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# EU update

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A B S T R A C T

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.



## 1. Trademarks and copyright

**Dr. Fabian Klein**, *Senior Associate, DLA Piper Germany,* Fabian.Klein@dlapiper.com

### 1.1. *Case C-347/14 – New media online GmbH v Bundeskommunikationssenat – advocate general's opinion*

On the 1 July 2015, Advocate General Szpunar handed down his opinion on Case C-347/14 – New Media Online GmbH v Bundeskommunikationssenat.

The case revolves around the "video" section on the website of an Austrian newspaper. On this separate subsection of the website, videos that were used as illustration or additional information for corresponding articles on the general website are compiled. The section moreover featured additional videos, e.g. user submitted content. The video content can also be searched. The relevant Austrian supervision authority qualified this as an "audiovisual media service" which required reporting under the Austrian implementation under the Audiovisual Media Directive 2010/13/EC ("Directive").

The Austrian Supreme Administrative Court referred the question to the ECJ, which thereby will have its first chance to comment on the definition of audiovisual media services under the Directive. In his opinion, AG Szpunar suggests a limiting interpretation of audiovisual media series, and thereby a limited scope of application of the Directive where services as the one offered by New Media Online GmbH are concerned.

AG Szpunar argued that the Directive's intention was to regulate only content that was in competition with traditional broadcasting services, citing briefly the history of this regulatory field and its original focus, which lied purely on linear TV services and only later on was widened to also incorporate on-demand online services where these were in competition with traditional broadcasting services. He also directed the view to the fact that almost every website nowadays combines text, images and videos, categories which used to be more or less strictly separated pre-online. In consequence, AG Szpunar comes to the conclusion that non-linear or on-demand services are not a separate regulation area of the Directive, but should only insofar be subject to the Directive where they are a "substitute" to traditional broadcasting services.

He fears significant disadvantages if the definition of audiovisual media services was to be interpreted as broadly as done by the Austrian authorities. In his opinion, this would not

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only hinder the goal of the Directive to create a level playing field for services competing with broadcasting services by including too many forms of services. But it would furthermore over-regulate internet services as such, thereby minimising the effectiveness of the Directive. Last, he found it not convincing to differentiate whether the content was "compiled" on one side or if the individual videos were spread across a multitude of sites and allocated to each article, a distinction made by the Austrian authorities.

Overall, the analysis of AG Szpunar is very much oriented on the development history of services such as the one provided by New Media Online GmbH, stating that this development was independent of the developments in the sector of traditional broadcasting services. In addition, it seems to be driven by a desire to limit regulation in the internet, culminating in the advice to "in doubt" not apply the Directive to internet services if it is not clear whether these are audiovisual media services (in the sense of the Directive) or not.

It remains to be seen whether the ECJ adheres to this liberal course proposed by AG Szpunar. If it does, it would potentially create more freedom for especially news services in their online appearance. Whether this in turn would lead to the legislator to act again would be a different question.

## 2. Telecoms

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### 2.1. *Towards a connected continent: the European Union abolishes roaming charges and advances net neutrality rules*

Almost two years after the European Commission proposed a draft regulation for a "Single Market for Telecommunications", the European Parliament, Commission and Council agreed on 30 June 2015 that it was time to put an end to roaming charges and ensure network neutrality. The Permanent Representatives Committee approved the deal on 8 July and the Industry, Research and Energy Committee of the European Parliament did so on 15 July.

What does the current proposal (the Proposal) imply?

#### 2.1.1. *The end of telecommunications boundaries*

Roaming charges are the extra fees travelers pay when using their mobile phones abroad, either to make or receive calls and texts or to browse the Internet.

Negotiations on this topic have been numerous. In April 2014, the European Parliament had even voted so as to make roaming charges disappear by December 2015. Since 2007, roaming prices have decreased by 80%; the latest move happened on 1 July 2014, when roaming charges were forced down to a cap of 20 cents per megabyte, 19 cents per call made and 5 cents per call received, 6 cents per text message (VAT excluded).

The European regulators now seem to agree on two steps:

An interim period will start from 30 April 2016, where roaming charges will be capped at 5 cents per megabyte, 5 cents per minute for calls and 2 cents for texts (VAT excluded);
As of 15 June 2017, extra charges for data roaming will be prohibited (Article 6a of the Proposal). Any citizen of the European Union will be able to travel within the EU and pay for his/her communications as much as he/she pays at home.

The European Commission considers that the interim period will make roaming 75% cheaper than it is now for EU citizens.

In sight of such measures, many telecommunications providers already have started to include foreign destinations into their service bundles. Nevertheless, service providers will likely benefit from two exceptions to the no-charges principle (Article 6b of the Proposal):

- They will be allowed to apply a "fair use policy" in order to "prevent abusive or anomalous usage of regulated retail roaming services", such as a use in a Member State for purposes other than periodic travel;
- Under specific and exceptional circumstances, "where a roaming provider is not able to recover its overall actual and projected revenues from the provision of its services", it will be able to request authorisation to apply a surcharge.

The European Commission will be in charge of adopting rules pertaining to the fair use policy's implementation and the methodology to assess sustainability of roaming charges' abolition for a telecommunications provider.

#### 2.1.2. *The end of commercially justified Internet traffic discriminations*

Network neutrality is the principle recently upheld in the United States, according to which Internet Service Providers (ISPs) must treat all Internet traffic equally. Pursuant to the Proposal, ISPs shall do so "when providing Internet services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used."

In particular, net neutrality is viewed as a means to guarantee that the Internet remains an engine of innovation; for instance, digital start-ups should not face impeding costs when entering the market.

End-users are granted a substantive right to access and distribute information and content that may only be restricted under strict conditions (Article 3 of the Proposal). Thus, traffic management measures will be allowed if:

- They are transparent, non-discriminatory, proportionate and based on "objectively different technical quality of service requirements" instead of commercial considerations;
- They are set in order to (i) comply with national or EU legislation or with orders of courts/public authorities,