product as natural cider from Asturias. The existence of multiple alternative forms that serve the function of containing and pouring cider supports the argument that this particular shape is not necessary.

The provision ensures that only those product forms incorporating solely a technical solution, whose trademark registration would hinder other companies from using that technical solution, are refused registration.

## EUCJ Ruling on Likelihood of Confusion - Family Trademarks vs Trademarks in Series

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The EU Court of Justice (EUCJ) decision on October 25, 2023 (T-511/22), addressed a case involving the comparison of a figurative trademark and a figurative trademark with word elements, which were similar in their figurative aspects but not the dominant ones.

The court considered that the holder of the contested mark possessed a family of trademarks, potentially affecting the likelihood of association. This principle can only be invoked if two conditions are cumulatively met. Firstly, the proprietor of a series or earlier registrations must provide proof of use for all marks in the series, or at least a sufficient number to constitute

a "series." Secondly, the trademark in question must not only be similar to the series marks but also exhibit characteristics that associate it with the series.

## Entering into force of regulation of influencers operating in audiovisual platforms

On April, 30, 2024 entered into force Royal Decree 444/2024, establishing the requirements for being considered a user of special relevance of video-sharing platforms, which develops and causes the entering into force as well of article 94 of the Audiovisual Communications General Act dated July 2022 (Ley 13/2022 de 7 de julio, General de Comunicación Audiovisual).

These legal instruments establish a minimum regulatory framework for controlling the activity of influencers using video-sharing platforms to operate in the market (such as YouTube or Twitch), when they have a significant presence in those platforms, by means of their number of followers and/or the income obtained from such activity.

First of all, those specially relevant users shall register before the national Registry of Audiovisual Communications Service Providers.

Secondly, they have to comply with certain rules and obligations set forth by Law 13/2022, namely as per article 94 therein, which include, among others, respecting the principles ruling the audiovisual activity (i.e., protecting human dignity, pluralism, gender equality, and accessibility, adopting measures to protect minors against content that may damage their physical, moral and mental development, and respecting the regulations related to audiovisual commercial communications.

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The court considered that the holder of the contested mark possessed a family of trademarks, potentially affecting the likelihood of association.



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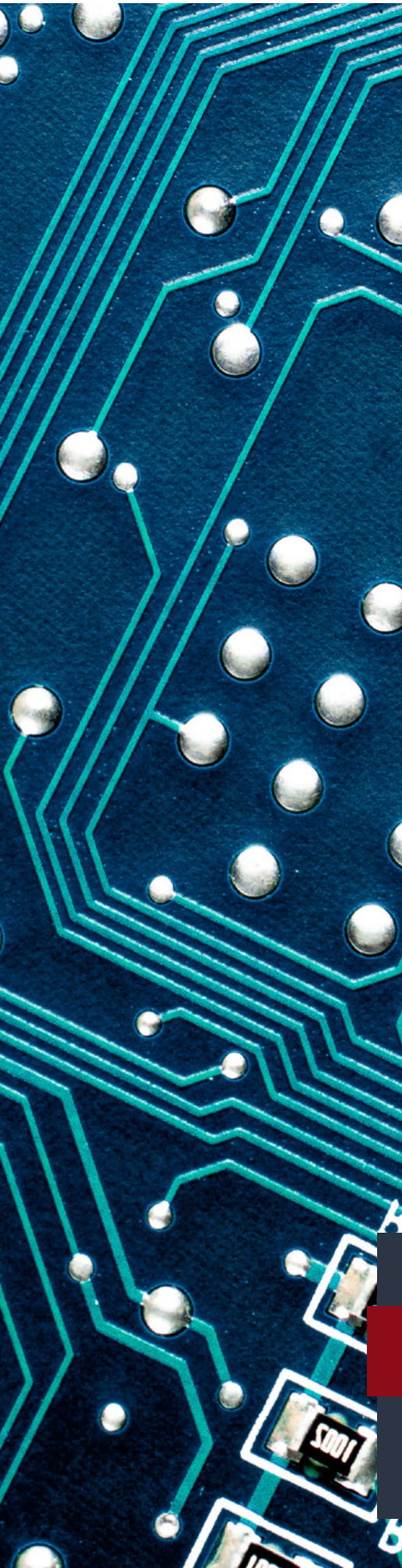
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