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The EU's Digital Single Market Announcement – Regaining Europe's Digital Sovereignty?

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On 6 May 2015, the European Commission announced its plans to accelerate the creation of a digital single market across the EU. The new EU strategy will have a significant impact on sectors such as e-commerce, media and entertainment, telecoms and the provision of online services.

Overtly designed to unite consumers of digital services across all 28 EU countries and to create a stronger indigenous European digital economy, the subtext to the proposals is the European Commission's desire to address inequalities in the market for digital services, which it sees as being dominated by global digital superpowers, largely headquartered outside the EU.

This Alert examines the EU's plans for the digital services market and the likely effect of those plans – positive and negative – both on consumers in the EU and on providers of digital services whatever their location.

The Commission's plans for the EU Digital Single Market (DSM) have evolved gradually, although the "big reveal" on 6 May still garnered plenty of attention, especially since it includes an [antitrust review of the e-commerce sector](#) to gather information on perceived artificial barriers to online trade.

There is a strong feeling in the Commission that the EU has surrendered ground to non-EU-based digital superpowers and essentially forfeited its digital independence. In announcing the DSM, European Digital Economy and Society Commissioner Günther Oettinger stressed that the EU's aim is to move towards a strategy which will reinforce Europe's digital authority and its digital sovereignty. Competition Commissioner Margrethe Vestager, while commenting on the e-commerce sector inquiry, highlighted the benefits for European citizens and businesses that the removal of barriers to e-commerce would represent.

The Technology, Media and Telecoms (TMT) sectors have been a particular focus for the EU for some time. One of the first steps for the new Commission, headed by ex-prime minister of Luxembourg Jean-Claude Juncker, was to adopt a new [Work Programme](#) containing a series of plans in the TMT sectors. One of the main priority areas of the Work Programme was the creation of a secure, trustworthy and dynamic digital single market across the EU.

The desire to create a digital single market reflects the digitization of the global economy and the need to position EU-based companies to compete on the global stage. According to the Commission, "achieving a Digital Single Market will ensure that Europe maintains its position as a world leader in the digital economy, helping European companies to grow globally." The Commission also recognises that 28 separate national laws addressing issues relevant to the e-commerce sector are likely to represent a barrier to competition. More covertly, the Commission

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also feels that EU-based digital providers are harmed by non-EU global providers accessing the EU market through low-water mark countries and failing to comply with the EU's national based rules to the same extent as indigenous EU providers.

DSM STRATEGY

In unveiling its DSM strategy, the Commission aims to break down regulatory walls and ensure that competitors operate in a free and fair market. These objectives will be met through a combination of amendments to existing laws, as well as the adoption of new legislation – reform which the Commission hopes will contribute €415 billion per year to the European economy.

The Commission focuses on three pillars – *access*, *environment* and *economy and society*. What this really means is: (i) creating better access for consumers and businesses to digital goods and services around Europe; (ii) creating the right conditions and a level playing field for digital networks and innovative services to flourish; and (iii) investing in a Europe-based and Europe-owned digital economy with long-term growth potential.

Each of the three DSM pillars includes a number of key actions which provide details of how the Commission expects to achieve its aims, ultimately breaking down into 16 specific target areas.

PILLAR 1: BETTER ACCESS TO DIGITAL GOODS AND SERVICES AROUND EUROPE

Under Pillar 1, the Commission plans the rapid removal of key differences between the online and offline worlds to break down barriers to cross-border online activity. This includes differences in contract and copyright law, reducing VAT burdens and ensuring affordable and high-quality cross-border parcel delivery services. The DMS aims to define an appropriate e-commerce framework and prevent unfair discrimination against consumers and businesses (in terms of nationality, residence or geographic location restrictions) when they try to access content or buy goods and services online within the EU.

Key Action 1: Rules to make EU cross-border e-commerce easier

Cross-border commerce within the EU is inhibited by differences amongst the contractual rights provided by each of the EU Member States; those differences create legal barriers and increase costs for pan-European businesses that have to comply with up to 28 separate regimes. The Commission believes that companies should be able to manage their sales under a common set of rules.

Simplified and modern rules for online and digital cross-border purchases will encourage more businesses to sell online across borders, and increase consumer confidence in cross-border e-commerce. By the end of 2015, the Commission will propose laws covering harmonized EU rules for online purchases of digital content, and allowing traders to rely on their national laws based on a focused set of key mandatory EU contractual rights for domestic and cross-border online sales of tangible goods. This will address remedies for non-performance and the appropriate periods for the right to a legal guarantee.

This initiative builds on the platform of the Consumer Rights Directive (2011/83/EC), introduced in 2011 with the aim of harmonizing and simplifying consumer protection legislation in the EU.

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Key Action 2: Consumer protection

The Commission intends to allow consumer rules to be enforced both more quickly and more consistently, which it hopes to achieve via review and possible reform of the Regulation on Consumer Protection Co-operation (a 2004 regulation which sets out general conditions and a framework for cooperation amongst national consumer protection enforcement authorities). The aim here is to develop more efficient co-operation mechanisms amongst Member States' enforcement authorities.

The Commission also plans to establish in 2016 an EU-wide online dispute resolution platform.

Key Action 3: Parcel delivery

According to the Commission, one practical obstacle to the creation of the DSM is the lack of affordable cross-border parcel-delivery services. It believes that growth in this market will build trust in online sales.

Cynics may say that the market for home delivery of online purchases has never been better, but the Commission claims to be acting on the back of complaints about lack of transparency, excessive costs of small shipments and the lack of interoperability between the different operators typically involved in a cross-border shipment, as well as the resulting lack of convenience for the final consumer. This may not be unconnected to the predominantly non-EU ownership of the big global parcel carriers operating in the EU.

The Commission intends to introduce an initiative focused on enhanced regulatory oversight and improving price transparency for parcel-delivery services throughout the EU to address this issue.

Key Action 4: Geo-blocking

Geo-blocking is the practice of online sellers denying access to users in one jurisdiction to websites based in other jurisdictions – or, alternatively, allowing consumers to access a website, but then either preventing them from purchasing products or services from it or rerouting them to a local website of the same company with different prices or a different product or service. In other cases, where a sale is not denied, geo-localizing practices are used, resulting in different prices being automatically applied on the basis of geographic location – for example when online car rental customers in one Member State pay more for the identical car rental in a given destination than online customers in another Member State. The Commission considers that geo-blocking is one of several tools used by companies to segment markets along national borders, causing consumer dissatisfaction and fragmentation of the internal EU market.

The Commission plans to outlaw geo-blocking in the EU. This is to be achieved by amending the EU e-commerce framework and Article 20 of the Service Directive (2006/123/EC). The geo-blocking issue will also be scrutinized in the e-commerce sector inquiry by DG COMP, the Commission's Directorate-General for Competition.

Key Action 5: Competition

The Commission aims to identify potential competition concerns affecting European e-commerce markets. It suspects that companies have created artificial barriers to trade which impede the development of the e-

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commerce industry in Europe (e.g. by inserting into distribution agreements clauses restricting cross-border online sales). To this end, the Commission also announced on 6 May 2015, an [antitrust competition inquiry](#) into the e-commerce sector of the European Union; and, since then, has already started to send questionnaires to a large number of companies and organisations active in the sector. It is expected that the year-long inquiry will examine a number of industries, with a particular focus on consumer electronics, clothing and creative industries through information requests and subsequent consultations on provisional findings.

Key Action 6: Digital content: A modern, more European copyright law

With the incisiveness for which EU reports are (not) renowned, the DSM intones that “copyright underpins creativity and the cultural industry in Europe. The EU strongly relies on creativity to compete globally and is a world leader in certain copyright-intensive sectors. Digital content is one of the main drivers of the growth of the digital economy.”

Across the EU, [barriers to cross-border access to copyright-protected](#) content and digital portability exist, particularly for audiovisual programmes, and there are obstacles to accessing or purchasing online copyright-protected content from another Member State (either as a result of contractual restrictions between rights-holders and distributors, or due to business decisions taken by distributors).

The Commission intends to introduce legislation later in 2015 aimed at both reducing the differences amongst national copyright regimes and introducing further harmonising measures with the intention of allowing wider online access to works across the EU. Specifically, the Commission intends to ensure that users who purchase digital media in one Member State are able to enjoy that media throughout Europe.

The DSM strategy proposes that Europe needs a more harmonised copyright regime that provides incentives to create and invest while allowing transmission and consumption of content across borders.

The Commission also intends to increase enforcement against commercial-scale infringements of intellectual property rights in Europe.

Key Action 7: A review of the Satellite and Cable Directive

The Commission will assess whether the scope of the 1993 Satellite and Cable Directive (93/83/EC) needs to be broadened to include online transmissions and to analyse ways to boost cross-border access to broadcasters’ services throughout Europe.

Key Action 8: Value added tax

The Commission identifies the issue of dealing with a number of different national tax systems as a significant obstacle to cross-border commerce. It intends to tackle this administrative burden by extending a single system for VAT to the online sale of physical goods, as well as introducing a common EU-wide VAT threshold to assist smaller e-commerce businesses.

Since 1 January 2015, with the entry into force of new “place of supply” rules, VAT on all telecommunications, broadcasting and electronic services is levied in the jurisdiction where the customer is based, rather than where

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the supplier is located. Essentially, the Commission plans to extend this regime to online sales of physical products.

The Commission also intends to remove a VAT exemption for the importation of small consignments from suppliers in third countries outside the EU.

PILLAR 2: CREATING THE RIGHT CONDITIONS AND A LEVEL PLAYING FIELD FOR DIGITAL NETWORKS AND INNOVATIVE SERVICES TO FLOURISH

The Commission considers that the DSM requires reliable, trustworthy, high-speed and affordable networks and services that safeguard consumers' fundamental rights to privacy and personal data protection while also encouraging innovation. It is proposing the following areas of action:

Key Action 9: Telecoms rules

The Commission is aiming to implement an ambitious reform of EU telecom rules – making them “fit for purpose”. This will specifically address: (i) the perceived insufficient level of “infrastructure competition” across national EU markets; (ii) fragmented approaches to regulation with the intention of ensuring a consistent single market approach; and (iii) ensuring a level playing field for all market players.

Radio spectrum is a vital building block for the deployment of broadband services but it is currently managed at, national level, and Member States receive valuable revenues from the sale of spectrum rights – furthermore, these revenues remain exclusively with Member States. But national spectrum management results in widely varying conditions (e.g. different licence durations, coverage requirements) and the absence of consistent EU-wide objectives and criteria for spectrum assignment at the national level creates barriers to entry, hinders competition and reduces predictability for investors across Europe. So the Commission proposes that the radio spectrum be managed by Member States under a more harmonised framework that is consistent with the need for an EU DSM.

Key Action 10: Audiovisual media framework

The Commission will review the Audiovisual Media Services Directive (2010/13/EU) to ensure that it is sufficiently broad to encompass services available but not currently within the scope of the directive. In particular, the review will focus on the roles of different market players in the promotion and advertisement of European works and consider how to adapt existing rules to new content distribution business models.

Key Action 11: Online platforms

Search engines, social media, app stores and e-commerce platforms are seen to be disruptive competitors to established businesses, mainly as a result of the non-transparency of search results and pricing policies, use of information acquired and relationships between platforms that are detrimental to their competitors (but outside the scope of competition law).

This is a key area where the Commission considers that EU operators have fallen behind other, non-EU businesses. It feels that Europe has a strong potential in this area but is held back by fragmented markets which

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make it hard for businesses to scale-up. It is worried that online platforms control access to online markets and can exercise significant influence over how various players in the market are remunerated. It says, "This has led to a number of concerns over the growing market power of some platforms. These include a lack of transparency as to how they use the information they acquire, their strong bargaining power compared to that of their clients, which may be reflected in their terms and conditions (particularly for SMEs), promotion of their own services to the disadvantage of competitors, and non-transparent pricing policies, or restrictions on pricing and sale conditions." Whether this is a potentially protectionist measure is in the eye of the beholder. The Commission seems to believe that the market for online platforms is relatively immature and arguably dominated by a handful of large global corporations – and also that the market presents high barriers to entry for new market entrants (whether EU, or U.S.-based) which the types of behaviour highlighted by the Commission do nothing to diminish.

The Commission also considers that online platforms may not always comply with common economic or social rules (such as taxation and labour laws), and also that those platforms potentially operate unfair terms and conditions of access resulting in possible abuse of market power. The Commission intends to comprehensively analyse the above issues, and introduce legislation to ensure that online platforms are unable to distort the DSM.

Key Action 12: Personal data

The Commission intends to build upon the new EU data protection rules (due to be adopted by the end of 2015) and the e-Privacy Directive to reinforce trust and security in digital services.

Key Action 13: Cybersecurity

The Commission intends to create an industry partnership focused on technologies and solutions for online network security.

PILLAR 3: MAXIMIZING THE GROWTH POTENTIAL OF THE DIGITAL ECONOMY

The Commission believes that the EU needs a range of measures to ensure that European industries are at the forefront of developing and exploiting digital technology, automation, the Internet of Things, sustainable manufacturing and processing technologies to serve the markets of the future.

Key Action 14: European free flow of data initiative

The DMS strategy concludes that macro technology trends such as Big Data analytics, robotic process automation and the Internet of Things are central to the EU's competitiveness. Data is a catalyst for economic growth, innovation and digitization across all economic sectors, particularly for SMEs (and start-ups) and for society as a whole.

The Commission believes that the fragmented nature of European rules, as well as national obligations imposed by some Member States, is a barrier to incoming technology trends. To benefit fully from the potential of digital and data-reliant technologies, the EU plans to remove a series of technical and legislative barriers. These include restrictions such as those related to data location (*i.e.* Member States' requirements to keep data inside their territory) which force service providers to build expensive local infrastructures (data centres) in each region or country. Fragmented implementation of copyright rules and lack of clarity over rights to use data further obstruct

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the development of cross-border data use and new applications of technologies (e.g. text and data mining). The lack of open and interoperable systems and services, and of data portability between services, represents another barrier for the cross-border flow of data and the development of new services. Legal certainty as to the allocation of liability (other than personal data related) is important for the roll-out of the Internet of Things.

According to the Commission, businesses and consumers still do not feel confident enough to adopt cross-border cloud services for storing or processing data, because of concerns relating to security, compliance with fundamental rights and data protection more generally. (The fact that a perennial concern with, and barrier to, cloud adoption is the regulatory constraints over use and processing of personal data appears to be lost on the Commission.) The (eventual) adoption of the EU's data protection reform package will ensure that the processing of personal data is governed by uniform, up-to-date rules throughout the EU. However, contracts often exclude, or severely limit, the contractual liability of cloud providers if the data is no longer available or is unusable, or they make it difficult to terminate the contract. This means that the data is effectively not portable. In the field of data protection, both the current and the future legislative frameworks prevent restrictions to the free movement of personal data within the EU. Restrictions to the free movement of data on other grounds are not addressed. Member States are therefore not able to inhibit the free movement of personal data on grounds of privacy and personal data protection, but may do so for other reasons.

The Commission plans to remove any unnecessary restrictions regarding the location of data within the EU. As such, the Commission plans to launch a "European free flow of data initiative" that tackles restrictions on the free movement of data for reasons other than the protection of personal data within the EU, and unjustified restrictions on the location of data for storage or processing purposes. It will address the emerging issues of ownership, interoperability, usability and access to data in situations such as business-to-business, business-to-consumer, and machine-generated and machine-to-machine data.

The Commission also intends to launch a European Cloud initiative, introducing the certification of cloud services, the switching of cloud service providers and a research cloud – although not all of this is new.

Key Action 15: Standards and interoperability

The Commission intends to define priorities for standards and interoperability in sectors critical to the DSM, including energy (smart metering), e-health and transport planning. The Commission also aims to steer the development of ICT standards essential for supporting industry development in Europe, including Big Data, cloud computing, cyber security and the Internet of Things.

Key Action 16: E-government

The strategy proposes the creation of an inclusive digital society where citizens are able to seize the opportunities of the Internet to bolster employment prospects. The Commission also intends to implement an e-government action plan to connect business registers across Europe, allowing businesses and individuals to only have to communicate their data to public administrations once. To this end, the Commission will accelerate the roll-out of e-procurement and interoperable e-signatures.

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COMMENT AND ANALYSIS

The Commission's DSM strategy proposals can broadly be compartmentalised into two areas: those which aim to unify the fragmented European digital market, and those which aim to crack down on potential abuses of market power.

While this programme of reforms is likely to be welcomed by tech companies in Europe, there is a feeling outside the EU – especially in the U.S. – that the DSM is another step in a series of calculated moves on the part of the EU to combat the dominance of U.S.-based technology firms in Europe. In particular, the introduction of European-only technology standards is likely to increase cost for non-European firms wishing to operate within Europe. At the same time, it is widely expected that the antitrust inquiry into the European e-commerce sector will directly target U.S. companies, given their market dominance.

Questions also exist over the feasibility of the proposals. Member States are likely to be reluctant to allow the Commission to intrude on what are traditionally seen to be national competencies, such as post and parcel services, without more detailed proposals and further negotiation. Equally, the strategy contains none of the supporting documents required in the short term to allow the Commission to meet its ambitious 2016 deadline. Even if Member States sign up to the proposals without resistance or further negotiation, it would be an impressive achievement for the Commission to meet its schedule for implementation.

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