

EUROPEAN COMMISSION'S DIGITAL SINGLE MARKET STRATEGY

On May 6, 2015, the European Commission (the "Commission") adopted an important communication entitled "A Digital Single Market Strategy for Europe" (the "Communication").¹ This initiative is led by Commission Vice-President for the Digital Single Market, Andrus Ansip, and involves a number of Commission Directorates (including DG Connect, DG Internal Market, DG Justice, and DG Competition). Its release comes half-way through the period contemplated for the implementation of the Commission's 2010 Digital Agenda for Europe,² which set out public policy targets for the European digital society until 2020.

The main aims behind the Communication are to improve the digital economy as a driver for growth, and to realize a single digital market in which citizens and businesses can "seamlessly" access and exercise online activities under conditions of fair competition across Europe. However, after drafts of the Communication and the accompanying Staff Working Document³ were leaked in April,⁴ the initiative has already been interpreted by several commentators as specifically aimed at certain US-based "over-the-top" ("OTT") and cloud computing companies.⁵

While the Communication contains many proposals relating to various legal and financial instruments at the disposal of the Commission or the EU institutions to intervene in the digital sector, it remains to be seen how much of this ambitious program will actually be implemented. In particular, while some initiatives proposed in the Communication relate to existing policies and legal instruments (including competition law and EU funds), others would entail legislative changes that will require the support of the European Parliament and/or the Council. The Commission's timetable for carrying out close to all of the planned reforms by the end of 2016

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe. COM(2015) 192 final.

² Communication from the Commission of March 3, 2010 – "Europe 2020 A strategy for smart, sustainable and inclusive growth", COM(2010) 2020 final.

³ Commission Staff Working Document: A Digital Single Market Strategy for Europe – Analysis and Evidence, COM(2015) 192 final.

⁴ See, e.g. "Leaked digital single market's 'evidence file' reveals Commission's ambitions", Politico, April 20, 2015. "These documents reveal the EU's thoughts on regulating Google, Facebook, and other platforms", WSJ, April 23, 2015.

⁵ See, e.g. "Trade winds buffet Digital Single Market", EurActiv, January 12-18, 2015; "Europe Looks to Tame Web's Economic Risks", WSJ, April 23, 2015; "These documents reveal the EU's thoughts on regulating Google, Facebook, and other platforms", WSJ, April 23, 2015.

seems particularly optimistic (in particular if implementation periods are subsequently granted to Member States).

Concurrently, the Commission launched a competition law inquiry into the e-commerce sector, with a particular focus on “*potential barriers erected by companies to cross-border online trade in goods and services where e-commerce is most widespread*” such as digital content, electronics, or clothing and shoes.⁶ A final report is expected in early 2017.

The sections below summarize the most sensitive aspects of the Communication relating to online platforms, the establishment of a level playing field in the telecommunications sector, Internet sales, access to digital content, big data, interconnectivity, illegal content, and data protection.

I. ONLINE PLATFORMS

The Communication voices a concern that the rise of powerful Internet platforms might impede business-to-business relationships (“B2B”) and hurt small and medium enterprises (“SMEs”).

The Communication and the accompanying working document do not define precisely the concept of an “online platform”, but they provide several examples covering some of the most important Internet content providers (*i.e.* search engines, social media, e-commerce platforms, app stores, and price comparison websites). The Commission considers that the growing market power of certain types of platforms (*i.e.*, those which control access to online markets and exercise significant influence on how various players are remunerated) raises issues including:

- a lack of transparency in the way platforms use the information they collect;
- strong bargaining power compared to that of their clients;
- the promotion of their own services to the disadvantage of their competitors;
- potentially unfair terms and conditions (particularly for SMEs); and
- non-transparent pricing policies as well as restrictions on pricing and sale conditions.⁷

⁶ See Commission press release and factsheet available online at <http://ec.europa.eu/competition/antitrust/news.html>. The sector inquiry was originally announced by Commissioner for Competition, Margrethe Vestager, in late March.

⁷ This could, for example, concern “price-parity clauses,” which prevent business customers of a particular platform to charge better prices to competing platforms.

In response, the Commission will launch by the end of 2015 a “*comprehensive assessment*” on the role of online platforms. This investigation will, in particular, cover:

- transparency in search results (involving “paid-for” links or advertisement);
- how platforms use the information they collect;
- relationships between platforms and suppliers;⁸ and
- constraints on the ability of users to move from one platform to another (involving standardization and data portability issues).

The Communication does not expressly mention the legal basis for the planned “assessment”. It is, for example, unclear whether the e-commerce competition law sector inquiry announced on the same day as the Communication will be part of the assessment, whether the assessment will be conducted through *ad-hoc* inquiries by other Directorates, and/or whether this will indirectly trigger antitrust enforcement against specific undertakings. However, an internal comment in the leaked draft Communication expressly acknowledged the importance of competition rules and provided for the need to review the above action points once a decision has been reached in the Google abuse of dominance case.

II. LEVEL PLAYING FIELD IN TELECOMMUNICATIONS SECTOR

To address concerns from the European telecommunications industry regarding the growing commercial power of Internet content providers in the telephony and TV markets through OTT services (e.g., “Voice over Internet Protocol” services such as Skype, messaging services such as WhatsApp, and TV on-demand services such as Netflix), the Commission proposes ensuring a “*level playing field*” in the telecommunications sector while meeting the “*long term connectivity needs*” of the EU. Specifically, the Commission intends to re-assess the Audiovisual Media Services Directive;⁹ this assessment may lead to the Commission seeking to extend the scope of the Directive to new categories of operators or to broadcasters falling outside of its geographic scope. It is yet unclear how interoperability and open-access requirements, which are linked to ownership over physical telecommunications networks, would apply to Internet content providers. The Commission also refrains from commenting on whether these legislative changes will affect the definitions of the relevant telecommunications markets.

As regards network infrastructure, the Commission is still not satisfied with the way radio spectrum is managed and allocated to operators. The Communication therefore proposes to adopt a “true single market approach” to spectrum allocation and management, to harmonize conditions such as license durations and coverage requirements, and to ensure the expedient

⁸ This could potentially concern matters such as online platforms payments for using copyrighted content to draw traffic and generate revenues. See, “*Trade winds buffet Digital Single Market*”, EurActiv, January 12-18, 2015.

⁹ Directive 2010/13/EU of March 10, 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

release of available bandwidth. This initiative however falls short of transferring the lucrative radio spectrum auctions to the EU level. It is also not certain whether the definition of “consistent EU-wide criteria” for spectrum assignment will result in a single allocation procedure or whether Member States will remain free to allocate spectrum by way of auctions or, for example, through “beauty contests”.¹⁰

III. INTERNET SALES & ACCESS TO DIGITAL CONTENT

The Commission notes that online sales are significantly impacted by the lack of contract law harmonization, the lack of affordable and high-quality cross-border parcel delivery services, pervasive discrimination on the basis of residence, and heavy VAT procedures for cross-border sales. The Commission also notes that access to digital content is often contractually restricted, in particular for audiovisual programs. The Communication therefore proposes to:

- define harmonized EU rules for the purchase of online digital content, such as eBooks,¹¹ and harmonize national laws with a focused set of contractual rights and obligations applicable to domestic and cross-border online sales of tangible goods (including the parties’ main rights and obligations, remedies for non-performance, and appropriate warranty periods);
- launch measures and promote further self-regulatory action on price transparency and regulatory oversight for parcel delivery;
- address unjustified geo-blocking (e.g., denying sales or re-routing to a local website with higher prices)¹² through the competition law sector inquiry announced the same day as well as amendments to the e-Commerce legislative framework¹³ and to the legislative framework deriving from Article 20 of the Service Directive (which provides that Member States “*shall ensure that the*

¹⁰ “Beauty contests” were widely used in the past to allocate spectrum and have been utilized by countries such as Estonia and Lithuania since 2010.

¹¹ This would for example include harmonized remedies for defective digital content.

¹² The Communication acknowledges that geo-blocking might be justified, for example, if the seller needs to comply with specific legal obligations, or if the costs associated with cross-border sales would be too high for certain types of companies. In addition, exclusive territorial licenses are not identified with geo-blocking. On its website, the Commission specifically states that “*the financing of the audiovisual sector widely relies on a system based on territorial exclusivity, which as such cannot be considered as unjustified geo-blocking.*” See http://europa.eu/rapid/press-release_MEMO-15-4920_en.htm. The Staff Working Document also acknowledges that exclusive territorial rights may be justified by the necessary upfront investments to finance audiovisual productions or by differences in the value of those rights across Member States.

¹³ Directive 2000/31/EC of June 8, 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market and Commission Communication “A coherent framework to build trust in the Digital single market for e-commerce and online services” of January 11, 2012.

recipient is not made subject to discriminatory requirements based on his nationality or place of residence”);¹⁴

- on the one hand, ensure the full portability of legally acquired online content (e.g. in a different country than the country of purchase) and uninhibited access to online services or content across Member States, as well as harmonize national copyright regimes, including through a possible extension of the satellite and cable directive¹⁵ to broadcasters’ online transmissions; and, on the other hand, protect the overall value of IP rights in the audiovisual sector and remuneration for creators, as well as improve the cross-border enforcement of IP rights;
- reduce the administrative burden resulting from different VAT regimes to encourage cross-border online sales.

IV. BIG DATA & INTERCONNECTIVITY

The Commission wishes to create a single market for data in which interoperability and portability between individuals and devices would allow information to circulate without technical restraints and which has better legislative safeguards relating to ownership, security, liability, and data protection. The Commission will also challenge unjustified restrictions imposed by Member States on the free movement of data and on the location of data storage and processing activities.

This initiative also covers the public sector with the adoption of a new e-Government Action Plan for 2016-2020. The plan will mandate the interconnection of business registers by early 2017 and the application of the “Once-only” principle¹⁶ for frequent administrative documents that cross-border businesses need to process.

In addition, the Commission will reinforce its European cloud computing initiative and launch an integrated standardization plan to identify and define key priorities for standardization in various sectors including health, transport, environment, and energy. It is not yet clear whether these programs will only benefit EU operators, or how they will comply with the EU State aid rules and trade commitments. In particular, the Communication’s section on the “international dimension” of the Digital Single Market is strikingly short and no more than mentions the need to press EU’s trading partners to open their markets and develop a sustainable approach on Internet governance. There is no reference to the ongoing trade negotiations conducted at the WTO or in other bilateral or multilateral fora (such as the TTIP).

¹⁴ Directive 2006/123/EC of December 12, 2006 on services in the internal market.

¹⁵ Directive 93/83/EEC of September 27, 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

¹⁶ Pursuant to the “Once-only” principle, an undertaking should not have to carry out a given formality twice if the relevant information is already available within the broader administration.

V. ILLEGAL CONTENT & PRIVACY

In the area of “cyber-security” the Commission proposes to promote EU industry solutions and closely examine the use of personal data by online players, and in particular online platforms. The Commission will set up a public-private partnership on cyber-security to find technologies and solutions for online network security. As with the European cloud computing and standardization initiatives, it is not yet clear whether this program will only benefit EU operators, or how it will comply with the EU’s trade obligations and the State aid rules.

On the legislative aspect, the Commission will analyze how best to tackle illegal content on the Internet and whether to introduce a new legislative proposal, which could impose heavier obligations on intermediaries (such network or system managers). The Commission also proposes to review the ePrivacy Directive¹⁷ once the new general EU rules on data protection are agreed¹⁸, with a focus on ensuring a high level of protection for data subjects and a level playing field for all market players (including Internet content providers who offer similar services to those of “traditional” telecommunications operators).

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If you have any questions with respect to the issues addressed herein, please feel free to contact the members of Cleary Gottlieb’s e-commerce/digital single market team including [F. Enrique González-Díaz](#), [Thomas Graf](#), [François-Charles Laprèvote](#), [Nicholas Levy](#), [Robbert Snelders](#), [Romano Subiotto QC](#) (Brussels), [Romina Polley](#) (Cologne), [Maurits Dolmans](#) (London), [Marco d’Ostuni](#) (Rome), [François Brunet](#) (Paris), [Leah Brannon](#), [George Cary](#) (Washington) or any of your regular contacts at the firm listed at <http://www.cgsh.com/>.

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¹⁷ Directive 2002/58/EC of July 12, 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector

¹⁸ The Commission proposed a new legal framework for the protection of personal data in the EU including a Regulation and a Directive in 2012. The European institutions are expected to enact the new package in late 2015 or early 2016.

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