IP/IT NEWSTICKER

AUSTRIA

No liability of host providers for unlawful content of internet-users in case of timely deletion of hate speech posts – obligation to deliver user data in case conviction is possible or not totally excluded

In principle the operator of an online discussion forum cannot be held liable for unlawful content of users provided that the incriminating content is deleted in due time. The deletion of posts on the day of service of a lawsuit is considered reasonable. The operator is obliged to deliver user data upon a third party's request if the prosecution of the alleged infringement initiated by the plaintiff is "possible" or "not totally excluded".

As part of an online discussion forum operated by a media owner, internet users published posts referring to the plaintiff - the CEO of another media group in Austria - as a rat/unprincipled person ("Charakterschwein") and retard ("Vollidiot") and comparing him to Joseph Goebbels. Subsequently, without any prior request, the entrepreneur concerned filed a lawsuit – based on Sec. 1330 General Civil Code – against the operator of the online discussion forum seeking omission of the libelous language about him as well as delivery of the users' names and address.

In its decision 6 Ob 188/16i of 30 January 2017 the Supreme Court of Justice dismissed the plaintiff's request for omission. Although at first sight this decision is somewhat unexpected, ultimately, however, it is absolutely correct: In fact the Supreme Court with good reason held that readers of content on an online discussion forum will not automatically assume that a user's post mirrors the forum operator's opinion. In the view of the trial senate, the operator of the online forum as host provider pursuant to Sec. 16 E-Commerce-Act cannot be held liable for unlawful content of users provided that he has not caused such content by his own conduct and the content in dispute is deleted in due time. In the present case the sued forum operator deleted the incriminating content on the day of the service of the lawsuit and therefore immediately after having gained knowledge thereof. Hence, the request for omission was dismissed in its entirety.

Pursuant to Sec. 18 para 4 E-Commerce-Act and following the Court's decision mentioned above, the operator of the online-forum was obliged to deliver the user data. Upon a third party's request the defendant as host provider must deliver the user's name and address if there is an overriding interest in ascertaining the user's identity with regard to a specific unlawful matter. This is the case, in particular, if the prosecution of the alleged infringer has a certain prospect of success. Objectively, based on the incriminated posts the prosecution of the authors of the posts pursuant to Sec. 1330 General Civil Code is possible or not totally excluded. As a consequence, the operator is obliged to deliver the user data to the plaintiff.

CZECH REPUBLIC

New developments in the copyright law

An amendment to the Copyright Act became effective as of 20 April 2017, mainly implementing the EU directive on collective management of copyright. The directive has introduced stricter and more transparent rules for collective management of copyright and a common standard for collective management across the EU Member States. Also other numerous important changes have been introduced, such as:

- A major change is a significant extension of the license for architectural works. The current statutory license applies only to works expressed as a structure, i.e. a building built based on an architectural project. The amendment extends the license to cover architectural works expressed in drawings or plans. Under the new rules, an architectural work also includes maintenance work or alterations to a completed structure to a necessary extent which preserve the value of the architectural work, and is expressed either as a structure or in drawings or plans.
- Another change applies to employee works, expressly providing that an employee's consent to the transfer of a copyright is taken to be irrevocable, and applies to all other assignments. The person to whom the copyright is transferred is then considered an employee for the purposes of the Copyright Act.
- Licensees under exclusive licenses will be entitled to seek reasonable satisfaction as compensation for a non-pecuniary loss for an infringement of copyright. To date, licensees of exclusive licenses have had no opportunity to seek reasonable satisfaction at all.
- Further, the amendment introduces a new statutory license in relation to caricature and parody. This means that the use of a work of authorship for the purpose of parody or caricature without the author's consent is not considered an infringement of copyright.
- Changes have been made to provisions governing termination of "orphan work" status. An orphan work means a work of authorship where the author cannot be identified or found. The change affects the termination of the orphan work status by the author: if an orphan work has been used in compliance with the statutory license to use an orphan work, the author may terminate the orphan work status via a notice sent to the licensee of the orphan work or, where no statutory license has yet been issued, the status is terminated by a notice sent to the collective management organization that keeps a list of orphan works. The orphan work status may, of course, also terminate in cases where the requirements for obtaining the orphan work status no longer apply, for example the author is found in another way than via a notice sent by the author themselves.

Uber banned in the second largest city in the Czech Republic

Uber must obey the preliminary order issued by the Regional Court in Brno that prevents Uber from doing business in the city of Brno. The Court reasoned that Uber has been

providing its services in violation of Czech laws, in particular due to the fact that Uber drivers are not licensed taxi drivers, Uber cars are not marked as a taxi, do not bear the name of the company and do not have a taximeter. This is the first "anti-Uber" court decision in the Czech Republic.

Court proceedings were initiated against Uber also in Prague and are still pending; however the application for preliminary order was already rejected by the Prague courts.

Tougher requirements in cyber security

The Czech Government is discussing an amendment to the Czech Cyber Security Act which is intended to implement tougher requirements for a significantly larger number of companies. The amendment, among others, extends the scope of the existing regulation from critical information infrastructure managers also to operators of so-called basic services.

Furthermore, an increased fine of up to CZK 1 million (approx. EUR 3,700) could be imposed when the target of a cyber-attack does not respond to security instructions given by the competent authorities. Existing legislation, which still applies only to the most important players and institutions, imposes also other duties. Companies must appoint someone to the role of manager, architect, and cyber security auditor, and report themselves to authorities when they become a target of a cyber-attack.

Finally, thanks to this amendment, a new national office for cyber and information security shall be established.

Mobile data prices to be lowered?

The Czech Government is discussing an amendment to the Electronic Communications Act which is primarily aimed at bringing better protection for consumers. However operators argue that the effect of the legislation will be just the opposite. The amendment aims, among others, at lowering the price of mobile data use and expediting the transfer of a mobile number to another operator to a maximum of 10 days. Furthermore, in case the operator changes its terms and conditions, customers shall be allowed to withdraw from their contract without charge. An agreement on the scope of permitted unilateral changes to the terms and conditions, as well as the manner of notification of such changes to the customer by the operator, including a notification of withdrawal, shall form an obligatory part of the terms and conditions. The amendment also includes a prohibition of the provision of services to consumers for other than published prices.

Billion investment fund

Investment group KKCG (owned by the third wealthiest man in the Czech Republic, Karel Komárek) along with the electronics producer Foxconn has founded an investment fund called ETIP (The European Technology Investment Platform). The ETIP will focus on

developing and investing in technological companies in Europe. The fund will be provided with tens or maybe hundreds of million euros. ETIP will invest in well-established as well as technologically innovative companies. In particular, the targets are middle-sized companies with the potential for quick growth. ETIP will buy majority shares in the companies focusing on smart technologies, data centers, cyber security etc. In the first stage, the fund shall focus on the Czech Republic, Slovakia, Poland, Austria and Germany.

POLAND

The reputation of a trademark is to be assessed at the time an infringing entity enters the market.

Gino Rossi S.A. is a Poland-based company that produces footwear and leather accessories. Its trademark, "Gino Rossi" comes from the surname of the company founder, was first used in 1992 and was registered with the Polish Patent Office in June 1997. The company has more than 100 outlets in Poland and abroad.

Gino Rossi filed an action for infringement of its trademark against a producer of watches that uses the same brand name. The defendant is a significant producer and distributor that commenced activity in 2006 and registered the "Gino Rossi" trademark with the Polish Patent Office in 2008.

Under Article 296 (3) of the Industrial Property Law, it is illegal to use a trademark which is identical or similar to a well-known trademark, even for dissimilar goods, if such use could bring undue benefit for the user or be detrimental to the distinguishing character or the repute of the previously existing trademark.

The Regional Court, and subsequently the Appellate Court, prohibited the defendant from using the trademark in question for watches and ordered the publication of an apology for its illegal use. In the opinion of both courts, the use creates the risk of misleading consumers as to the producer and origin of the watches.

It is a prerequisite for seeking legal protection of a trademark that it be recognized on the market, i.e., that it be reputable. There was no doubt that at the time of the court action the Gino Rossi footwear trademark was well known on the market.

The defendant appealed to the Supreme Court which focused on the question of when a trademark must be reputable for legal protection to be available.

In the case in question, the Supreme Court came to the important conclusion that "The repute of a trademark is to be assessed at the time the infringing entity entered the market". Thus, the fact that the Gino Rossi footwear trademark was reputable at the time of the verdicts of the Regional (2015) and Appellate (2016) Courts was not determinative.

The Supreme Court remanded the case to the Appellate Court in order to complete

evidentiary proceedings as to whether the Gino Rossi footwear trademark was well-known on the day when the defendant's Gino Rossi watches entered the market.

Publication of the draft version of the new Act on Personal Data Protection

On 28 March 2017, the Ministry of Digitalisation published a draft version of the new Act on Personal Data Protection. The Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which will repeal Directive 95/46/EC, is due to enter into force on 25 May 2018. The draft version contains the following parts: general provisions, provisions regulating proceedings on violating the provisions on personal data protection, European administrative cooperation, controlling procedure, administrative monetary penalties, civil law liability, and issues related to personal data protection inspectors. Although the bill is not yet complete, the very fact of its publication is considered as positive. This autumn, the Ministry plans to present a complete draft of the new act on personal data protection together with the provisions that will amend many more specific acts.

ROMANIA

Cross-sectoral collaboration explored by the regulatory authorities for communications and energy field

The regulatory authority for communications (ANCOM), the Competition Council and the regulatory authority in the energy field (ANRE) held a first joint meeting in April 2017 dedicated to providers active in the energy and communications sectors in order to debate the pro-competitive practices and regulations in the area of physical infrastructures. Decision-making entities in the field of establishing public policies, representatives of relevant associations and owners of infrastructures and networks also attended the event.

To explore and further develop their joint potential in promoting a more effective regulation of the two sectors, ANCOM, ANRE and the Competition Council announced their intention to set up a "Romanian Regulatory Network"; a formal cooperation framework aiming at ensuring the provision of high quality regulatory services in the energy and communications markets and, implicitly, to providers and their users. While the Competition Council and ANCOM already enjoyed a close cooperation, resulting in joint regulation and significant attention paid by the Competition Council to the telecom sector, the agreement should result in increased scrutiny of the energy sector from a competition law perspective.

UiPath, a Romanian startup for robotic process automation, raised USD 30m investment from Accel, Earlybird, Credo and Seedcamp

UiPath, a leading Romanian Robotic Process Automation (RPA) startup, recently

announced a Series A investment totaling USD 30 million led by Accel and with participation from previous investors Earlybird Venture Capital, Credo Ventures and Seedcamp. The funding will be used to accelerate the company's rapid global expansion and product development, building on its six times growth in 2016.

UiPath builds intelligent software robots that help businesses automate repetitive processes across HR, finance, accounting and operations (e.g. claims handling for insurance providers, employee onboarding, back office support etc.).

Although founded in Romania, UIPath is now a US-based company, with additional offices in the UK, India, Singapore and Japan. The company is rapidly growing and claims to have 200 global customers (75% of which register revenues exceeding USD 10 billion) and over 150 partners across the globe.

Remote control productions (rcp) sets-up its second international subsidiary in Bucharest, Romania

Remote control productions (rcp) recently announced that it opened its second international subsidiary in Bucharest, Romania. Remote control productions Romania is the second international subsidiary of rcp, Europe's biggest developer. Today, the group consists of 13 game developer studios in Germany, Austria and Finland, a gamification unit and an in-house publisher as well as offices in Germany, Finland and now Romania.

Remote control productions (rcp) is an independent production house focusing on the development, production and mediation of games and gaming applications. Since 2005 the Munich-based rcp group has been supporting, financing and coaching startups and development studios creating games for all major platforms including PC, console, mobile and browser.

Consolidation of the role of the State Office for Inventions and Trade Marks

As the essential part of a package for promoting Romanian intellectual property (a declared target of the current governing program), the Romanian Government has adopted, a measure to increase the efficiency of the activity carried out by the State Office for Inventions and Trade Marks ("OSIM").

Under the measure OSIM shall initiate a financial support program for the international patenting of Romanian inventions. Specifically, the innovation activity of Romanian patent applicants for patenting their inventions abroad shall be financially supported by OSIM from its own income. This program is expected to increase investments in the innovation sector.

Moreover, according to a press release of the Ministry of Economy, the Romanian Government will take all necessary measures required in order to submit Romania's

candidacy for hosting a regional office of the World Intellectual Property Organization (WIPO).

Fiscal treatment of revenues derived from intellectual property rights

Law 227/2016, which entered into force on 1 January 2016, contained a number of provisions whose entry into force was delayed until 1 January 2017, some of which concern the revenue derived from intellectual property rights. As such, the percentage of deductible expenses, used for determining the net income derived from intellectual property rights, has been increased to 40%, while the income derived from intellectual property rights is now subject to social security contributions, even though the same person may be deriving revenues from other types of activities, e.g. salary.

SERBIA

IT Sector in Serbia

The IT sector in Serbia has been one of the fastest growing sectors in the past years and today represents one of the sectors with the greatest potential in Serbia.

Due to the aforementioned, the Government of Serbia adopted a Proposal to promote the IT sector. The Proposal sets out priority goals and activities of state administration bodies and the Government for promoting and improving the IT sector, which are aimed at increasing capacities in the IT industry as well as at providing training and prequalification of IT personnel. Also, the Minister of State Administration and Local Authority announced that certain amendments of existing regulations are planned for the purpose of improving the business environment for the IT sector.

SLOVAK REPUBLIC

Alternative Domain Name Dispute Resolution

As of 31 May 2017, alternative dispute resolution (ADR) in connection with domain name disputes will be possible in Slovakia. The aim is to provide more time- and cost-efficient mechanisms for solving domain name disputes in comparison with standard court proceedings. It is also intended to fight more efficiently against cyber squatters. ADR proceedings may be initiated by third parties for the protection of their IP rights (such as tradenames).

ADR proceedings can be initiated under the ADR Rules issued by SK-NIC, a.s. (SK-NIC), the registration authority of the domain of the highest level; .sk. The ADR Rules shall be attached to the Domain Rules and thus become a part of the Domain Contract. The European Information Society Institute, o.z. has been appointed as the ADR center which will issue the procedural rules and the price list and maintain the list of experts.

ADR proceedings can only be triggered if all of the following conditions are met: (1) the chain of signs creating the domain is identical or similar to the protected IP right of the

applicant; (2) there is a probability of confusion between the domain and the protected IP right (this condition does not have to be fulfilled if the applicant proves that the protected IP right has a good name or a good reputation with the relevant part of the public); (3) the domain was registered or acquired without the right or legitimate interest of the domain holder (as further specified in the ADR Rules); and (4) the domain was not registered, acquired and used in good belief.

The owner of the protected IP right or the holder of the exclusive license, and eventually anyone else having the consent of the owner of the protected IP right, has to right to initiate ADR proceedings. SK-NIC itself is not a party to the proceedings; it shall only enforce the expert decision if applicable.

ADR proceedings cannot be considered as the performance of any state authority or as the equivalent of arbitration proceedings. ADR aims at the speedy resolution of disputes by a recognized expert. The expert may decide in one of the following manners: (a) cancellation of the domain; (b) domain transfer to the applicant or an authorized person; (c) termination of the proceeding if the parties reached a settlement; (d) termination of the proceeding if the matter has already been decided by a valid court judgement/arbitral award or if the matter cannot be solved within the ADR proceedings due to its complexity (e.g. if an oral hearing is necessary for the purpose of hearing evidence, or some preliminary question needs to be solved); or (e) refusal of the application if the conditions (as described above)are not met or the applicant apparently abuses its right.

Within the ADR proceedings, the expert cannot recognize any damages claims or award compensation for incurred costs; these claims have to be claimed separately within court/arbitration proceedings. The decision of the expert is final – it cannot be further reviewed. However, this does not affect the right of any party to initiate court/arbitration proceedings at any time (i.e. prior to, within or after the ADR proceedings). Provided that the domain holder evidences to SK-NIC the initiation of court/arbitration proceedings within 10 days as of the delivery of the expert decision, SK-NIC shall not enforce the decision and shall inform the ADR center accordingly. Otherwise, SK-NIC shall comply with the expert decision within 15 days as of the delivery.

ADR proceedings definitely represent a good step forward although the actual practice and success of this tool will largely depend on the parties and the particular expert.

Update on mandatory electronic mailboxes

As of 1 August 2016, the Slovak Republic instituted the mandatory use of electronic mailboxes (accounts) (hereinafter "emails") for legal entities. Natural persons or self-employed subjects may use emails on a voluntary basis. The obligation was introduced by Act No. 305/2013 Coll., on e-Government, as amended, whereby the respective state authority was obliged to activate the emails by 1 August 2016 without any further conditions. However, as neither the affected entities, nor the state authorities were sufficiently prepared for the activation of the emails, the deadline for the

mandatory activation was rescheduled to 1 July 2017. To the extent an email has been activated, public authorities are required to deliver the documents to such activated emails already during the transition period between 1 August 2016 and 1 July 2017.

Moreover, a new option for accessing emails has been introduced for foreign nationals in the form of an alternative authenticator as of 1 March 2017. Until then, emails could only be accessed by Slovak citizens holding a personal identification card (ID) with an electronic chip and a personal security code (the so called BOK code) or foreign nationals holding a residence card with an electronic chip and the BOK code. This discriminated against foreign nationals (holding a position as the statutory representative of legal entities) who did not have to hold a residence permit and who had to authorize a third person holding the respective card (typically a lawyer) and often pay for such service.

Further details about the mandatory emails in Slovakia including information about the alternative authenticator can be read in our client alert available at: http://www.wolftheiss.com/knowledge/client-alerts-newsletters/detail/update-on-mandatory-electronic-mailboxes-for-legal-entities/

SLOVENIA

Three-dimensional trademarks – eligibility for protection

While Slovenian IP law specifically provides for protection of three-dimensional signs, in the practice, there was ambiguity during trademark registration and disputes with regard to the required level of distinctiveness. At the end of 2016 the Supreme Court of Slovenia provided some additional clarity on this subject in its judgement III Ips 44/2015, dated 22 November 2016.

The court held that the determination of distinctiveness with regard to three-dimensional signs should be based on a comparison of the sign with similar products as observed by the relevant group of consumers. The court grounded its reasoning on CJEU case law, where it is established that an average consumer relates the shape of a product to the product's origin only when the shape is materially distinct from standards and customs in the relevant industry.

As a consequence, the court concluded that claimants arguing that a trademark is void due to the lack of distinctiveness are required to establish the lack of distinctiveness by demonstrating that the figure is not distinct from similar products when viewed through the eyes of relevant consumers and to state who are the relevant consumers. In this regard, a simple claim that the trademark is not distinct because the protected shape is common in the respective industry is not sufficient.

Legitimate users of collective trademarks

In its judgement III Ips 121/2015, dated 24 January 2017, the Supreme Court dealt with

the infringement of the collective trademark "Kraški pršut" by a member of the holder of the collective trademark. Pursuant to the Industrial Property Act, the holder of a collective trademark may be an association or another group of legal entities or persons (i.e. members of the holder). The Supreme Court clarified that a member of the holder of a collective trademark is not *per se* authorized to use the trademark.

According to the explanation of the Supreme Court the Industrial Property Act does not provide for a legitimate ground for members of the holder to use the collective trademark. The legitimacy for use of a collective trademark by the members is determined by the holder's rules on the collective trademark. Therefore, the members may use the collective trademark only in accordance with the rules and if they do not comply with the rules, they may be liable for infringement of the collective trademark.

Processing of personal data in the context of employment

The Slovenian Information Commissioner published updated Guidelines on the processing of personal data in the context of employment. Since this matter is only scarcely regulated, the Guidelines present one of the main sources for determining compliance in this field. Therefore, it is advisable that employers review the Guidelines and adjust the way they handle the personal data of their employees accordingly.

In the Guidelines, employers may find answers to many of the daily problems that they face when dealing with employee data. In particular, the Guidelines clarify the highly debated boundary of the processing of personal data on the basis of the Employment Act, i.e. when data processing is necessary for the execution and performance of rights and obligations in the employment relationship. They include also an explanation on processing of employee data with regard to health and safety at the workplace (e.g. execution of drug and alcohol tests). Finally, the Guidelines describe the lawful scope for monitoring of employees and in this regard, the importance of the transparency of monitoring measures.

UKRAINE

Rules of procedure for new IP courts

Since its introduction in 2016, the specialized IP court system is still missing both new judges and the rules of procedure to make it work. However, certain actions to implement the new judicial system are being undertaken. For instance, the election of new judges to the Supreme Court of Ukraine is on the way. The new Supreme Court of Ukraine shall review the decisions of the High Court on Intellectual Property in the cassation instance. However, the appointment process for the position as judge of the High Court on Intellectual Property has not been initiated yet.

Draft amendments to the codes of procedure have now been registered in the Parliament of Ukraine: a Draft Law "On amendments to the Commercial Code of Procedure of Ukraine, Civil Code of Procedure of Ukraine, Administrative Code of Procedure of Ukraine

and Other Laws", no. 6232 of 23 March 2017. The draft law sets forth that in both the first and second instance, IP cases will be heard based on the rules of the commercial law of procedure, same as for the Supreme Court. As to litigation proceedings, not only individual entrepreneurs and legal entities, but also any natural persons, and state and municipal bodies can submit IP-related lawsuits.

With regard to cases subject to consideration by the IP courts, these include rights to inventions, trade and service marks, utility models and industrial designs and other intellectual property rights, including prior use right, rights as author or related rights, including on collective management of property rights. Litigation on the registration of IP rights, documents affirming IP rights and their accounting are also expressly included into the competence of the commercial court, thus fixing existing court practice into the law. Recognition of a trademark as well-known, litigation proceedings on the conclusion, change, termination and performance of agreements on the exercise of IP rights, including franchising agreements, shall also be considered by the High IP Court.

Possibilities for IP disputes to be submitted to an arbitral tribunal or to international commercial arbitration are expressly set by the draft law and will be allowed for cases related to (i) rights to an invention, trade and service mark, utility models and industrial designs and other intellectual property rights (including prior use right); (ii) rights as author or related rights (including collective management of property rights); and (iii) conclusion, change, termination and performance of agreements on the exercise of IP rights, including franchising agreements. International commercial arbitration considers only civil law aspects of disputes on unlawful use of designations or goods of another producer, copying the external view of a product, and the collection, use and disclosure of commercial secrets. Moreover, the competence of general courts over IP claims remains unchanged. In particular, administrative and criminal infringements are not submitted to the competence of the High IP Court.

It is expected that consideration of the draft code by the Ukrainian Parliament will not be unreasonably delayed, thus the creation of the new IP court system in Ukraine can be completed in 2018.

Use of e-commerce in Ukraine's agriculture

The agricultural sector in Ukraine is actively exploring innovative and technological solutions to increase its efficiency. An online market place for local farmers, their customers and suppliers was recently introduced. The project is called Agro Yard; it allows online tenders to be held, orders to be placed online, and gives agriculture professionals the possibility to interact online or through a mobile application. The project won an award from the EGAP challenge (an initiative of the Ukrainian State Agency on Electronic Governance, foreign funds, representatives of the Ukrainian IT industry and the EGAP program funded by the Swiss Confederation). Considering that this is a new product, the Agro Yard platform is expected to develop further and become even more functional.

Ukrainian startup Grammarly raised USD 110 million investments

The Ukrainian startup Grammarly has introduced a tool which helps to improve writing skills, including a spelling, grammar and style check. Moreover, it makes tone and context-specific language suggestions for the text at hand as well as checks it for plagiarism. The project uses machine learning and artificial intelligence technologies. The startup was founded in Ukraine in 2009, in 2015 the company switched to a freemium business model, which resulted in fast growth of its user base. Now Grammarly has around 7 million active daily users. The applications of Grammarly are available for Microsoft Word, Macintosh and as browser extensions for Firefox, Chrome, and Safari. It is widely used by journalists, writers, educational institutions, and sales and marketing specialists.

The company recently raised USD 110 million in its first institutional funding from General Catalyst, IVP and Spark Capital to facilitate the development of the company. It has offices in Kyiv, San Francisco and New York.

About WOLF THEISS

Wolf Theiss is one of the leading law firms in Central, Eastern and Southeastern Europe (CEE/SEE). We have built our reputation on a combination of unrivalled local knowledge and strong international capability. We opened our first office in Vienna 60 years ago. Our team now brings together over 340 lawyers from a diverse range of backgrounds, working in offices in 13 countries throughout the CEE/SEE region.

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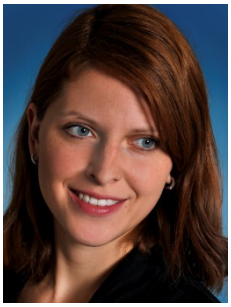

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