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EU update

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ABSTRACT

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This is the latest edition of the DLA Piper column on developments in EU law relating to IP, IT and telecommunications. This news article summarises recent developments that are considered important for practitioners, students and academics in a wide range of information technology, e-commerce, telecommunications and intellectual property areas. It cannot be exhaustive but intends to address the important points. This is a hard copy reference guide, but links to outside web sites are included where possible. No responsibility is assumed for the accuracy of information contained in these links.

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1. Telecoms

1.1. On September 11th, 2015, the European Commission launched a new public consultation on the evaluation of the legal and regulatory framework for the electronic communications sector

1.1.1. Mathilde Hallé (consultant) DLA Piper Paris

This consultation follows the Commission's communication on the "Digital Single Market Strategy for Europe" dated May 6th, 2015, according to which the Commission's target is to establish "a single market in order to adapt electronic communications to the digital revolution".

Indeed, the field of electronic communications has been subject to significant evolutions over the last decades characterised especially by the development of fibre to the detriment of copper, by the convergence of fixed and mobile networks, by the apparition of new technologies such as cloud services or big data and finally by a consistent reduction of revenues for telecommunication groups.

In order to foster the development of this "Digital Single Market", three main targets, encompassing 16 actions to be achieved by European institutions by the end of 2016, have been identified by the Commission:

- Ensuring a better access for consumers and businesses to online goods and services across Europe;
- Creating the right conditions and a level playing field for digital networks and services to flourish; and
- Maximising the growth potential of the European digital economy.

To implement the second target, the Commission has notably planned a review of the current legal framework for the sector. For that purpose, a "Regulatory Fitness and Performance Programme" (REFIT), designed to assess the efficiency of the current European legal framework for the telecom sector, will be undertaken to determine whether or not the current framework sets the conditions for digital networks and services to flourish.

The scope of the consultation will therefore concern most of the European legislation in force in the field of electronic communications, usually referred to as the "Telecom Package", and including mainly:

- Directive No. 2002/21/EC dated March 7th, 2002 on a common regulatory framework for electronic communications networks and services, as amended by Directive No. 2009/140 and Regulation No. 544/2009;

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- Directive No. 2002/20/EC dated March 7th, 2002 on the authorisation of electronic communications networks and services, as amended by Directive No. 2009/140;
- Directive No. 2002/19/EC dated March 7th, 2002 on access to, and interconnection of, electronic communications networks and associated facilities, as amended by Directive No. 2009/140;
- Directive No. 2002/22/EC dated March 7th, 2002 on universal service and users' rights relating to electronic communication networks and services; and
- Regulation No. 1211/2009 dated November 25th, 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

The aim of the consultation is first to assess the current European legal framework in light of the Commission's "Better Regulation Guidelines" designed to ensure the quality of regulations. The consultation will also allow gathering opinions and possibly recommendations on current issues affecting the telecom sector, to give the Commission insights on new market and technological evolutions and on the stakeholders' current concerns for the development of their operations.

The European Commission has published an online survey to enable any stakeholders, such as, e.g., electronic communications operators or consumers associations, to participate. The survey will remain open until December 7th, 2015. According to the Commission website, a public summary report of the consultation should be made available one month after closing of the survey.

To read and respond to the survey launched by the European Commission, please click on the following link, <https://ec.europa.eu/digital-agenda/en/news/public-consultation-evaluation-and-review-regulatory-framework-electronic-communications>.

2. Patents

2.1. Spain and the EU unitary patent

2.1.1. Ceyhun Pehlivan, associate, and Patricia Torres, trainee lawyer, DLA Piper Spain

Spain is becoming increasingly isolated in the context of the European unitary patent protection. Indeed, the European Commission's decision (EU 2015/1753) of 30 September 2015 confirmed the participation of Italy in enhanced cooperation in the area of the creation of the European unitary patent protection, becoming the 26th Member State to join the enhanced cooperation.

As of today, patents are granted by national bodies and provide protection only on a national basis. These patents must also be litigated separately in the national courts of each country. On the contrary, the European unitary patent will allow inventors to protect their invention in 26 EU countries by filing a single patent application, without having to validate it in each country. Similarly, the Unified Patent Court (UPC) will be given the competence to take decisions with effect in all of the participating countries.

This simplified mechanism is therefore expected to significantly reduce patenting costs for companies, particularly

small and medium-sized enterprises, providing a one stop shop covering the territory of all the 26 participating countries.

Following the decision of 30 September, the participation of Italy, the fourth biggest market in Europe in terms of patent validation, according to the European Commission, in the enhanced cooperation for a unitary patent is also expected to bring benefits to Italian companies, which might save significant amounts of time and cost when applying for patents.

Since Italy has now joined the party, Spain and Croatia are now the only Member States who are not currently participating in the enhanced cooperation. Although Poland is participating formally, it has not yet signed the Agreement on the Unified Patent Court, and any unitary patent granted by the EPO will not take effect in Poland.

EU Regulations 1257/2012 (the Unitary Patent Regulation) and 1260/2012 (the Translation Regulation) entered into force in Italy on 30 September 2015. Nevertheless, they will be only effective, as in all the other EU member states participating in the enhanced cooperation, when the Unified Patent Court Agreement as well as the UP regulations have been adopted and ratified. Until then, it is "business as usual" for companies willing to protect their IP in one, several or all EU member states.

3. Data privacy

3.1. In a ground-breaking decision on October 6, 2015, the court of CJEU declares safe harbour invalid – what next in Europe?

3.1.1. Mari Martin, trainee, DLA Piper Munich

In a ground-breaking decision on October 6, 2015, the Court of Justice of the European Union (CJEU) declared the U.S. Safe Harbor scheme to be invalid and confirmed that individuals have the right to challenge through their national data protection authorities any similar schemes that may be established by the European Commission.

The U.S. Safe Harbor framework was established 15 years ago to provide a mechanism by which European businesses could validly transfer personal data from the EU to the U.S. The framework has been widely adopted, with over 5,000 companies currently using the scheme to support the free flow of data across the Atlantic. It is commonly adopted to support data transfers needed to support intra-group operations (for example, to assist a U.S. parent in managing EU based activities) and outsourced services involving a U.S. cloud or software-as-a-service (SAAS) provider.

3.1.2. National DPA positions

National data protection authorities have developed their own interpretations and positions over the past weeks. National DPAs of Austria, France, Italy, Spain, Germany, Estonia, Latvia, Hungary, the Netherlands, Portugal, Ireland, Greece, Lithuania and the United Kingdom have issued statements describing specifically the impact of the ECJ's decision in each country individually.

However, common among all national DPA positions is that Safe Harbor is now clearly invalid, and the transfer of

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