DIGITAL SINGLE MARKET: WHERE ARE WE NOW?

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Legal Briefings

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*The European Commission's Digital Single Market Strategy ("**DSM Strategy**") was published in May 2015 and included a set of 16 targeted initiatives and actions to be delivered by the end of this year. The aim of the DSM Strategy was to create a Digital Single Market, where the free movement of goods, persons, services and capital is ensured — and where citizens and businesses can seamlessly and fairly access online goods and services: whatever their nationality, and wherever they live.*

The DSM Strategy is built on three pillars: (1) better access for consumers and businesses to digital goods and services across Europe; (2) creating the right conditions and a level playing field for digital networks and innovative services to flourish; and (3) maximising the growth potential of the digital economy. Each of the pillars has various initiatives/action points underneath it.

As we now approach the end of 2016, and the deadline for delivery on all 16 actions, this article sets out the progress made to date and the next steps for the DSM Strategy.

BETTER ACCESS FOR CONSUMERS AND BUSINESSES TO DIGITAL GOODS AND SERVICES ACROSS EUROPE

Within the "access" pillar of the DSM Strategy, the European Commission identified the following initiatives and action points:

1. Rules to make cross-border eCommerce easier

In May 2016, the European Commission published updated guidance on unfair commercial practices to respond, amongst other things, to the challenges presented by the digital world. The guidance clarifies the application of the Unfair Commercial Practices Directive. For instance, any online platform that qualifies as a "trader" and promotes or sells goods, services or digital content to consumers must make sure that its own commercial practices fully comply with EU consumer law. Platforms must state clearly that rules on unfair commercial practices do not apply to private persons selling goods, and search engines should be required to clearly distinguish paid placements from natural search results.

The revised Guidance also incorporates two sets of self-regulatory principles agreed among stakeholders: one will support comparison tools to better comply with the Directive and the other will help the enforcement of unfair commercial practices rules against misleading and unfounded environmental claims.

To view a copy of the updated guidance, please click here.

Next steps: No further action is expected from the European Commission, although the BEUC (the European Consumer Association) commented in September 2016 that: "*the scope of application of the [Directive] is often not clear, which is why we welcome the update of the Commission's guidance document on the Directive. However, even though such guidelines may serve as a valuable source of information, a renewal of the guidance alone is not enough. They cannot provide a formal interpretation of EU law in relation to specific situations and have no legal authority*".

2. Enforcing consumer rules

On 25 May 2016, the European Commission tabled a legislative proposal on eCommerce to strengthen enforcement of consumers' rights and guidance to clarify, amongst other things, what qualifies as an unfair commercial practice in the digital world. The Commission proposed an amendment to the Consumer Protection Cooperation Regulation which will give more powers to national authorities to better enforce consumer rights. They will be able to:

- check if websites geo-block consumers or offer after-sales conditions not respecting EU rules (e.g. withdrawal rights);

- order the immediate take-down of websites hosting scams; and

- request information from domain registrars and banks to detect the identity of the responsible trader.

To view a copy of the legislative proposals, please click here.

Next steps: The Regulation is currently going through the European legislative process. Parliament's Committee on Transport and Tourism is responsible for the file, which is awaiting the appointment of a rapporteur.

4. Ending unjustified geo-blocking

On 25 May 2016, the European Commission tabled a legislative proposal to address unjustified geo-blocking and other forms of discrimination on the grounds of nationality, residence or establishment. The Commission proposed a draft Regulation to ensure that consumers seeking to buy products and services in another EU country, be it online or in person, are not discriminated against in terms of access to prices, sales or payment conditions, unless this is objectively justified for reasons such as VAT or certain public interest legal provisions.

The general objective of this proposal is to give customers better access to goods and services in the Single Market by preventing direct and indirect discrimination by traders artificially segmenting the market based on customers' residence.

To view the proposed Regulation, please click here.

Next steps: The Regulation is currently going through the European legislative process. Subject to approval by the Council and European Parliament, the Regulation is expected to be adopted in 2017.

5. Launching an antitrust competition inquiry into e-commerce

On 6 May 2015, the European Commission launched a sector inquiry into eCommerce. As part of the inquiry, the Commission requested information from a variety of actors in eCommerce markets throughout the EU, both in relation to the online sales of consumer goods (such as electronics, clothing, shoes and sports equipment), as well as in relation to the online distribution of digital content.

On 15 September 2016, the Commission published its preliminary report on the sector inquiry. The preliminary report provides an overview of the main competition-relevant market trends, and points to possible competition concerns.

For further details regarding the Preliminary Report, please see our eBulletin available here.

Next steps: Interested stakeholders have been invited to comment on the preliminary report by 18 November 2016 and the Commission expects to publish its final report in the first quarter of 2017.

6. A modern, more European copyright framework

On 9 December 2015, the European Commission proposed a Regulation on the cross-border portability of online content services to allow EU residents to travel with content they have paid for in their home country.

To view a copy of the proposed Regulation, please click [here](#).

On 14 September 2016, the European Commission then published its proposed EU copyright reform package, comprising a proposed Directive on copyright in the Digital Single Market and a Regulation to adapt EU copyright rules to the realities of the digital single market. The proposals are intended to allow:

- better choice and access to content online and across borders

- a fairer and sustainable marketplace for creators, the creative industries and the press.

The European Commission also published a further Directive and a Regulation aimed at implementing the WIPO Marrakesh Treaty providing for:

- improved copyright rules on education, research, cultural heritage and access to copyright works for the blind or visually impaired.

To view a copy of the copyright reform package, please click [here](#).

Next steps: The proposals are currently going through the European legislative process and must be approved by both the Parliament and the Council. There is no legislative timetable for this. It is also reported that the Commission intends, later this year, to propose actions to improve enforcement of all types of intellectual property rights, including copyright.

7. A review of the Satellite and Cable Directive

The aim of this initiative was to review the Satellite and Cable Directive in order to assess if its scope needs to be enlarged to cover broadcasters' online transmissions and whether further measures are needed to improve cross-border access to broadcasters' services in Europe. As a result of this assessment, the proposed regulation in the copyright package aims at facilitating access to more television and radio programmes online from other EU countries. In particular, it introduces the application of the country of origin principle to some online transmissions of broadcasting organisations, and the collective management of rights to re-transmissions by means equivalent to cable.

Next steps: The proposed Regulation forming part of the copyright reform package is currently going through the European legislative process.

8. Reducing VAT burdens

The European Commission consulted on legislative proposals to reduce the administrative burden on businesses arising from different VAT regimes from October to December 2015. The proposals included:

- extending the single electronic registration and payment mechanism to intra-EU and third country online sales of tangible goods to private consumers;

- introducing a common EU-wide simplification measure (VAT threshold) to help small start-up eCommerce businesses;

- allowing for home country controls including a single audit of cross border businesses for VAT purposes and;

- removing the VAT exemption for the importation of small consignments from suppliers in third countries.

Next steps: The European Commission is expected to publish its legislative proposals by the end of 2016.

SHAPING THE RIGHT ENVIRONMENT FOR DIGITAL NETWORKS AND SERVICES TO FLOURISH

Within the "environment" pillar of the DSM Strategy, the European Commission identified the following initiatives and action points:

9. Overhaul of the telecom rules

On 14 September 2016, the Commission proposed a set of measures to ensure that everyone in the EU will have the best possible internet connection to participate in the digital society and economy. These proposals encourage investment in very high-capacity networks and accelerate the roll-out of 5G wireless technology and free Wi-Fi access points in public spaces.

This so-called connectivity package includes:

- The European Electronic Communications Code: a single rule book for communication services, and the revised BEREC Regulation

- Common broadband targets for the Gigabit Society

- A plan to foster European leadership in 5th generation (5G) wireless technology

- A support scheme for public authorities to offer free Wi-Fi access to their citizens.

To view a copy of the connectivity package, please click here.

Next steps: The proposals will be scrutinised by the Council and the European Parliament, with consultations with stakeholders likely to lead to some amendments before the proposals are adopted.

10. A review of the audiovisual media framework

On 25 May 2016, the European Commission put forward its proposals for amendments to the EU Audiovisual Media Services Directive (the "**AVMSD**"). The amendments contained in the revised AVMSD include:

- changes concerning linear TV services and some alignments of rules for linear and non-linear services

- changes to advertising

- the introduction of a quota on the provision of European content

- other provisions to deal with the protection of minors and with hate speech.

To view a copy of the proposed revised AVMSD, please click here.

Next steps: The current AVMSD will continue to apply until the revised Directive enters into force after having been adopted by the European Parliament and the Council of the EU. The Directive will then need to be implemented into national legislation. The current proposal is that Member States will have one year to transpose the revised AVMSD into their national legislation.

11. An analysis of the role of online platforms

On 25 May 2016, the European Commission published its communication on online platforms which:

- outlined the key issues identified in its assessment of online platforms; and

- set out its approach to online platforms in the future.

The Communication did not set out any legislative proposals, for example, by attempting to create a new law for online platforms. Instead the Communication set out the following guiding principles:

- create a level-playing field for comparable digital services

- ensure platforms act responsibly

- ensure transparency and fairness for maintaining user trust and safeguarding innovation

- safeguard a fair business environment

- ensure open and non-discriminatory markets in a data-driven economy

To view a copy of the European Commission's Communication, please click here.

Next steps: The European Commission has announced a number of plans for this initiative. For example, by the end of this year, it will reassess the need for guidance on the liability of online platforms when putting in place voluntary measures to fight illegal content online. By Spring 2017, the European Commission will also assess if further action is needed to address fairness in business-to-business relations.

12. Reinforcing trust and security in digital services and in the handling of personal data

In April 2016, after over four years of debate, the final text of the EU General Data Protection Regulation (the "**GDPR**") was formally approved. The GDPR was then published in the Official Journal (on 4 May 2016) and entered into force on the 20th day following that publication (i.e. on 25 May 2016).

Following the adoption of the GDPR in May 2016, the European Commission launched a consultation on the ePrivacy Directive in April 2016. The ePrivacy Directive sets out rules on how providers of electronic communication services, such as telecoms companies and Internet Service Providers, should manage their subscribers' data. It also guarantees rights for subscribers when they use these services.

A summary report of the ePrivacy consultation was published in August 2016 and is available [here](#).

Next steps: There is a two year implementation period for the GDPR, meaning that it will apply from 25 May 2018. A legislative proposal to reform the ePrivacy Directive is expected to be published by the end of this year.

13. A partnership with industry on cybersecurity

On 5 July 2016, the European Commission announced the launch of a contractual Public-Private Partnership on cybersecurity. The aim of the partnership is to foster cooperation at early stages of the research and innovation process and to build cybersecurity solutions for various sectors, such as energy, health, transport and finance. The EU will invest up to €450 million in this partnership, under its research and innovation programme Horizon 2020. Cybersecurity market players, represented by European Cyber Security Organisation ("**ECSO**"), are expected to invest three times more.

Next steps: The European Commission will launch the first calls for proposals for the Partnership in the first quarter of 2017.

CREATING A EUROPEAN DIGITAL ECONOMY AND SOCIETY WITH GROWTH POTENTIAL

Within the "economy and society" pillar of the DSM Strategy, the European Commission identified the following initiatives and action points:

14. Propose a European free flow of data initiative

A consultation workshop on the free flow of data initiative took place in Brussels on 18 May 2016. The workshop focused primarily on the issue of data localisation restrictions and legal barriers to the free flow of data. The initiative also deals with other emerging issues such as data ownership and access to data, liability, interoperability, and re-use of data. On 3 October 2016, the Commission published an Inception Impact Assessment on a European free flow of data initiative.

To view a copy of the Inception Impact Statement, please click [here](#).

Next steps: The Commission will commence online feedback on the Inception Impact Assessment and consult with academics, key stakeholders and the European Parliament.

15. Define priorities for standards and interoperability

In April 2016, the European Commission published its Communication on ICT Standardisation Priorities for the Digital Single Market, aiming to ensure that all devices in the future will be able to connect and share data with each other – independently of manufacturer, operating system, or other technical details.

The Communication focused on two main priorities. On the one hand, it aims to guarantee a fresh approach to standards in the following domains: 5G, Internet of Things, Cybersecurity, Cloud and Big Data. On the other hand, it tries to ensure that all forces in Europe pull in the same direction, using standardisation as a strategic instrument to EU industrial policy.

To view a copy of the Communication, please click here.

Next steps: The Commission has pledged to launch "*by 2017 a regular inter-institutional dialogue on European standardisation, highlighting – inter alia – ICT priorities in order to take stock of progress on the deliverables – and where necessary – to adapt the priorities*."

16. Support an inclusive digital society

In April 2016, a new eGovernment action plan was published to help connect business registers across Europe; ensure different national systems can work with each other; and ensure businesses and citizens only have to communicate their data once to public administrations, that means governments no longer making multiple requests for the same information when they can use the information they already have.

To view a copy of the Action Plan, please click here.

Next steps: The Commission has established an eGovernment Action Plan Steering Board composed of Member States' representatives responsible for their national eGovernment strategies. The Steering Board will discuss possible targets for the Action Plan between October and December 2016, with defined targets expected by the end of the year.

A final word on Brexit...

Whilst it appears that the European Commission is very close to delivering on its actions by the end of this year (as promised in the original DSM Strategy), the results of the June EU referendum in the UK has left UK businesses facing an uncertain future in relation to their own role in the European Digital Single Market.

A number of the legislative proposals currently being reviewed in Europe will require implementation into local laws at a national level. Given the timing of the European legislative process, the implementation period for each individual Directive, and the likely timing of any Brexit, it therefore seems unlikely that they will ever be required to be implemented into law in the UK. Likewise, any proposed Regulations which would ordinarily be directly applicable in EU Member States without the need for national implementation, will in all likelihood cease to apply to the UK upon its exit from the European Union.

The future may be uncertain for UK business but it is clear that the European DSM Strategy is continuing full speed ahead.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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