

A hand is pointing at a laptop screen displaying a colorful line graph. In the foreground, a white envelope is partially visible, with a green tab on the left side. The background is a blurred outdoor scene with greenery.

Hogan  
Lovells

DSM in 5 minutes



# Introduction

The Digital Single Market (DSM) is getting real! Since the European Commission introduced its strategy in May 2015, we have seen a multitude of legislative initiatives. The Commission has run numerous consultations amongst stakeholders and organisations. Impact assessments have been carried out and the results have been cumulated in official communications. All this is ongoing. Right now, the European institutions battle over the final wording for new regulations and directives aimed at breaking down the existing barriers to online trade and communication.

Here we provide a brief overview of what DSM means and how it will impact our daily lives. We set out what the key legislative measures will bring about and when we can expect the proposed changes. You can also explore our interactive online timeline of key milestones in the strategy so far and for the year ahead on our [microsite \(www.dsmwatch.com\)](http://www.dsmwatch.com).

Our DSM team is a group of 30 experienced legal advisors all dedicated to the technical, as well as legal challenges and opportunities vested in the Digital Single Market. You will find our contact details at the end.



Nils Rauer, Partner  
Hogan Lovells DSM Taskforce

# A digital world

Today's challenges are digital and so are the opportunities. All kinds of businesses depend on digital connectivity, online access to information and electronic platforms allowing business activities beyond the reach of the traditional analogue world. The Commission's president Jean-Claude Juncker phrased it well when pointing out that "we will need to have the courage to break down national silos in telecoms regulation, in copyright and data protection legislation, in the management of radio waves and in the application of competition law." Commissioner Andrus Ansip added that the "industrial revolution of our time is digital". Quite bold words, but they ring true. The European Commission estimates that a connected digital single market within the European Union could generate up to €250bn of additional growth in only a few years. This prospect led to what can be said to be the most comprehensive initiative the Commission has ever launched: The Digital Single Market Strategy.



## The strategy

The Digital Single Market (DSM) strategy was born in May 2015 and in May 2017 the Commission published its mid-term review. DSM is an umbrella term describing a wide ranging group of individual legislative initiatives from the European Commission. The unifying theme of the DSM initiative is to create a pan-European framework of laws for the digital economy applying the core principles of a single market: free movement of goods, services, people and capital; fair competition and a well-harmonized and level playing field for all stakeholders.

## The single market concept

The idea of an integrated single market across all Member States is not new. The founding members of the then-called European Economic Community (EEC) aimed to bring together their domestic economies. Accordingly, the notion of a “Common Market” was introduced at the very beginning. As early as 1982, the European Court of Justice emphasised that it requires “the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.”

Today, this goal is set out in Article 26 TFEU. However, the internet by its very nature does not recognise domestic borders. This is why the online world very easily reveals the trade barriers artificially implemented. So-called geo-blocking is the most apparent phenomenon of that kind. So, the Commission

eventually took on the regulatory challenge by developing its DSM strategy.

## The three pillars

The DSM rests 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. Maximising the growth potential of the digital economy**

“the internet by its very nature does not recognise domestic borders.”

In order to accomplish these goals, the Commission has divided the pillars into 16 individual initiatives. To name only a few: the development of a modern, more European copyright law, the harmonisation of differing VAT regimes and the overhaul of EU telecoms rules.

### The underlying principles

The underlying principles are not completely new. The EU has a range of established rules which apply to the digital economy. Whilst some are very specific, others apply general EU law in the particular context. However, the development of the existing regime largely pre-dated the explosion of digital activity in recent years. The current initiatives build on the existing framework with the aim of modernising the overall regime so that it works effectively for the digital economy as it is today. The DSM will be the product of existing and new rules working together.

Four familiar EU principles run through many aspects of it:

- **Harmonised rules:** applying the same minimum standards to the same activity (whether that be the terms on which consumers buy from digital commerce businesses, the content of digital content services or the handling of consumers’ personal data) across all Member States makes it easier for citizens and businesses to conduct their activities without regard to national borders
- **Reduced barriers:** making it easier for citizens to treat key “assets” of the digital economy, like content they acquire and their own personal data, in a way similar to personal possessions. Increasing rights to move those assets across national boundaries or from one service provider to another
- **Coordinated enforcement:** cooperation between those responsible for enforcing the rules locally, at Member State level or EU wide combined with “passporting” (meaning that compliance with the rules or regulator’s requirements in one Member State covers the whole EU) increases day to day consistency and also confidence for business and citizens that they can trade EU-wide. It also reduces costly requirements to establish compliance systems for multiple countries
- **Economies of scale and robust competition:** to compete on global markets, EU-based businesses should:

- a) be able to serve the entire EU market without having to duplicate infrastructure or seek local licenses
- b) be subject to robust competition from both EU-based and non EU-based players. Competition for the EU-wide market will lead to the emergence of EU digital champions able to compete on world markets

## Scope

To track the DSM as it develops we have identified six main areas covered by the initiatives. Whilst there are overlaps between these areas, they do provide a logical way to look at the DSM:

- **Copyright and Audiovisual Media Services:** the way in which content and content services are governed.
- **E-Commerce and Tax:** the rules covering buying and selling goods and services in the digital economy.
- **Digital platforms:** The regulation and status of platforms in the digital economy.
- **Telecoms and e-Standards:** The framework of regulation which seeks to ensure efficient and appropriate use of networks and interoperability of digital products and services.
- **Privacy, Cybersecurity and the Cloud:** The rules governing the use and protection of data.
- **Government and procurement:** Initiatives to modernise the operation of public institutions in line with the evolution of the digital economy.

The following pages provide a brief introduction to some of the issues as identified above.

# Copyright and Audiovisual Media Services (AVMS)

Copyright and audiovisual media services	E-commerce and tax	Digital platforms	Telecoms and e-standards	Privacy, cloud and cyber security	Government and procurement
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Social media Consumer Telecoms Digital service providers App stores Audio-visual and music platforms Online advertising News aggregators Media, publishers and broadcasters TMT Online service providers Collaborative economy platforms Content providers for social media services Online market places Search engines Infrastructure and transportation Industries engaged in data management and processing Demand content services IP rights holders Chip manufacturers and IoT

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## What are the key topics?

The Commission's aim is to reform, modernise and harmonise EU copyright by widening access to digital content across the EU; introducing new and assessing old exceptions and limitations; creating a fairer marketplace and by reducing piracy.

The Commission plans to revise the Audiovisual Media Services Directive 2010/13/EU (AVMSD) by extending the scope, encouraging co- and self-regulation, extending the protection of minors and anti-incitement to hatred principles to video sharing platforms, the introduction of quotas for European Works and the possibility for member states to request financial contributions to the production of European Works.

A review of the Satellite and Cable Directive 93/83/EEC (the SatCab Directive) may also result in an extension of the rules to programmes provided over the internet.

### What key things have happened so far?

- **9 December 2015:** Publication of the action plan “Towards a modern, more European copyright framework”
- **4 May 2016:** Report on consultation on the SatCab Directive
- **25 May 2016:** Publication of draft amendment of AVMSD
- **14 September 2016:** Publication of the Copyright Package II, including:
  - Communication on “Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market”
  - Draft Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes
  - Draft Directive on copyright in the Digital Single Market
  - Draft Regulation and a draft Directive implementing the Marrakesh Treaty
- **18 May 2017:** The European Parliament (EP) agrees proposed regulation on ensuring the cross-border portability of online content services

“The Commission’s aim is to reform, modernise and harmonise EU copyright by widening access to digital content across the EU.”

### What other key things are supposed to happen and when?

- **Spring/Summer 2017:** EP Committee on Legal Affairs working on the new copyright directive and the other drafts published on 14 September 2016
- **Spring 2017:** EP Committee Vote on the proposed amendments to the AVMSD due
- **2017 (indicative):** Possible draft legislation on IP enforcement reform

### What could some of the key impacts be?

- Content owners and licensees will need to review the entire production chain starting with the acquisition of content, the making available of content, the structuring of websites, the protection of content, etc
- Changes to the AVMSD will increase the regulatory burden on online video sharing platforms as well as introduce additional regulation for content provided via audiovisual media services
- Clients will have to review their current business models, looking at whether those will work in future because of added regulatory burdens, and changes in sourcing costs due to different exploitation rights and different exemptions/limitations (e.g. news aggregators and online platforms)



# E-commerce and tax




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## What are the key topics?

The Commission aims to harmonise the rules on conformity of goods and digital content sold online and reduce territorial blocking of online sales sites (referred to by the Commission as “geo-blocking”).

The Commission is also reviewing the cross-border parcel sales market, price transparency/differentials for multijurisdictional sites and the administrative burden of VAT rules for cross-border online sales.

## What key things have happened so far?

- **6 May 2015:** The Commission launched e-commerce sector inquiry
- **9 December 2015:** The Commission published draft directives on contracts for goods and digital content sold online to consumers as well as a draft regulation on the cross-border portability of online content services
- **7 April 2016:** Release of the Commission's VAT Action Plan
- **25 May 2016:** The Commission proposes draft regulations on geo-blocking, parcel delivery and consumer protection
- **26 July 2016:** The Commission made legally binding the commitments offered by Paramount following its investigation into restriction of cross-border access to pay-tv services in the UK and Ireland
- **15 September 2016:** The Commission published a preliminary report on the e-commerce sector inquiry setting out its initial findings
- **18 November 2016:** End of public consultation regarding the preliminary report on e-commerce. 65 submissions were made in relation to consumer goods and digital content
- **1 December 2016:** Release of Proposals for VAT systems (a) cross border e-commerce and (b) the SME sector
- **10 May 2017:** The Commission published its final report on the e-commerce sector inquiry

“The Commission aims to harmonise the rules on conformity of goods and digital content sold online and reduce geo-blocking.”

### **Key findings on consumer goods:**

- Certain clauses in selective distribution agreements may go beyond what is necessary to achieve goals of ensuring a high quality distribution, a coherent brand image, and the quality of pre and after sales services
- The clauses which contain the following restrictions may act as barriers to competition: (i) restriction of cross-border sales through geo-blocking; (ii) restrictions on the use of marketplace



bans (the assessment will vary depending on a variety of factors); (iii) restrictions on the use of price-comparison tools; and (iv) price recommendations

### **Key findings on digital content:**

- Right holders require the vast majority of content providers to restrict access to their online digital content services to users in other Member States with geo-blocking measures
- Licensing agreements which are exclusive and have long duration clauses could render entry or expansion difficult. This is exacerbated by first negotiation clauses, automatic renewal clauses and other analogous clauses
- There is widespread use of minimum guarantees and fixed/flat fees often in conjunction with advance payments in the payment mechanisms which determine the amounts digital content

providers have to pay rights holders for the license to online rights. The Commission has expressed that this might make it more difficult for a new entrant to gain a foothold in the market

### **What other key things are supposed to happen and when?**

- Proposal for final VAT system for (a) cross-border trade and (b) VAT rates (REFIT)

### **What could some of the key impacts be?**

- Likely reduction of ability to restrict cross-border access to online digital content and online sale of goods. However, compared to the initial concerns expressed by the Commission, it seems it is increasingly accepting that geo-blocking is justified in certain circumstances
- Likely restrictions on discriminatory pricing based on jurisdiction

- Harmonisation of definition and minimum standards for provision of digital content
- Easement of current VAT rules for cross-border activities, in particular reduction of costs associated with VAT compliance, should result in 95% less costs for e-commerce companies

# Digital platforms




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**Social media** Consumer Telecoms Digital service providers **App stores** **Audio-visual and music platforms** **Online advertising** News aggregators Media, publishers and broadcasters TMT Online service providers **Collaborative economy platforms** Content providers for social media services **Online market places** **Search engines** Infrastructure and transportation Industries engaged in data management and processing Demand content services IP rights holders Chip manufacturers and IoT

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## What are the key topics?

While the Commission appreciates that online platforms play an increasingly central role in the digital economy the Commission is concerned about the growing market power of some digital platforms (search engines, social media, app stores, etc.). In particular, there are concerns about non-transparency of search results (e.g. the use of paid for links/advertising) and pricing policies; how platforms use the information they acquire; the relationship between platforms and suppliers and the promotion of platforms' own services to the disadvantage of competitors. The Commission is also looking at ways to tackle illegal content on the internet and considering whether new measures are needed, including additional obligations on intermediaries.

## What key things have happened so far?

- **24 September 2015 until 6 January 2016:** The Commission launched a public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy
- **25 May 2016:** The Commission issued a communication which sets out the position on what is needed in terms of regulation over platforms (Communication on Online Platforms and the Digital Single Market). This communication is notably based on the results of the public consultation which also led to the publication of the “Staff Working Document on Online Platforms” on the same day as the communication
- **2 June 2016:** The Commission published its Communication on “A European agenda for the collaborative economy” encouraging the collaborative economy and pleading for an open and reasonable approach to this quickly growing area for which the Commission predicts a huge potential for innovation and growth in the European Union
- **14 September 2016:** The European Commission presented its second copyright package including a draft copyright directive also covering auxiliary rights for press publishers which ultimately should put them in a better negotiating position in their contractual relations with online services using and enabling access to their content

“The Commission is concerned about the growing market power of some digital platforms.”

- **29 September 2016:** The Commission also stated that it will explore the need to issue Guidance on voluntary measures, to render the fight against illegal online content more effective. This effort could be followed, from 2017 onwards, by a Commission-led discussion forum whereby platforms should be incentivised, where appropriate, to do more to maintain user trust
- **6 March 2017:** Final report on the results of the Commission’s consultation on the Next Generation Internet Initiative published. Ensuring sovereignty over citizens’ data and protection of privacy were the most important values identified
- **30 March 2017:** Publication of high level report of a workshop with online platforms on ‘platform-to-business’ trading practices

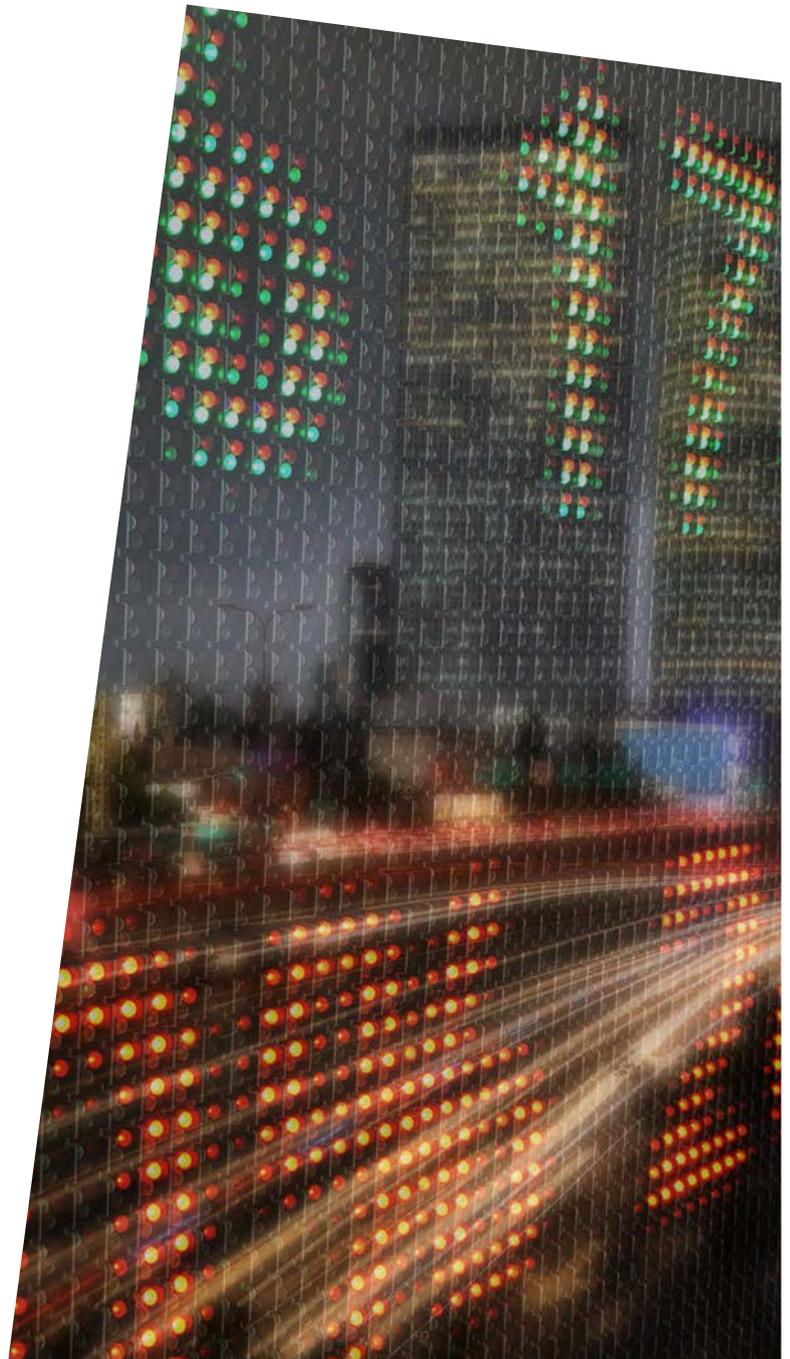
### What other key things are supposed to happen and when?

- The Commission is carrying out a “targeted fact-finding exercise” on the relationships and B2B practices between platforms and suppliers to decide whether further action is necessary in this regard – by Spring 2017
- The Commission is reviewing the need for formal notice-and-action procedures in light, notably, of the results of the updated AVMS and copyright frameworks – no date available yet

### What could some of the key impacts be?

- Increase of obligations (notably implementation of formal notice-and-action procedures) on platform operators
- Limited adjustments to the liability regime governed by the e-commerce Directive (2000/31/EC) (e.g. clarification on platform’s liability in relation to self-regulatory measures)

- Competition for competence between the European Commission and national EU Member States enforcers as well as between national enforcers directly (e.g. will we see a future UK regulation on platforms after Brexit?)
- In response to national proposals (e.g. German Government's announced White Paper on digital platforms and the French inquiry into data processing for online advertising), the Commission has announced an EU directive empowering national antitrust enforcers to deal with competition law issues arising out of Big Data (expected for Spring 2017)



# Telecoms and e-standards

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## What are the key topics?

The Commission aims to reform the EU telecoms regulatory framework (Pillar 2). The proposed reforms are the centerpiece of the Commission’s “Connectivity Package”, published on 14 September 2016. The Connectivity Package is a bundle of legislative proposals and related initiatives whose common goal is to dramatically increase the speed and geographic coverage of high quality internet connectivity across the EU over the course of the next decade.

The most ambitious reform is a proposed Directive to create a single new overarching telecommunications law for the EU: the European Electronic Communications Code. The principal goals of the proposed Directive are:

- Simplification and adaption of existing rules to stimulate investment in network infrastructure: for example the circumstances under which price control obligations may be imposed on network providers with significant market power will be narrowed
- OTT communication services are to be regulated: providers of OTT communication services that use telephone numbers will be subject to some of the laws that apply to traditional telephony services, whilst providers of OTT services that communicate without numbers will be subject to some telecommunication laws
- Stronger consumer protection: the reforms include proposals for clearer contracts for customers, and importantly basic broadband access at an affordable price is to become a universal service
- New rules relating to radio spectrum licensing: minimum licence durations of 25 years and more coordination of the timing of spectrum assignments are two of the more prominent items here
- Enhanced powers for regulatory authorities and BEREC (Body of European Regulators for Electronic Communications)

Pillar 2 also includes the 2015 Open Internet Access and Roaming Regulation which

“The Commission aims to reform the EU telecoms regulatory framework. The most ambitious reform is a proposed Directive to create a single new overarching telecommunications law for the EU: the European Electronic Communications Code.”

addresses net neutrality and ending roaming surcharges for data within the EU.

The Commission has also adopted an Priority ICT Standards Plan, aimed at ensuring that standardisation output keeps pace with technological change in areas deemed critical to the Digital Single Market including areas such as health (telemedicine, m-health), transport (travel planning, e-freight), environment and energy. The Commission also plans to extend the European Interoperability Framework.

### What key things have happened so far?

- **6 May 2015:** Initial DSMS strategy press release with announcement. Reform of Telecoms laws under Pillar 2, and ICT Standards under Pillar 3
- **2 February 2016:** Publication of draft Decision to coordinate use of 700MHz spectrum for mobile broadband use
- **19 April 2016:** The Commission publishes “Digitizing European Industry”, “Advancing IoT in the EU”, and “Priorities in ICT Standardization” communications
- **30 August 2016:** BEREC publishes guidelines for national regulators on the implementation of the Open Internet Access Regulation
- **14 September 2016:** The Commission publishes the ‘Connectivity Package’, which includes proposals for: (i) a Directive updating and merging existing EU telecommunications laws into a single European Electronic Communications Code; (ii) an updated Regulation that revamps and gives new powers to the Body of European Regulators of Electronic Communications (BEREC); and (iii) a new Regulation to support local communities in providing free public Wi-Fi to their citizens (WIFI4EU)
- **12 December 2016:** BEREC adopts high-level Opinion on the proposed new Directive establishing a European Electronic Communications Code
- **15 December 2016:** Roaming charges: Commission adopts the Implementing Act on fair use policy and sustainability mechanism in time for June 2017

- **6 April 2017:** EP approves proposed regulation to set maximum wholesale roaming charges

### What other key things are supposed to happen and when?

- **From 15 June 2017:** End of roaming charges for consumers who travel in the EU
- **During the course of 2017:** BEREC to publish in-depth analysis of the Commission's proposed European Electronic Communications Code

### What could some of the key impacts be?

- A revised telecommunications regulatory framework is clearly going to be a major development for network operators and communication service providers. There is an emphasis by the Commission on making it easier for investment in new network infrastructure to take place. Network providers that co-invest in new network infrastructure, or that build private networks for wholesale services, will benefit from lighter access obligations

- Some regulation of OTT services are being proposed as the Commission wants to ensure that the same rules are applied consistently to OTT and traditional service providers offering similar or competing services
- It is evident that the landscape of telecoms regulatory enforcement is changing across the EU with a keen emphasis on placing the EU at the forefront of internet connectivity, a necessary condition for the success of the Digital Single Market strategy



# Privacy, cloud and cyber security

Copyright and audiovisual media services	E-commerce and tax	Digital platforms	Telecoms and e-standards	<b>Privacy, cloud and cyber security</b>	Government and procurement
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## What are the key topics?

The DSM seeks to give effect to the core principle that individuals should have control over their personal data by protecting the ability to prevent undesirable use of personal data, and ensuring that personal data can easily be moved from one business to another. The Commission also wants to reduce barriers to the free-flow of all data across borders in order to stimulate the growth of cloud services, data-driven science and the Internet of Things in Europe.

## What key things have happened so far?

### Privacy – Data Protection Package:

- Data Protection Directive for the police and criminal justice sector proposal (Adopted on 27 April 2016): Member States shall adopt and publish, by 6 May 2018, the laws, regulations and administrative provisions necessary to comply with this Directive
- General Data Protection Regulation (GDPR) (Adopted on 27 April 2016): applicable from 25 May 2018
- Publication of guidance by the Article 29 Working Party on data portability, data protection officers and lead supervisory authorities (Dec 2016)

- Privacy Shield framework, approved by the Commission on 12 July 2016. This has been followed by a similar Switzerland-US agreement
- Draft e-Privacy Regulation proposed by the Commission on 10 January 2017

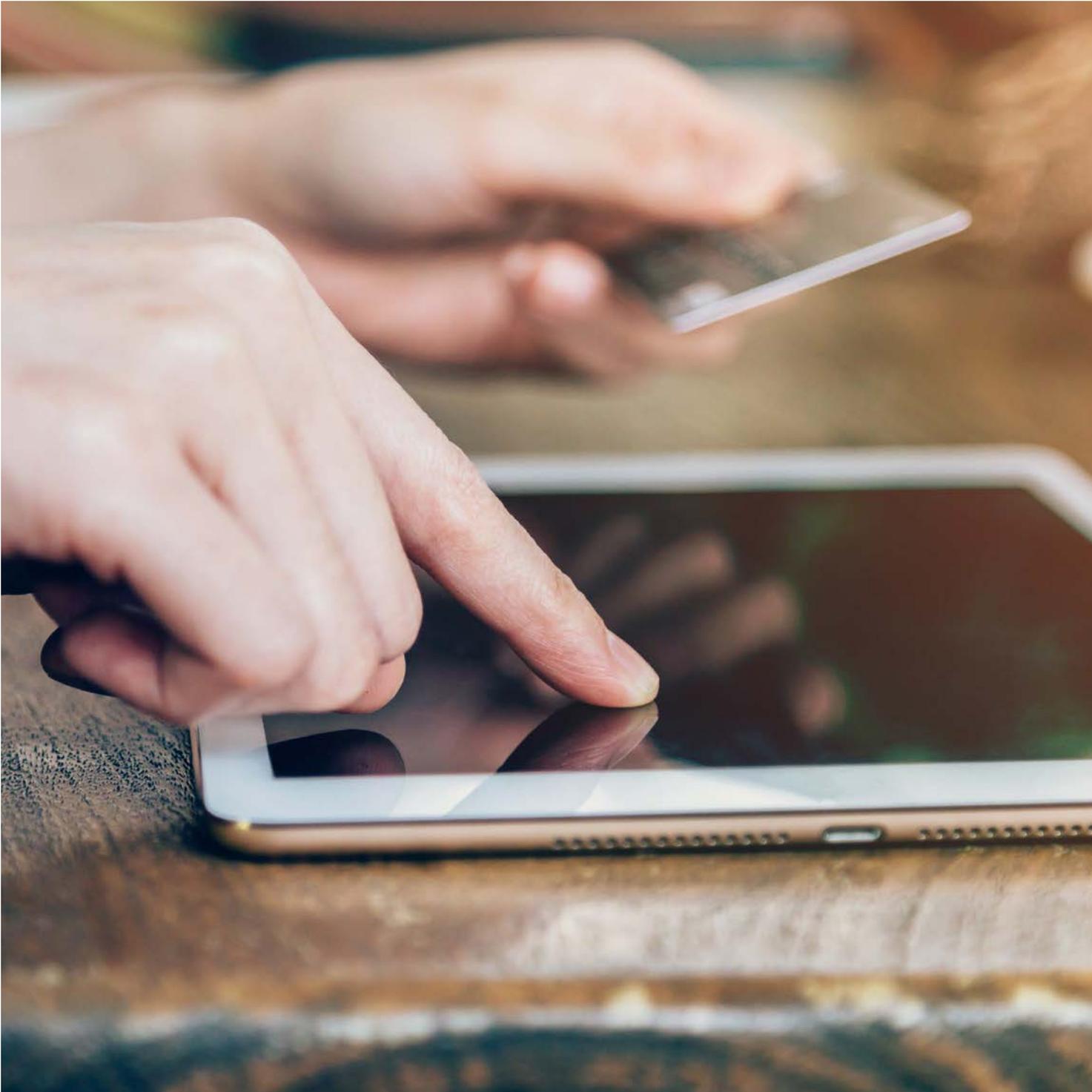
### Cloud

- European Cloud Initiative (April 2016)
- Commission Communication on Building a European Data Economy published on 10 January 2017

### Cybersecurity

- Network and Information Security (NIS) Directive (published in the Official Journal on 19 July 2016; applicable from 9 May 2018)





- Security and reporting requirements in GDPR and Payment Services Directive 2 (came into force 12 January 2016)
- Signature of a contractual public-private partnership with the European Cyber Security Organisation on 5 July 2016, under which the Commission will invest up to €450m in cybersecurity research and innovation
- Electronic Identification Regulation came into force 1 July 2016 containing new security and reporting requirements

### What other key things are supposed to happen and when?

#### Privacy – Key events for 2017

- Discussion of the draft e-Privacy Regulation by the European Parliament and Council
- Legal challenge to the Privacy Shield by Digital Rights Ireland

#### Cloud – Key events for 2017

- Stakeholder consultation on “Building a European Data Economy” as part of the “free flow of data” initiative (Jan to April 2017)

#### Cybersecurity – Key events for 2017

- National implementations of the NIS Directive

#### What could some of the key impacts be?

- Focus on data protection compliance due to high fines and wide scope of GDPR and draft e-Privacy Regulation
- Less restriction on data flow under the “free flow of data” initiative
- New security and breach reporting requirements for multiple industries under new cyber-security legislation

“The Commission also wants to reduce barriers to the free-flow of all data across borders in order to stimulate the growth of cloud services, data-driven science and the Internet of Things in Europe.”

# Government and procurement



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## What are the key topics?

The Commission's objective is to usher in the full digitalisation of public procurement.

### What key things have happened so far?

- Public Procurement Directives (three of them) were adopted in 2014, with an implementation deadline of 18 April 2016 for national governments. Since then, the new rules have started being gradually introduced (eg since April 2016, tender opportunities and tender documents must be electronically available).
- The Commission has also launched a number of initiatives to boost the uptake and interoperability of e-procurement solutions (such as the European Single Procurement Document, replacing the various exclusion and selection criteria documents used by different Member States).

### What other key things are supposed to happen and when?

- The Commission has developed the “EU eGovernment Action Plan 2016-2020” which aims to modernise public administration, achieve cross-border interoperability and facilitate easy interaction with citizens. This is the first industry-related package developed under the Digital Single Market strategy. It is designed to remove all existing digital barriers to the Digital Single Market.
- The package follows on from the “EU eGovernment Action Plan 2011-2015” and includes 20 measures to be launched by the end of 2017. By 2020, public administrations and public institutions in the EU should be providing borderless, personalised, user-friendly, digital public services throughout the EU.

### What could some of the key impacts be?

- The Commission’s plans will have several key benefits for clients, including:
  - The administrative burden placed on businesses will be reduced
  - Interactions with public administrations will become more efficient, more convenient, and less costly
  - Competitiveness will be increased which will make the EU more attractive to investors



“The Commission’s objective is to usher in the full digitalisation of public procurement.”

# Our DSM taskforce

## Copyright and AVMS



**Nils Rauer**  
Partner, Frankfurt  
T +49 69 962 36 371  
nils.rauer@hoganlovells.com



**Winston Maxwell**  
Partner, Paris  
T +33 1 53 67 48 47  
winston.maxwell@hoganlovells.com



**Penny Thornton**  
Senior Associate, London  
T +44 20 7296 5665  
penelope.thornton@hoganlovells.com

## E-Commerce and Tax



**Sabrina Borocci**  
Partner, Milan  
T +39 02 720 2521  
sabrina.borocci@hoganlovells.com



**Mathias Schönhaus**  
Counsel, Dusseldorf  
T +49 211 13 68 0  
mathias.shoenhaus@hoganlovells.com



**Oliver Wilson**  
Senior Associate, London  
T +44 20 7296 5347  
oliver.wilson@hoganlovells.com

## Digital Platforms



**Falk Schöning**  
Partner, Brussels  
T +32 2 505 0911  
falk.schoening@hoganlovells.com



**Christian Ritz**  
Senior Associate, Munich  
T +49 89 290 12 0  
christian.ritz@hoganlovells.com



**Alberto Bellan**  
Senior Associate, Milan  
T +39 02 7202521  
alberto.bellan@hoganlovells.com

## Telecoms and e-standards



**Peter Watts**  
Partner, London  
T +44 20 7296 2769  
peter.watts@hoganlovells.com



**Charlie Hawes**  
Associate, London  
T +44 20 7296 5792  
charlie.hawes@hoganlovells.com



**Dina Jubrail**  
Associate, Brussels  
T +32 2 505 0956  
dina.jubrail@hoganlovells.com

## Privacy, cloud and cyber-security



**Patrice Navarro**  
Counsel, Paris  
T +33 1 53 67 47 64  
patrice.navarro@hoganlovells.com



**Nick Westbrook**  
Associate, London  
T +44 20 7296 2000  
nick.westbrook@hoganlovells.com

## Government and Procurement



**Ciara Kennedy-Loest**  
Partner, Brussels/London  
T +32 2 505 0911 (Brussels)  
T +44 20 7296 5173 (London)  
ciara.kennedy-loest@hoganlovells.com



**Joshua Esam**  
Associate, London  
T +44 20 7296 5102  
joshua.esam@hoganlovells.com

# Notes



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