

The EU's Digital Single Market Strategy

May 6, 2015

Earlier today, Vice-President Andrus Ansip (Digital Single Market) unveiled the European Commission's long-awaited strategy aiming to achieve a single, borderless, European online marketplace and kick-start growth in the European digital economy.

The Commission's roadmap includes several initiatives intended to ensure better access to digital goods and services across Europe for consumers and businesses, create the conditions for digital networks and services to flourish and maximize the growth potential of the digital economy. The Digital Single Market Strategy consists of 16 initiatives, 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; (3) maximizing the growth potential of the digital economy. We have identified the key policy proposals below.

Platform Regulation and E-commerce Competition Inquiry

A number of the Commission's Directorate Generals believe that the role played by online platforms in shaping the Internet and collecting data will make them key players in the digital ecosystem. The French and German governments appear to share this view, given that their Ministers of Economy expressed concerns just last week that such platforms are "capturing a significant part of the value from services and content created by third party [...] providers".

While it is not clear which "platforms" are under examination, the Commission is clearly focusing on larger online platforms, particularly those operating in two-sided markets, with strong network effects and (in some cases) the ability to "lock-in" customers. The Commission has identified the following as examples of online platforms: "search engines, social media, e-commerce platforms, app stores, price comparison websites."

According to internal documents, a number of Directorate Generals have expressed concerns relating to certain types of conduct by platforms, including: (i) the ability of certain platforms to control "access" to the market place by third parties (particularly SMEs), (ii) the potential for platforms that are both market participants and providers of services to competitors to use data about their competitors' transactions, (iii) the imposition of high and opaque pricing, and (iv) platforms restricting the ability of merchants to price differently for sales through other channels.

The Commission's underlying concern is that certain online platforms have evolved to become players competing in many sectors of the economy that use their market power in a manner that raises a number of issues that warrant analysis beyond the application of competition law in specific cases.

In this context, internal documents suggest that the Commission is considering a number of possible regulatory responses, including measures relating to trading practices, access terms and contract terms (including transparency, prohibitions of unfair trading practices including price parity and MFN clauses), measures restricting discrimination by vertically-integrated companies in favor of their own operations, amending European competition rules

May 6, 2015

as they apply to online platforms, and creating a roundtable on European online platform building to encourage the development of European online platforms.

E-commerce Sector Inquiry

As part of the Digital Single Market Strategy, today DG Competition launched a sector inquiry into the e-commerce sector, examining clauses in online distribution arrangements relating to geo-blocking and restrictions on cross-border transactions that it considers to be potentially anticompetitive (including restrictions on the use of credit cards).

The e-commerce sector inquiry press release can be found [here](#).

E-commerce Rules

The Commission will revise online rules for consumer shopping and VAT rules, and is launching an initiative relating to parcel delivery.

The Commission plans to harmonize rules for online purchases of digital content (e.g. for defective content purchased online, like faulty eBooks, downloaded music etc.). Under the proposed rules, the contract laws applicable in the country of the online seller will apply to the transaction. The Commission also intends to introduce a set of mandatory contractual rights for the domestic and cross-border online sale of tangible goods. This set of mandatory contractual rights will relate to guarantee periods and remedies for non-performance. In addition, the Commission proposes to review the [Regulation on Consumer Protection Cooperation \(2011\)](#), in order to enhance the enforcement authorities' powers and increase coordination of the monitoring and alert mechanisms. The Commission also intends to establish an EU-wide online dispute resolution platform in 2016.

The Commission will also propose measures intended to minimize the administrative burden arising from different VAT regimes in 2016. For example, the Commission proposes to extend the simplified VAT system for digital goods to intra-EU and third country online sales of tangible goods, which will affect online selling platforms.

Following the submission of an industry-penned report on parcel delivery in June 2015, the Commission intends to introduce measures in the parcel delivery sector, which will focus on price transparency, speedy delivery and "track and trace" aspects of parcel delivery. The proposed measures are expected in the first half of 2016.

Geo-blocking

Geo-blocking (the practice of restricting online content based on someone's location) has been a contentious issue within the Commission. Some Commissioners have pushed ambitious legislative measures, while other Commissioners and some Member States are more reluctant to regulate. Those in favor of legislation are concerned that some geo-blocking measures restrict trade in the EU, are being used to segment markets, and can lead to price-differentiation and other anti-competitive effects.

The Commission proposals address this issue directly. Commission proposals could include changes to the [eCommerce Directive](#), which established an Internal Market framework for e-

commerce and to Article 20 of the [Services Directive](#), which provides for non-discrimination of recipients of services. With these changes, online sellers would have limited grounds to deny access to online services. The Commission will also review the 1993 [Satellite and Cable Directive](#) assessing how it has facilitated consumers' cross-border access to satellite broadcasting services in the EU, possibly seeking to extend the directive to cover certain broadcasters' online services. There are concerns that any attempts to prohibit geo-blocking may be difficult to monitor and enforce in practice.

Copyright Reform

EU copyright rules date back to 2001 and the Commission aims to modernize these rules to respond to changing technologies, consumer behavior and markets. By the end of 2015, Commissioner Oettinger (Digital Economy & Society) intends to propose copyright reform seeking to deliver portability of legally acquired content i.e. remove geo-blocking (see above), and deliver greater legal certainty for the cross-border use of content for specific purposes (e.g. research, text and data mining, etc.). The measures will seek to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU. The copyright reforms will also clarify the rules on the activities of intermediaries in relation to copyright-protected content and modernize enforcement of intellectual property rights, by focusing on commercial-scale infringements, as well as its cross-border applicability.

In conjunction with the copyright reform, the Commission also plans to review the [Audio-visual Media Services Directive](#) in 2016, updating the rules to apply to all market players (such as on-demand services), in particular to include the protection of minors and advertising rules.

Telecoms Regulation

The telecoms industry is facing many challenges at the moment: industry consolidation, spectrum shortage, competition from VoIP and “Over The Top” providers (who deliver audio, video, and other media over the Internet), and lack of investment in broadband infrastructure. The Commission recognizes that the current [Connected Continent Telecoms Package](#) discussions have become overly focused on roaming and net neutrality and do not address all of the challenges affecting the industry. The Commission intends to create a regulatory framework that will support a single European telecoms market. Reform proposals are expected to focus on consistent spectrum management, encouraging investment in high capacity networks, tackling fragmented regulation and creating an environment in which “economies of scale can be achieved by efficient network operators” (a measure likely to favor incumbent telecoms operators).

ePrivacy Directive, Intermediary Liability and Cyber Security Reforms

The Commission seeks to review the [ePrivacy Directive \(2002\)](#), which concerns the processing of personal data and the protection of privacy in the electronic communications sector and involves the confidential treatment of traffic data, spam and cookies. The original ePrivacy Directive applies only to traditional telecoms providers. The revised ePrivacy Directive will apply to information society service providers as well as traditional telecoms

May 6, 2015

providers. This review of the ePrivacy Directive will only take place once the [General Data Protection Regulation](#) proposal (which aims to modernize and harmonize European data protection rules) has been agreed (aimed for in 2015, but more likely to be in 2016).

In addition, the Commission will also analyze the rules in relation to the liability of intermediaries for illegal content on the Internet. This is not limited to copyrighted content, it may include terrorism related content or pornographic content. The Commission will explore whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems.

The Commission also proposes to establish a Public-Private Partnership on cyber security, focusing on producing technology and solutions in the area of online network security, and to stimulate their take-up by business and consumers alike.

Data Flow, Interoperability and Standardization

In 2016, the Commission will propose a “European free flow of data” initiative that tackles restrictions on free movement of data (apart from restrictions related to protection of personal data). The purpose of this initiative is to remove technical and legislative barriers to allow development in sectors such as big data computing, cloud computing, 3D printing and the Internet of Things (inter-connected everyday devices, systems, and services such as smart fridges). The measure will target issues related to data ownership and interoperability, and will also clarify the allocation of liability (other than personal data) in relation to data flows.

As part of this initiative, the Commission is also considering measures which would require online businesses to make their systems, technologies and services interoperable on the basis of common standards, enabling consumers to switch to different service providers without technical restrictions. In this regard, the Commission plans to revise and extend the European Interoperability Framework.

The Commission will also launch an integrated standardization plan to identify and define key priorities for interoperable standards. It will focus on essential sectors such as health (telemedicine, m-Health), transport (transport planning, e-freight), environment, and energy (smart metering).

The European Commission’s Digital Single Market strategy can be found [here](#) and the press release [here](#).

If you have any questions concerning the issues raised in this client alert, please contact the following partners:

Sebastian Vos - Partner, Public Policy & Government Affairs Practice

Miranda Cole - Partner, Competition Practice

Lisa Peets - Partner, Technology & Media Practice

Jetty Tielemans - Partner, Privacy & Data Security Practice

svos@cov.com

mcole@cov.com

lpeets@cov.com

htielemans@cov.com

May 6, 2015

Upcoming Covington event

Director-General Robert Madelin of DG Connect will present and discuss the Commission's Digital Single Market Strategy at Covington's Brussels office on 11 June. Please join us by following the instructions in the event invitation:

<http://www.cov.com/events/detail.aspx?event=654>

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.