

Digital Single Market Strategy Launched

Introduction

Today the European Commission issued a strategy paper on the Digital Single Market (“DSM”) that includes 16 initiatives to be completed by the end of 2016. It is the most radical industrial policy adopted by the EU since the original Single Market project nearly 25 years ago for the free movement within the EU of goods, services, labour and capital.

An underlying theme of the DSM strategy paper is a desire to ensure that competitors compete in a free and fair market. The application of competition law to the “new digital age” will be examined through a sector inquiry that was also announced today. The objective of creating a competitive digital single market in the EU will have a material effect on businesses in many sectors. This objective will be met by amending existing law and adopting new legislation and rules, some only recently adopted and others soon to be adopted.

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The announced sector inquiry by the EU Commission’s competition department will pick up many aspects of the creation of a level playing field, which is an underlying element of the Commission’s strategy – see the next section “Competition Inquiry” for details. More particularly, key proposals of the strategy, indicated by industry sector and subject, are listed below. Please click on any item of interest. Each item is linked to the relevant part of this document which provides details, including any existing legislation and rules likely to be affected (in italics for ease of reference).

App stores	Consumer protection rules
Audio-visual media	Copyright
B2C - contract law	Data mining
Big data	Delivery services
Cloud services	Digital content

E-commerce platforms	Radio
Geo-blocking	Search engines
Health	Social media
Illegal content	Standards
Mobile payments	Subscription services
Net neutrality	Tax – corporate
On-line platforms	Telecommunications
Over-the-top services	Universal service
Price comparison websites	VAT
Privacy	VoIP

Differences in Member States’ contract law are creating barriers to trade with the EU, with potentially 28 different national consumer protection and contract laws needing to be addressed by businesses. The Commission will propose initiatives on simple and effective cross-border rules for consumers and business, including a limited but harmonised set of key mandatory EU contractual rights applicable to domestic and cross-border online sales. This will include purchases of products with digital content.

The Commission argues that e-commerce is hampered by a lack of affordable, high-quality, cross-border delivery (parcel) services, with stakeholders facing a lack of transparency, excessive costs for small shipments and lack of inter-operability between different operators. The Commission will prepare an initiative with a focus on improving price transparency for parcel delivery and enhanced regulatory oversight. This initiative is in addition to a self-regulation exercise by industry that will report to the Commission in June 2015. The Commission intends to ensure that effective competition exists.

Geo-blocking refers to the practice of an online service provider denying access by users in one country to websites based in other countries. Whilst there are some justified reasons for this to occur, the Commission regards unjustified geo-blocking as an unfair practice and will initiate action to put an end to it. The proposed competition sector inquiry will in particular look at this practice. There will be changes to the *e-Commerce framework* and Article 20 of the *Services Directive*.

The Commission has identified barriers to the Single Market caused by the current copyright regime, notably access issues to online media or the purchase of copyright-protected material. The Commission will propose measures aimed at allowing full portability of subscription services and access to on-line content in another country and facilitating more cross-border use of content for research, education, and text and data mining.

Concerning the Commission's existing actions in relation to tax fraud and evasion the Commission will shortly present an Action Plan on an approach for corporate taxation in the Single Market, under which profits are taxed where the value is generated, including in the digital economy. In relation to Value Added Tax, dealing with many different national systems is identified as a serious obstacle to cross-border commerce. The Commission will propose measures that could include extending a single system for VAT for the on-line sale of tangible goods (it already exists for the sale of digital products); a common EU-wide VAT threshold applicable to e-commerce suppliers; and allowing for a single audit of cross-border businesses for VAT purposes.

Recognising the telecommunications sector as the backbone of digital products and services, the Commission is already well advanced in producing new rules in its *Telecom Single Market package*. However, the focus of these to-be-adopted rules is on net neutrality and roaming. The package does not address the issues of spectrum, regulatory fragmentation or consumer protection rules. The Commission seeks a more ambitious reform of the Telecom rules. This will address the lack of full infrastructure competition; the

“over-the-top” services provided by other services and platforms, such as VoIP; and tackling the fragmented approaches to regulation, ensuring a consistent single market approach. Universal broadband availability, including the investment incentives needed to ensure the network is constructed, will be addressed as part of the review of the *Universal Services Directive*. Radio, in particular, radio spectrum, will also be considered, given the current national and so fragmentary nature of the allocation of spectrum.

The Commission will review the *Audiovisual Media Services Directive* given the expression of views that it needs to be broadened to encompass services available but currently not falling within its scope, in particular measures for the promotion of European works and advertising rules.

On-line platforms such as search engines, social media, e-commerce platforms, app stores and price comparison websites raise challenges to established businesses in terms of them being disruptive competitors. They also raise challenges, according to the Commission, for integration into common economic and social rules, including taxation, labour laws and standards. The Commission notes the possibility of unfair terms and conditions of access and that some online platforms hold market power. The Commission will analyse issues such as lack of transparency, fair remuneration of rights-holders and limits on portability. As an aside, in this context, the Commission announced on 15 April that it had sent a Statement of Objections to Google on comparison shopping services and also formally opened a separate antitrust investigation into Google's conduct as regards the mobile operating system Android. By the former the Commission alleges the company has abused its dominant position in the markets for general internet search services in the European Economic Area by systematically favouring its own comparison shopping product in its general search results pages. The Commission's preliminary view is that such conduct infringes EU antitrust rules because it stifles competition and harms consumers. By the latter, the investigation will focus on whether Google has entered into anti-competitive agreements or abused a possible dominant position in the field of operating systems, applications and services for smart mobile devices.

Noting that responsibility for illegal content on the Internet is addressed in principle in the *e-Commerce Directive*, the Commission identifies that removing illegal content can be slow and complicated, and there is a lack of transparency in the process. The Commission will propose to tackle illegal content through a common approach such as the establishment of a duty of care. Cyber security, privacy and data protection are high on the list of consumer concerns in Europe. In relation to privacy, the *e-Privacy Directive* is considered to be generally limited to traditional telecoms companies and not applicable to newer Internet-based service providers. As a result, the Commission will review that Directive once the new EU rules on Data Protection have been agreed, which is expected to be this year. Cyber security, privacy and data protection are high on the list of consumer concerns in Europe. In relation to privacy, the *e-Privacy Directive* is considered to be generally limited to traditional telecoms companies and not applicable to newer Internet-based service providers. As a result, the Commission will review that Directive once the new EU rules on Data Protection have been agreed, which is expected to be this year.

On the basis that data is the “oil of the modern economy”, the Commission considers that action is required in relation to the ownership and access to data, so affecting big data, analytics and cloud services. A barrier to the exploitation of big data is the fragmented nature of the rules in Europe, as well as obligations in some EU Member States for storage of certain data within the country. At the same time, cloud computing presents its own issues of lack of portability, limits to contractual liability that may not be fair, and a balance that needs to be struck between the foreseen benefits from the use of big data and the privacy of personal data. The use of big data is also likely to be the key to research in many areas but the creation of “open science” cannot occur without access to the data. The Commission will launch a “Free flow of data” initiative by imposing a free movement of data obligation on Member States. The Commission will also explore with stakeholders the emerging issues of ownership, interoperability, usability and access concerning non-personal data, including B2B data flows, machine-generated data and machine-to-machine data flows.

The Commission recognises that ICT standards have an essential role to play in increasing interoperability in the ICT sector. The Commission considers that it can help steer the development of ICT standards that are essential for supporting industry development in Europe, e.g. Internet of Things, cyber security, big data, big data and cloud computing. The Commission will also aim to create essential sector standards in the areas of health, transport, mobile payments and facilitating cross-border provision of services.

Competition Inquiry

The current situation: The head of the European Commission’s competition department (“DG COMP”), Margrethe Vestager, has announced today the opening of an inquiry into the e-commerce sector. The announcement identifies a political desire to examine and likely break down what the Commission regards as business practices that limit or restrict the operation of the “digital” Single Market, such as geo-blocking, by which a consumer can only access a company’s website in the country where the consumer is located. The inquiry will examine industry practices and likely involve all the major players in the sector, although there is to be a focus on the consumer electronics industry, clothing sector and creative industries, through information requests and consultation on provisional findings. The inquiry will likely last for one year.

Companies involved: Companies that would likely receive the antitrust questionnaires are holders of content rights, broadcasters, manufacturers with own-selling operations, merchants of goods sold online and the companies that run online platforms such as price comparison and marketplace websites.

More details: DG COMP may undertake a sector inquiry if it concludes that “rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market” per Article 17(1) of Regulation 1/2003. This can be more broadly expressed as a concern that there exists market failure in the sector. In a sector inquiry DG COMP can request and demand information from market participants. It can even undertake “dawn raids” and did so in the pharmaceutical sector inquiry.

Since the creation of implementing powers for DG COMP in 1965 there have been eight sector inquiries, namely in relation to: beer distribution; business insurance; energy; margarine; new media; pharmaceuticals; retail banking; and telecommunications. Most of these sector inquiries resulted in either or both legislation being adopted by the EU and competition cases being brought by DG COMP against particular companies. For example, in relation to the most recent sector inquiry, which concerned the pharmaceutical sector, DG COMP found commercial strategies by originator companies to prolong the commercial life of their medicines under exclusive terms and delay generic medicines entry on the market (most notably by patent litigation and agreements) affecting competition between originator companies, and competition between originator and generic companies. Subsequent actions by DG COMP were three competition cases for delay of generic entry against respectively Servier, Lundbeck and Cephalon in each case in relation to a particular medicine. Additionally a competition case was brought against Servier for providing misleading or incorrect information in the course of the sector inquiry. Further, DG COMP imposed a monitoring exercise on market participants engaged in patent settlements. Finally, the EU proposed in 2011 legislation to implement enhanced cooperation in the area of the creation of unitary patent protection.

The e-commerce inquiry need not be limited in scope, despite the announced focus of the inquiry. Thus DG COMP may consider areas where it is already active, such as digital platforms (e.g. music and book digital platforms, hotel booking) and licensing of standard essential patents (the Samsung and Qualcomm cases are examples), and even areas where it is merely speculated that there are broader issues to address, such as the fact that many significant acquisitions in the digital space fall below the EU Merger Control regime because the target typically has a level of sales well below the current relevant financial thresholds.

Practical considerations: Whilst the questionnaires will typically be business oriented and intended to fill-in or expand DG COMP's knowledge of the sector (how it works, why it works that way...), companies should consider carefully the potential implications and impact on their businesses before freely responding. In-house counsel has a role, but it is important to note that DG COMP does not recognise in-house counsel as having legal privilege. Consequently, where questions raised touch upon potentially sensitive or core business matters it would be appropriate to engage external EU counsel. As the inquiry proceeds and focuses on particular business practices or aspects of the sector, very detailed and exhaustive questionnaires will be issued, requiring significant resources to be devoted to responding. Whilst companies are used to enquiries of various sorts from government agencies and regulators, the potential importance of how a company engages in the inquiry should not be regarded as a "business as usual" activity. By the same token, whilst relevant trade associations will also be engaged in the process, a company should consider carefully the extent that it can rely on trade associations to protect and promote its individual interests vis-à-vis other sector players.

Timeline: DG COMP expects to publish a preliminary report for consultation in mid-2016. The final report is expected in the first quarter of 2017.

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