EU update

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ABSTRACT

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 websites are included where possible. No responsibility is assumed for the accuracy of information contained in these links.

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1. ePrivacy and Electronic Communications

1.1. Proposal for a new Regulation on Privacy and Electronic Communications

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Following the leaked of the draft Regulation in December 2016, on 10 January 2017, the European Commission adopted a proposal for a Regulation on Privacy and Electronic Communications to replace the existing Directive on Privacy and Electronic Communications 2002/58 ("ePrivacy Directive").

1.1.1. Regulation vs Directive
The first and self-evident difference is the direct effect of regulations, as opposed to the need for transposition in case of directives. Therefore, there will be less room for divergent national laws.

1.1.2. The material scope
It should be noted that providers of telecommunication services over Internet (Over the Top or OTT) and Internet of Things (IoT) services will be included in the scope of the Regulation. In this sense, once the new Regulation will be adopted, privacy rules will apply to traditional telecoms operators but also to new providers of electronic communications services, such as WhatsApp, Facebook Messenger, Skype, Gmail, iMessage, or Viber.

Furthermore, this Regulation does not apply only to personal data but rather to electronic communications data, which is defined in the new Regulation as the content exchanged by means of an electronic communication service, and the electronic communication metadata, which encompasses "all data processed [. . .] for the purposes of transmitting, distributing or exchanging electronic communications content". This data, according to the Regulation, refers to end-users, which may be an individual or an entity.

On top of this, the proposed Regulation also prohibits the processing and storage of information from end-user's terminal equipment, broadening the material scope of the current Directive.

1.1.3. Territorial scope
The Regulation would apply when the provision of electronic communication services is directed to end-users located in the

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European Union. Therefore, the location of communication service providers will not be relevant to determine the application of the Regulation. However, if the communication service provider is located outside the European Union, it will have to appoint a local representative in one of the Member States in which end-users are located, in order to provide such services.

1.1.4. Alignment with the GDPR
The two main pillars of the data protection legal framework in the EU are the ePrivacy Directive and the General Data Protection Regulation, adopted in May 2016.

There is an alignment between the proposed Regulation and the GDPR in terms of -among others- informed consents, breach notification procedures and fines’ regime. In this sense, pursuant to the proposed Regulation, a very stringent consent regime for the processing of data will apply, providers will have to report any “personal data breach” to the corresponding national authority and inform individual directly of any risk related to personal data/privacy, and sanctions for non-compliance entities may reach 4% of their annual revenue.

1.1.5. Tracking tools
The proposed Regulation confirms that the current cookies rules apply universally to all end-users and applies a more stringent approach to consent. In this sense, opt-in consents will be required prior developing any non-essential cookie, and device firmware and browser software will have to be configured to restrict these cookies by default. This stringent regime will apply to cookies and pixel tags but also to any form of tracking tool.

1.1.6. Marketing
The proposed Regulation bans unsolicited electronic communications by any means (e.g. by emails, SMS and in principle also by phone calls if users have not given their consent) what, in principle, would include OTT services. The scope of the prohibition has been extended as the ePrivacy Directive referred only to automatic calling machines, faxes and electronic emails.

Additionally, pursuant to the new Regulation, consumers will have the right to object to the reception of voice-to-voice marketing calls and marketing callers will need to display their phone number or use a special pre-fix that indicates a marketing call.

1.1.7. Confidentiality
There is a duty in the proposed Regulation for electronic communications service providers to erase or make anonymous both electronic communication content and electronic communication metadata, except for very strict exceptions. The enforcement of the confidentiality rules in the Regulation will be the responsibility of national data protection authorities.

The intention of the Commission is to ensure the adoption of the new Regulation by 25 May 2018, when the General Data Protection Regulation will enter into application. If this is the case, citizens and businesses will finally have a complete and harmonize legal framework for privacy and data protection in Europe by this date.

2. Copyright

2.1. French “out-of-print” = European outlaw! – French law on “out-of-print books” is held contrary to the InfoSoc Directive (ECJ, case C-301/15, 16 November 2016)

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With a view to modernizing copyright law and putting it up to the challenge of mass digitalization, French lawmaker created in 2012 a system aimed at reviving the exploitation of “out-of-print books”.

Under this law, an “out-of-print book” is defined as one published in France before 1 January 2000 and which is no longer commercially distributed by a publisher and not currently published in print or in digital. Every year, books fitting the above definition are registered in a dedicated database (named ReLIRE), following advertisement measures intended to inform their authors and publishers.

One of the key features of this law is the “opt-out” system: once a book is officially (and publicly) added to ReLIRE, the author and publisher have 6 months to jointly express their refusal that said book be added to the database – except if the author is the exclusive owner of all the rights, in which case he/she can act alone. Absent a timely “opt-out”, a new-and-approved collecting society (the SOFIA) is entrusted with the book’s digital exploitation. After that, the author alone can oppose the book’s digital exploitation provided he/she can prove that it damages his/her honor or reputation.

This “opt-out” system convinced some authors to challenge the law before the Conseil d’Etat (French Administrative Supreme Court). The latter decided to stay the proceedings and referred the case to the ECJ with the following question: “do Articles 2 and 5 of Directive 2001/29 preclude legislation . . . that gives approved collecting societies the right to authorize the reproduction and representation in digital form of “out-of-print books”, while allowing the authors of those books . . . to oppose or put an end to that practice, on the conditions that it lays down?”.

According to the ECJ, the answer is “yes”. Or more precisely: “yes, but . . .”.

Indeed, “authors are the only persons to whom that Directive gives, by way of original grant, the right to exploit their works” (pt. 47). Authors then have the exclusive right to authorize the reproduction and/or representation of their works. The case of “out-of-print books” is also not one that any of the exceptions to this general rule – exhaustively enumerated by the Directive and subject to a strict interpretation – may cover. In other words, France acted like a “lone ranger” of copyright law by creating, out of nowhere, a new exception to the author’s monopoly.

The ECJ however opens an interesting door here, as it considers that the author’s consent (to the reproduction and/or representation of works) can, under certain circumstances, be “implicit” (pts. 37–39). The conditions under which such implicit consent may be admitted must however be strictly
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