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Special feature:
Europe's Digital Single Market Strategy

Hogan Lovells

Editorial

Europe Plans Major Update of Digital Laws

Europe has embarked on an ambitious program to modify its laws affecting the digital economy. The reform is called the "Digital Single Market Strategy". The program is reminiscent of the European Commission's push in the 1980s and 1990s to liberalize telecommunications. The Commission's objective is to spur economic growth in digital industries by facilitating access to a truly European–wide market. The Commission feels that European digital markets are still divided by national boundaries and that this hinders the emergence of strong pan-European businesses.

In addition to this digital growth agenda, the Commission seeks to achieve a high level of consumer protection and respect for fundamental rights. For certain Member States, this aspect is of particular importance. France complains, for example, that US-based internet companies are not subject to the same obligations as European companies. Therein lies one of the principal challenges of the Digital Single Market (DSM): European Member States currently have different levels of regulatory constraints, and the countries with the highest level of regulatory protections do not want to see those protections diluted.

This edition of the Global Media and Communications Quarterly focuses on several aspects of the Digital Single Market strategy, including copyright law, geo-blocking, telecom regulatory reform, modernization of online sales laws and proposals to regulate digital platforms. The opening articles, written respectively by Peter Watts and Alastair Shaw, present the DSM strategy as a whole, including a timeline showing how the DSM legislative proposals are likely to be rolled out in the coming months. We'll be updating this timeline regularly, as well as providing breaking news on Commission initiatives via our "DSM Watch" blog entries.

Hogan Lovells has created a DSM Task Force to cover the whole of the Commission's ambitious digital strategy: lawyers across five European jurisdictions, are organized into "buddy groups" responsible for covering each aspect of the DSM.

The issues addressed here are not just European, they are global. Modernizing telecom rules, copyright, cybersecurity, data protection and online consumer protection laws are on policy makers' agendas around the world. How Europe approaches the DSM strategy may influence how governments treat these problems worldwide.

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Europe's digital single market: online – into the future

The Digital Single Market

The digital single market consists of three basic ideas or "pillars" that the European Commission believes will help Europe to lead the global digital economy. They are: (1) better access to digital goods and services; (2) creating conditions for digital networks to flourish; and (3) maximizing the growth potential of the digital economy.

The following article sets out each pillar, initiative by initiative, and you can see the whole, in overview, on our DSM Task Force Timeline (at pages 10-11). But by way of introduction I'd like to focus on Pillar 1.

Focus on Pillar 1

This first pillar perhaps looks the most coherent of the three, and currently it is the most developed. It certainly has the feeling of an effort to bring the single market to reality in the digital economy. Within this pillar it is possible to discern three key themes: leveling the playing field between Member States whether in the area of consumer rules, copyright or VAT; facilitating pan-European movement of products – whether of parcels or digital content; attacking commercial practices which are inconsistent with the single market.

More specifically the initiatives within this pillar include:

- Reforming the rules which apply to online and digital cross border sales to make it easier for businesses and consumers to conduct transactions between Member States whilst at the same time revisiting the approach to enforcement to maximize speed and coordination of the rules;
- Reforming the VAT rules to increase harmonization between Member States, create a level playing field for e-commerce businesses and ensure VAT revenues accrue to the consumer's Member State;
- A two year long review of the e-commerce market focusing on business conduct and contracts which might be inhibiting competition;
- Ending unjustified geo-blocking. It is important to note in this context that whilst much attention has been expended on this initiative in the context of digital content and digital content services, the initiative is not specific to that form of online commerce. Indeed it is clear that the Commission's intention is that this initiative should address any and all practices which "localize" an e-commerce outlet in one Member State whether for physical or intangible items by making it difficult or expensive for consumers in another Member State to take advantage of that outlet;
- Finally, a more modern European copyright regime. Perhaps the most contentious of all of the initiatives, this encompasses changes to copyright laws which will seek to maximize harmonization and have the potential to go significantly further – threatening the fundamentally territorial nature of current copyright licensing practices – together with reform of the Satellite and Cable Directive which again has the potential to substantially alter the territorial nature of much current rights exploitation.

What are the prospects for pillar 1? It is fair to reflect that nearly the entire content of pillar 1 has to a greater or lesser extent been visited for reform by the Commission in recent years without substantive progress being made. Indeed whilst this is the first time that such a comprehensive package has been proposed, I am tempted to say that pillar 1 is in many ways "Back to the Future" rather than "Into the Future".

And we can already see that the progress of these initiatives is not simple or smooth. There are significant challenges for the Commission in seeking to reconcile the competing interests and perspectives involved, let alone successfully aligning the other Brussels institutions with their view. And the signs are they will continue to struggle.

The Commission will struggle

Why is that? Three basic reasons:

– First and most fundamentally, aside from any business or financial consequences, any examination of this area involves grappling with some basic political and social tensions. Creating common product standards across the EU and eliminating barriers to B2B trade is one thing. Taking steps which, in effect, have the potential to remove the ability of individual societies within the community to protect their own consumers is much more sensitive. Similarly, any change which makes it more difficult for national broadcasters, whether state funded or commercial, to operate successfully is fraught with complexity.

– Second, particularly in the area of territorial exploitation of content, there are significant vested interests. It is not for me, here, to comment on the underlying long term rights or wrongs of the arguments but it is undoubtedly true that a change which threatens to destroy territoriality would put at risk the entire commercial model for content financing with questionable short to medium term benefits for consumers.

– Third, there is the challenge of the conflict between different legal traditions: not simply between jurisdictions but also between IP and competition laws. It is important not to underestimate the difference of perspectives which different players in this drama bring simply because of their respective backgrounds and experiences.

All this of course is set in a broader context of deep political tensions across Europe – Greece, Brexit and migration to name but three – and a change in the balance of power within the European institutions with the strengthening of the Parliament at the expense of the other institutions.

I suspect it is obvious from these remarks that my view is that there is a real risk that much of the Commission's ambitions under pillar 1 will run into the sand.

Three other highlights

Pillar 1 is the main area of focus for broader business online with many elements of pillars 2 and 3 of particular importance to the communications industries themselves. I will not go into them in depth. However, it would be useful to flag three particular items:

– The Audiovisual Media Services Directive provides the framework for the provision of broadcast and similar services across the EU. It sits behind much of the national regulation of broadcast content and includes rules in areas such as sponsorship and product placement which are potentially relevant to a wide range of commercial organizations. The key questions which this review will focus on are how the rules should apply to a range of platforms from broadcast and video-on-demand on into the broader and currently much less regulated online world. To make this real, how far should regulation intrude on something like "Zoella", which started as a fashion and beauty blog and slowly evolved into a marketing platform.

– The Commission's review of online platforms hopes to identify and address market failures that some believe are caused by platforms, for example through the way in which they organize (and generate income from) search results and use data they collect. So again, any business which reaches its customers through online platforms should be engaged in that debate.

– Finally, I wanted to flag one specific data protection issue which sometimes gets forgotten and it is important for on-line traders not to lose sight of in the wider privacy debate. This is the portability of data. The DSM strategy is primarily focused on removing internal boundaries to the movement of data held by business but please don't forget that the new European General Data Protection Regulation will introduce clear rights for consumers to move their data from one business to another. A French legislative proposal would go even further, requiring service providers to transfer to competitors data relating to a consumer's use of the service.

Our DSM Task Force

Hogan Lovells has created a cross-border team to follow the various moving parts of the Digital Single Market strategy. Bearing the unoriginal title “DSM Task Force”, our team organizes weekly DSM calls and periodic meetings in Brussels to follow the Commission’s multi-faceted agenda. DSM Watch updates appear regularly in our Global Media Communications Watch blog. The articles that follow give you an overview of our team’s analysis of certain DSM subjects and perspectives on how the European initiative compares to regulatory reforms underway in the United States and around the world.

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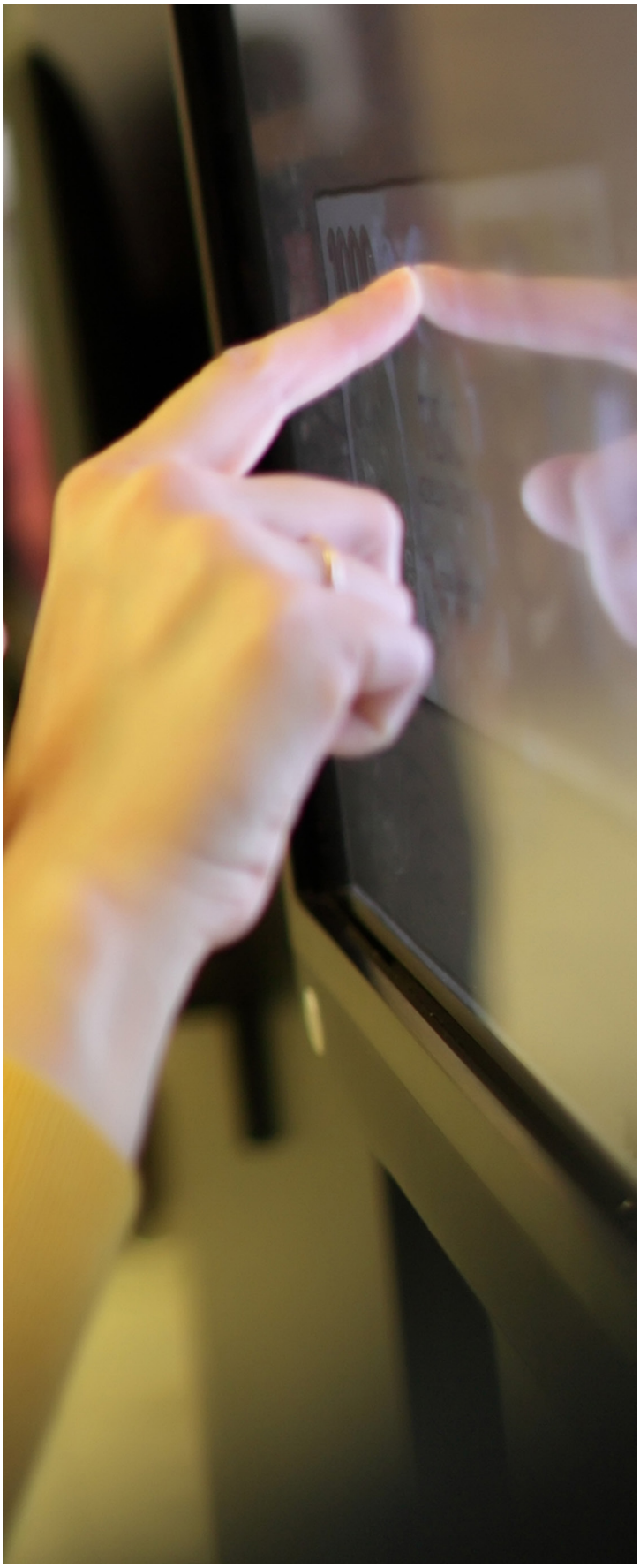

Digital single market strategy: where are we now?

It is almost a year since the European Commission published its Digital Single Market strategy for Europe on 6 May 2015 so now seems a good time to reflect on progress so far – and what's next on the agenda.

We start with a recap of the DSM strategy itself. Then we look at the initiatives which have happened so far and their present status. Finally, we look at what initiatives are in the calendar for the remainder of 2016. You can see what is going on at a glance on our DSM Task Force timeline on the following pages.

Recap on the strategy

The Digital Single Market strategy sets out a total of 16 initiatives under 3 pillars based upon key areas for action identified by the Commission which lay the groundwork for Europe's digital future.

We take a brief look through each pillar, and the initiatives set out underneath it, below.

Pillar I: Better access for consumers and businesses to online goods and services across Europe

Focusing on the need to provide businesses, particularly entrepreneurs, with new opportunities to scale up across Europe, the Commission is seeking to break down existing obstacles which prevent cross-border online activity.

The Commission has set out 8 initiatives to achieve these aims. A particular area of focus is harmonizing laws on consumer protection, contract and VAT so that businesses do not face the prohibitive cost of complying with 28 different national regimes when they sell goods and services online (initiatives 1-4). Of equal importance is ending unjustified geo-blocking and the application of competition law in the e-commerce area (initiatives 5 and 6). The strategy also sets out initiatives to modernize copyright law and the Satellite and Cable Directive (initiatives 7 and 8).

1. **Legislate for harmonized EU rules on contracts and consumer protection for online purchases** (be it tangible goods or digital content).
2. **Review the Regulation on Consumer Protection Cooperation** to develop cooperation mechanisms enabling more efficient and consistent enforcement of consumer rules for online purchases. The Commission has already established an EU-wide online dispute resolution platform, launched in mid-February 2016.
3. **Extend the single electronic registration and payment to online sales of tangible goods and introduce a common VAT threshold** to help smaller start-ups selling online and reduce the administrative burden which online businesses face from different VAT regimes.
4. **Launch measures to improve price transparency and enhance regulatory oversight of parcel delivery** to facilitate the delivery of goods ordered online cross-border in the EU.
5. **Legislate to end unjustified geo-blocking** – whilst the Commission accepts that geo-blocking is sometimes justified (for example to comply with local laws) it generally takes the view that geo-blocking is unjustified because it fragments the internal market. Reforms may include changes to the e-Commerce Directive (2000/31/EC) and the framework set out by Article 20 of the Services Directive (2006/123/EC).
6. **Launch an antitrust competition inquiry into the e-commerce sector** in the EU to identify potential competition concerns.
7. **Legislate for a modern European copyright regime through further harmonization measures**. These will be aimed at making legally acquired content and online services accessible anywhere in the EU; clarifying rules on online intermediary activity with copyright-protected content; and focusing enforcement of IP rights on commercial-scale infringements (the 'follow the money' approach). Measures will also seek to introduce greater legal certainty for cross-border use of copyright materials for research (e.g. copying text and datasets).
8. **Review the Satellite and Cable Directive** to assess if its scope should expand to cover online transmissions and explore how to enhance cross-border access to broadcasters' services in the EU.

Pillar 2: Creating the right conditions for digital networks and services to flourish

Recognizing that Europe's network infrastructure is key to the Digital Single Market, with this pillar the Commission seeks to encourage a reliable, trustworthy, high-speed and affordable network on which future digital innovations (including Cloud computing, Big Data and the Internet of Things) will be built. The Digital Single Market strategy sets out 5 initiatives to achieve these aims:

1. **Reform EU telecoms rules** – a key focus here is reforming the regulatory regime in telecoms to make it fit for purpose in the 21st century. This includes reforming for EU wide coordination of spectrum allocation; a review of the Universal Service Directive (2002/22/EC) and the adoption of the Telecoms Single Market package to address net neutrality and ending roaming surcharges for data within the EU.
2. **Review the Audiovisual Media Services Directive** (2010/13/EU) focusing on its scope, in particular whether it should be broadened to encompass new services and players not currently captured and whether its rules are up to date with market and technological developments. Again, the focus here is on bringing existing laws into the 21st century.
3. **Establish a contractual Public-Private Partnership on cybersecurity** for online network security. This will be in addition to the new Network and Information Security Directive which is currently in the legislative process.
4. **Review the e-Privacy Directive** (2002/58/EC), in particular whether its scope should be expanded to ISPs. This will build on the soon in force **General Data Protection Regulation**.
5. **Review the role of online platforms** in the EU market – including looking at how to best tackle illegal content online whilst ensuring that citizens' right to freedom of expression is preserved; how online platforms use data they collect; data portability between platforms; relations between platforms and suppliers; and transparency (e.g. paid for links or adverts in search results).

Pillar 3: Maximizing the growth potential of our European Digital Economy

Recognizing that soon all industry sectors will be digitized (and need to be for Europe to maintain its competitiveness internationally), under the third pillar the Commission seeks to optimize Europe's growth potential in the digital economy. The Commission has set out 3 initiatives to achieve this:

1. **Free flow of data**: Introduce a 'european free flow of data initiative to promote the free movement of data in the EU, and launch a European Cloud initiative covering certification of cloud services, the switching of cloud service providers and a "research cloud".
2. **Better interoperability and standardization**: Adopt a Priority ICT Standards Plan, aimed at ensuring that standardization 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.
3. **An inclusive e-society**: Introduce a new e-Government Action Plan which will include making the interconnection of business registers a reality by 2017; launching an initiative to pilot the 'Once-Only' principle, working towards a 'Single Digital Gateway' for e-government by integrating European and national online portals; and accelerating Member States' transition towards full e-procurement and interoperable e-signatures.

Where are we now?

With its Digital Single Market strategy communication in May 2015, the Commission shared a roadmap setting out an ambitious agenda to see the 16 initiatives into action before the end of 2016. What has been the progress over the past year?

Progress on consultations has been rapid, with some closing ahead of their original schedule. By contrast, concrete policy and legislative proposals have appeared only for copyright reform and digital contracts.

The most rapid progress has been made on Pillar 1. For example initiatives to review the Audiovisual Media Services Directive and consult on cross border parcel delivery were scheduled in the Commission's original roadmap to take place in 2016. However consultations on both have already taken place and are now closed.

However, progress is being made across all three pillars, with several consultations on initiatives in pillars 2 and 3 having closed around the turn of the year.

What's on the agenda for 2016?

Our timeline on the following pages shows that there is still plenty more in store across all three pillars. These include reform of EU telecoms rules, review of the ePrivacy Directive and work on a public-private partnership on cybersecurity. There are also various action points around the eHealth Action plan and "European Cloud".

The precise dates for most of the future initiatives are yet to be announced. Keep an eye on our blog www.hlmediacomms.com for DSM Watch updates.

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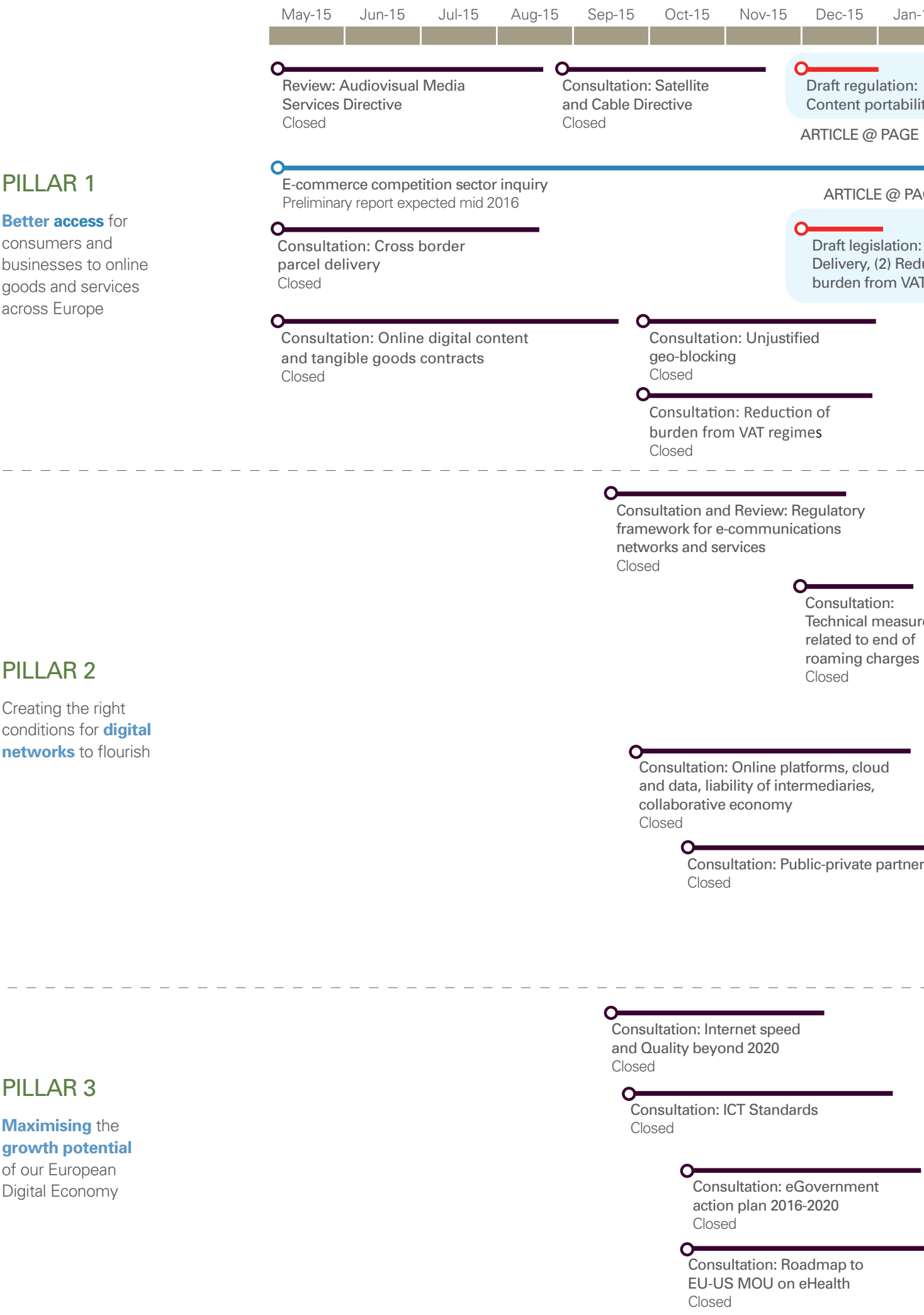
May-15
Jun-15
Jul-15
Aug-15
Sep-15
Oct-15
Nov-15
Dec-15
Jan-
Review: Audiovisual Media Services Directive
Closed
Consultation: Satellite and Cable Directive
Closed
Draft regulation: Content portabilit
ARTICLE @ PAGE
PILLAR 1
Better access for consumers and businesses to online goods and services across Europe
E-commerce competition sector inquiry
Preliminary report expected mid 2016
ARTICLE @ PA
Consultation: Cross border parcel delivery
Closed
Draft legislation: Delivery, (2) Redu burden from VAT
Consultation: Online digital content and tangible goods contracts
Closed
Consultation: Unjustified geo-blocking
Closed
Consultation: Reduction of burden from VAT regimes
Closed
Consultation and Review: Regulatory framework for e-communications networks and services
Closed
Consultation: Technical measur related to end of roaming charges
Closed
PILLAR 2
Creating the right conditions for digital networks to flourish
Consultation: Online platforms, cloud and data, liability of intermediaries, collaborative economy
Closed
Consultation: Public-private partner
Closed
Consultation: Internet speed and Quality beyond 2020
Closed
PILLAR 3
Maximising the growth potential of our European Digital Economy
Consultation: ICT Standards
Closed
Consultation: eGovernment action plan 2016-2020
Closed
Consultation: Roadmap to EU-US MOU on eHealth
Closed

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Synopsis report: Satellite and Cable Directive

Consultation: Role of publishers on copyright value chain and on 'panorama' exception

Draft legislation: Cross-border content access/ Copyright exceptions/ Intermediary liability

Draft legislation: Online IP infringement

GE 24

(1) Parcel uction of regimes

Report: Geo-blocking and other restrictions

Draft legislation: Unjustified geo-blocking

Review: Regulation on Consumer Protection Cooperation
Due in 2016

Draft Directives: On Consumer contracts for (1) Digital Content, and (2) Online Goods
Forecast in 2016

Reform of EU telecoms rules
Forecast in 2016

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es

Draft decision: Use of 700MHz spectrum

Consultation: On 2009 Commission recommendation on termination rates. Closes 7 June

Review of ePrivacy Directive
Forecast in March 2016

Report: Online platforms, cloud and data, liability of intermediaries, collaborative economy

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ship on cybersecurity

Establishment of public-private partnership on cybersecurity
Forecast in 2016

General Data Protection Regulation and Network and Information Security Directive adopted:
Forecast Q2 2016

European cloud and free flow of data inititatives
Forecast in 2016

Consultation: Safety of apps and non-embedded software (e-health)
Forecast April 2016

eHealth Action Plan
Forecast Q1 2016

The DSM and cross-border access to digital services and content

Introduction

In this article, we focus on two aspects of the digital single market that are to some extent connected with each other: (1) **portability** of digital content, and (2) **cross-border access** to online services, potentially including, but not limited to, audiovisual services.

– The Commission wishes to ensure the **portability** of legally acquired digital content. In the era of on-demand internet streaming services, consumers pay for the service and expect to access it wherever they are (e.g. whilst travelling) within the European Union. The service providers most commonly refer to the limited rights they have obtained or a general strategy of domestic licensing which does not allow for access from another Member State. A **draft Regulation** on portability was published on 9th December 2015.[1] In brief, the Commission plans to oblige providers of online content services to enable EU consumers to access and use online content services to which they subscribe when they are temporarily in an EU Member State which is not their Member State of residence. The aim is to achieve this goal by 2017. Thus, we see a first step in the direction of portability of online content. However, the draft is still subject to discussion with the other EU institutions and its provisions are very likely to change during this process.

– **Cross-border access** would be slightly different, in that an internet user who is domiciled in Member State A may get access to services (e.g. TV programs) in Member State B. In particular, this topic matters for people living outside their home country but who are interested in news or sports events at home. Cross-border access raises again the problem of territorial licensing.

Legal background

The Concept of a Single Market

The concept of a single or internal market is anything but new for Europe. Even Article 2 of the Treaty of Rome signed back in 1957 by the European Economic Community states the aim to establish a common market. Today, the definition of the Internal Market is found in Art. 26 (2) of the Treaty on the Functioning of the European Union (TFEU):

> “The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”

Plainly, this does not differentiate between the real and the online world and it is fair to say that the Digital Single Market is not a goal newly-invented by the Commission. It has always been part of what the Union is generally aiming for. However, with the internet and online trade having gained more and more importance in our daily life over the last decade, the imperfections of the current market have become increasingly obvious to the Commission.

1 COM(2015) 627 final.

Intellectual Property

Establishing a single market does not necessarily mean free trade in absolute terms. There are always elements that limit trade in one way or another. What is crucial is to distinguish between socially and legally accepted impediments and those deemed unreasonable. For instance, intellectual property rights form, by their very nature, obstacles to free trade as they come with exclusive rights. Copyright is one of the most clear examples – in the real as well as in the online world.[2] Equally, the European ideal calls for cultural diversity. Domestic cultural policy must remain possible, even in a (digital) single market.[3]

Copyright law has always been a national matter. In consequence, licenses are often only granted on a country-by-country basis. Although pan-European licenses are possible, they are by no means a common phenomenon. Even the concept of copyright protection, i.e. the criteria for awarding protection to a specific work, differs between the Member States. This is despite the harmonization process having started already in the early 1990s. At the heart of the European copyright legislation, we see the so-called InfoSoc Directive 2001/29.[4] The individual rights under a copyright and the exceptions and limitations are harmonized, but there is no common definition of what is deemed a protected work.[5] Over the years, clarifications have emerged from the Court of Justice of the European Union (CJEU).[6] However, one single definition of a work still does not exist. European copyright law therefore holds imperfections.

Other related directives such as the Database Directive 96/9[7] or the Software Directive 2009/24[8] hold their own definitions. However, they differ in other ways from the underlying principles of copyright law, e.g. the concept of exhaustion.[9] Overall, there is surely room and need for reform of copyright law within a single digital market. What will stay, however, is the concept of intellectual property rights forming a legitimate ground for limiting free trade of protected goods and services. This restriction goes to the essence of intellectual property rights.

Portability of copyright-protected content

What would portability entail?

Full portability would in principle allow consumers who can legally access a service or consume audiovisual content in one country to do the same when travelling throughout the EU. The nature of what constitutes "legal access to a service" is an important question: the concept is clear for paid subscription services, but less so for free advertising-funded services.

For audiovisual service providers, both TV and subscription video-on-demand (SVOD), portability would entail some costs: technical costs to implement conditional access and monitoring costs to ensure the agreements with rights holders are respected. Although the draft Regulation would render unenforceable contractual provisions contrary to its aims in any event, one can easily envisage substantial time and costs being expended by rights holders and licensees alike to determine the extent of the effect of the Regulation on their existing contractual arrangements.

For some, such as frequent travelers, portability could be valuable and although providers of paid for services may be able to monetize this, free-to-air (FTA) TV providers may not.

Content right holders may also face costs and losses. For example, some contracts already provide an option for portability. If exercised, these typically trigger additional payments. But given the unenforceability provisions of the draft Regulation mentioned above, it's uncertain whether these kinds of terms would bite.

2 See e.g. CJEU, judgment of 21th June 2012, Case Ref. C-5/11 – Titus Alexander Jochen Donner.

3 See Rauer, Zwischen Binnenmarkt und Wahrung nationaler Identität, 2003, 260 pp.

4 See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF.

5 http://www.hlmediacomms.com/2015/08/18/tmt2020-comparing-eu-and-u-s-copyright-protection-frameworks-for-non-literary-texts/.

6 CJEU, judgment of 22nd December 2010, Case Ref. C-393/09 – BSA; CJEU, judgment of 16th July 2009, Case Ref. C-5/08 – Infopaq. CJEU, judgment of 1st December 2011, Case Ref. C-145/10 – Painer

7 See http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0009&from=DE.

8 See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:111:0016:0022:EN:PDF.

9 See e.g. CJEU, judgment of 3rd July 2012, Case Ref. C-128/11 – UsedSoft.

Concerns and potential barriers

The requirements for portability and the impact on service providers and content rights holders create barriers and a degree of residual opposition to the generalization of portability for audiovisual services. The barriers can be broadly characterized as follows:

– Potential abuses: stakeholders will be concerned that portability may be abused, leading to distortions in the valuation and monetization of content.

– Asymmetric impact on rights holders' negotiating position: mandatory portability may lead to right holders who sell content across borders suffering a loss of revenue, which in some countries may affect audiovisual output.

In order for a consensus to rally behind compulsory portability, these barriers must be addressed, for example through the following mechanisms.

Avoiding abuse

Both content rights holders and service providers will need to ensure that portability is not abused, particularly through subscriptions from residents of one country to services of another EU country in contravention with the terms of use of the services.

In order to do so, services providers could for example:

– Limit the duration of portability, through a "fair use" policy of sorts. This may be a sensible 'self help' remedy in the absence of any time limits specified by the current draft Regulation.

– Limit the number and location of simultaneous connections, to help avoid subscription-sharing across borders.

– Limit the geographic scope of portability to the EU, so that out-of-EU portability could become a desirable add-in.

A fair balance for rights holders

Right holders appear to consider mandatory portability as interference with their ability to structure and monetize content rights. As a result, some stakeholders are of the view that the wider the scope of portability, the greater the potential loss for rights holders. Generally speaking, any negative impact on rights holders should in principle be manageable if the conditions of portability are strictly limited and correctly monitored.

This would leave open the question of "value sharing" between right holders and audiovisual service providers. Some rights holders are likely to call for a regulated financial payment as a condition for portability.

Cross-border access to copyright-protected content

What could cross-border access entail?

True cross-border access to audiovisual services, as envisaged in the DSM strategy, would imply that any EU consumer can access any European audiovisual service on equal terms, wherever they are in the EU. Because copyright content is central to these services, cross-border access implies a strong tension between the primacy of the copyright asserted by rights holders (which gives them the right to refuse access to their content in any geography) and the objectives of the single market.

In practice, therefore, true cross-border access to audiovisual content would require a licensing and rights clearance mechanism which resolves this tension. In the past, pan-European licenses have been discussed, but their imposition across the board has been categorically rejected by the vast majority of market participants.

Concerns and potential barriers

For audiovisual service providers, cross-border access may offer the opportunity to expand the market they serve, but this seems of limited value given the current structure of the audiovisual markets in Europe, where most distributors are national in scope.

The exact definition of cross-border access remains unclear, and rights holders and traditional distributors are left to speculate on the risks they might face. The main concerns are that the Commission's plans could undermine exclusivity and facilitate price arbitrage.

As we have mentioned above, valuable content is typically licensed on a national basis (sometimes for language areas, e.g. Germany, Austria and Switzerland), and enables rights holders to partake in the benefits that their content brings to a distribution platform that can exploit it exclusively. With cross-border access, consumers could subscribe to a service in a different country that offers similar content despite the national licenses being exclusive. If take-up across borders were high enough, it could undermine the value of exclusivity. This is not a zero-sum game for rights holders: the sum of the value of non-exclusive licenses could be significantly lower than the value of a truly exclusive licence.

This is particularly sensitive for the most internationally-attractive content, such as valuable movies and TV series, as well as some sports events, but it may also affect more niche content that relies on national exclusivity as a value creation mechanism. For example, many European TV co-productions, (which various European initiatives seek to encourage), are funded by broadcasters in several EU countries in exchange for exclusive rights in their own market. If cross-border access disrupted these mechanisms, European production could be affected.

Outlook

The new Collective Rights Management Directive 2014/26 on the multi-territorial licenses in the music sector must be implemented by the member states by 10th April 2016. Multi-territorial licenses in the music industry may provide lessons for the audiovisual sector.

But for now, for audiovisual services it appears that portability becomes an acceptable short-term compromise for all parties, and implementation issues will then come to the fore. Full cross-border access will probably remain on the negotiating table, but the lack of clear data on demand and the impact of various options on the market mean that this is likely to take a long time to resolve.

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EU and US regulators rush to update telecom rules

Regulators in the European Union and United States are racing to rewrite telecom rules for a host of new technologies ranging from over-the-top voice to ultra high-speed wireless broadband. But does the regulatory mantra of "new rules for new times" represent the foundation of the new digital economy or its undoing?

Are regulations mandating an open internet the key to unlocking new innovation or a risky drag on investment? Do we need common spectrum assignments to scale deployment or can technically agile radios manage a pastiche of spectrum allocations? Will over-the-top voice and data services continue to expand access and reduce consumer costs or sink under the weight of new regulatory mandates?

How regulators answer these questions will determine the direction of billions of dollars of investment capital and affect the lives of digital consumers everywhere. Here, we explore how regulators in the EU and the US are approaching internet access, spectrum assignments, broadband deployment and over-the-top telecom services. The emerging picture is as complex and varied as technology itself.

Europe's Digital Single Market strategy

One of the key goals of the European Commission's Digital Single Market strategy ("DSMS") is the deployment of digital communications networks that offer high capacity broadband connectivity reliably and affordably throughout Europe. The Commission recognizes that excessive regulation of these networks and the services provided over them could act as a barrier to innovation or further market integration, and the Commission has called for far-reaching reforms of the EU's telecommunications laws under so-called Pillar 2 of the DSMS.

Starting in 2002, the EU harmonized telecommunications law for the first time through a series of legislative acts that provide EU Member States with some discretion regarding how to implement them. The EU began by adopting reforms to liberalize voice telecommunications markets from the legacy of monopolistic state-owned national network operators. And since 2002, a light-touch, technology-neutral approach has embodied the European regulatory framework for the telecommunications sector, emphasizing competition law remedies over regulatory intervention.

More recently, the Commission has said that the European Information and Communication Technologies ("ICT") sector has developed to a point where a new set of challenges requires a slightly different legislative mix. The Commission appears frustrated with the lack of regulatory consistency and predictability across the EU's Member States, especially in relation to radio spectrum regulation. The Commission has also expressed concern about the lack of investment in high speed network infrastructure, particularly in rural areas.

To address these issues, Pillar 2 of the DSMS proposes that the Commission and EU Member States: (1) adopt clear and harmonized rules for net neutrality and common EU-wide criteria for spectrum coordination at the national level; (2) create incentives for investment in high-capacity broadband infrastructure; and (3) ensure a level playing field for all market players, both traditional and new. The Commission proposes to achieve these measures by updating the telecommunications regulatory framework and granting the regulatory authorities new authority to act.

The US Strategy of "Reasonable and Timely Deployment"

The US has no direct analogue to the Commission's Digital Single Market Strategy. Perhaps the closest animating principle for the US telecommunications regulatory regime is section 706 of the US Telecommunications Act of 1996. The language of section 706 lacks the poetry of the Commission's call for "fewer barriers and more opportunities" in digital markets. Instead, section 706 directs the top US communications regulator, the Federal Communications Commission, to encourage the deployment of advanced telecommunications capabilities to all Americans on a "reasonable and timely basis."

In the twenty years since the US Congress passed section 706, each successive administration has sought to make its mark on the tech sector. For his part, President Barack Obama has called for a "21st Century Digital Infrastructure" that seeks to ensure that nearly every American has access to high-speed broadband internet access and fourth-generation (4G) wireless networks.

The Obama administration has recognized the internet has become "a global platform for communication, commerce and individual expression, and now promises to support breakthroughs in important national priorities such as health care, education and energy." Few would disagree. But how to protect the internet, accelerate deployment and expand its reach has provoked furious disagreement.

Promoting an Open Internet

As billions of people have gained access to the internet, demands on the internet's underlying infrastructure have grown too. Bandwidth-intensive content and applications have constrained internet service providers' capacity. As a result, ISPs have considered assessing fees on content producers to raise investment capital and keep consumer costs low. But content producers, edge service providers and consumer groups have raised concerns that broadband internet access service providers may use discriminatory fee structures to thwart competition. Based on these concerns, regulators in both the EU and US have taken steps to mandate "net neutrality" or an "open internet" to prevent potentially discriminatory treatment of internet traffic.

In the EU, the Commission included the recently published EU Regulation laying down measures concerning open internet access (Regulation (EU) 2015/2120) under Pillar 2 of the DSMS. The effect of the EU Open Internet Access Regulation is that the EU now has its own binding net neutrality law for the first time, effective from 30 April 2016. The Regulation enshrines the net neutrality principle that providers of internet access services must treat all traffic equally, and that EU citizens have the right to access and distribute information and content over the internet, irrespective of the type of information and content. The Regulation gives EU Member States' national regulatory bodies new powers to monitor and assess market practices at the national level. A series of 2011 directives contained net neutrality provisions, but they lacked a clear non-discrimination principle, and different Member States applied the rules differently. The new EU Regulation now imposes a single set of non-discrimination and open internet rules throughout the EU.

The EU Open Internet Access Regulation allows network providers to undertake traffic management measures, but it forbids paid prioritization for internet services. The Regulation allows ISPs to deliver a higher quality type of internet access service called specialized services, so long as the overall quality of internet access for other internet users is not harmed. The Regulation does not prohibit zero-rating, a commercial practice which exempts mobile phone or broadband customers from paying for the data they consume when using certain preferred services.

Critics of the EU Open Internet Access Regulation, including influential figures such as Sir Tim Berners-Lee, have argued that these measures are too loosely drafted and contain loopholes that may in practice be exploited to undermine the principles of the EU Open Internet Access Regulation. Further, monitoring and enforcement is left to EU Member States' discretion, calling into question whether the EU Open Internet Access Regulation will achieve a genuinely harmonized net neutrality regime in the EU.

In the same manner, the US has implemented net neutrality regulations, which have been in the making since the mid-2000s. The FCC's 2005 Internet Policy Statement laid out guiding principles designed to ensure that consumers had the right to access and use the lawful content, applications and devices of their choice online.

A court challenge undid the FCC's guiding principles, which were based on section 706 of the Communications Act. After an explosion of public input and heated debate, the FCC adopted the Second Open Internet Order in February 2015. This time, the FCC based its rules not on the aspirational goals of section 706 of the Act, but rather on decades-old "common carrier" rules governing traditional telecommunications services. In classifying broadband internet access service as a "telecommunications service" subject to common carrier regulation, the FCC reversed prior precedent classifying this service as an "information service" under the Communications Act. The change in jurisdiction provided the FCC with much surer footing to regulate the delivery of broadband internet access services, but brought howls of protest from service providers concerned that traditional common carrier rules would sap innovation and limit investment. The FCC responded that its rules were limited in scope, consisting largely of three bright-line conduct-based rules targeting specific practices: (1) no blocking; (2) no throttling; and (3) no paid prioritization.

In many respects, however, the US policies impose more constraints than the EU Open internet Access Regulation. The US may eventually constrain or disallow Internet "fast lanes" and zero-rating, unlike the EU which, according to some, opened the possibility for traffic management maneuvering by ISPs. It appears that some fast lanes will still exist in Europe, as providers will be able to charge for bandwidth that enables "innovative or specialized services." Opponents have suggested that this will allow providers too much discretion in managing traffic. Jan Philipp Albrecht, a German member of the European Parliament noted that this distinction will create two-classes of providers and that the Regulation will favor providers like Google and Apple. Similarly, the EU Open Internet Access Regulation's allowance of zero-rating has raised criticism, even though a recent OECD report has concluded that zero-rating can have pro-competitive effects.

Regulators in both the US and the EU want to promote open internet policies. However, both face significant challenges in the foreseeable future. The European Commission intends to combat and, perhaps, close loopholes that may allow for some traffic manipulation by ISPs. And while the FCC created what appears to be the more stringent policy, the law must stand up against legal battles in the court system as well as the outcome of the 2016 Presidential election, which could dramatically change the makeup of the nation's top regulator.

Spectrum: More is More

The European Commission has set a goal for ubiquitous, high-capacity broadband connectivity across the EU by 2020. A pre-condition for this goal is the availability of wireless spectrum in the frequencies required for 4G and 5G networks. The Commission has repeatedly cited the sporadic roll out of 4G spectrum in EU Member States in recent years as an example of how the current rules are not sufficient. Some EU Member States' delayed access to 800 MHz band spectrum derived from the digital dividend contributed in part to this patchy deployment of 4G service.

The Commission is also concerned with variations in national spectrum assignment and licensing conditions. It argues these variations create barriers to market entry, hindering competition and reducing predictability for investors across Europe. Some services such as satellite licensing could be licensed on a pan-European basis. To address these issues, the Commission envisages a set of harmonized rules for spectrum assignment and licensing, and requiring EU Member States' national regulators to follow these adopted rules.

Controversially, the Commission introduced a similar set of proposals in 2013, but jettisoned them after vehement opposition by EU Member States who regarded radio spectrum as an important national security asset. In a sign of trouble to come, the British Government this time around has already stated it does not agree with the Commission's approach to spectrum harmonization. European directives already impose technology neutrality, and in some cases service neutrality, in connection with spectrum licenses, as well as allowing secondary trading. But the Commission wants to go further in modernizing European spectrum rules.

Wireless spectrum is in short supply in the US as well, and existing constraints threaten to impede data consumption on mobile devices. In early 2012, the US Congress passed the Spectrum Act, which authorized the FCC to conduct "incentive" auctions to provide monetary and other incentives for incumbent spectrum holders to relinquish their licenses so that mobile broadband providers can purchase the repurposed spectrum. Incentive auctions will add to the pool of available spectrum for harmonized licensed and unlicensed use.

After years of planning, the FCC will conduct a two-part, first-of-its-kind spectrum incentive auction in spring 2016. First, broadcasters will put their license "in play" to be sold and repurposed for broadband. Next, the FCC will use a "reverse auction" to determine the actual cost of buying the broadcasters' spectrum; broadcasters will essentially bid against one another for the opportunity to surrender their spectrum rights for cash. Finally, the FCC will hold a "forward auction" where wireless providers bid against one another to acquire newly available broadband spectrum. The latter two steps will repeat in stages until the supply equals demand.

The incentive auction and spectrum-reassignment measures will dedicate more resources for exclusive use licensing. But even as the FCC has pursued several high-profile auctions, the FCC has also emphasized sharing spectrum resources among diverse sets of uses.

The FCC's aspirations for efficient spectrum sharing find their clearest expression in the 3.5 GHz band. Through a variety of tools, including dynamic frequency selection, geo-location databases, automated spectrum management protocols and smart antenna technology, licensed and unlicensed users will be able to share the 3.5 GHz band in the US. Additionally, the licenses in this band will present a great opportunity for companies looking to test the market (such as a company creating its own path to the consumer, whether in the home, on their person, or more broadly) because the FCC will offer licenses on very small geographic scales with limited terms of just one year.

In many respects, the European and American stories are fairly similar when addressing spectrum resources. Both aspire to roll out state-of-the-art 4G and 5G networks, but there is a shortage of spectrum standing in the way. The US has taken steps such as incentive auctions and new spectrum-sharing techniques to harmonize bands and create spectrum availability. The diverse approaches to allocating spectrum resources within EU Member States have created barriers to the co-ordination of similar actions across the EU. However, the EU seems likely to continue to try to increase spectrum availability as broadband demands increase.

Measuring Progress

Most people, if asked, would guess that either the EU or the US has the highest broadband penetration. Surprisingly, however, these two jurisdictions fall far behind competitor nations in providing adequate broadband services in a timely manner.

The European Commission is concerned that the EU is lagging behind competitors in terms of construction of high-capacity, next-generation networks. It has identified an investment gap of €120bn to meeting its targets of fifty percent of EU households being covered by a download speed of 100 megabits per second ("Mbps") and of 100 percent coverage at 30 Mbps speed by 2020.

The Commission wants to revamp its current rules to give regulators new powers to incentivize the construction of network infrastructure in line with these public policy objectives, for example by giving advantages to first-movers such as tax breaks or exemptions from wholesale service requirements.

A recurrent theme expressed by the Commission is that the current rules have not sufficiently encouraged investment in rural broadband network infrastructure and may have inadvertently discouraged investment in new types of high capacity network. For example, regulations may have artificially depressed prices for wholesale access to mobile data in some instances. At the same time, the Commission believes in a targeted approach: in many areas, broadband infrastructure competition is well developed and regulation should only preserve existing competition.

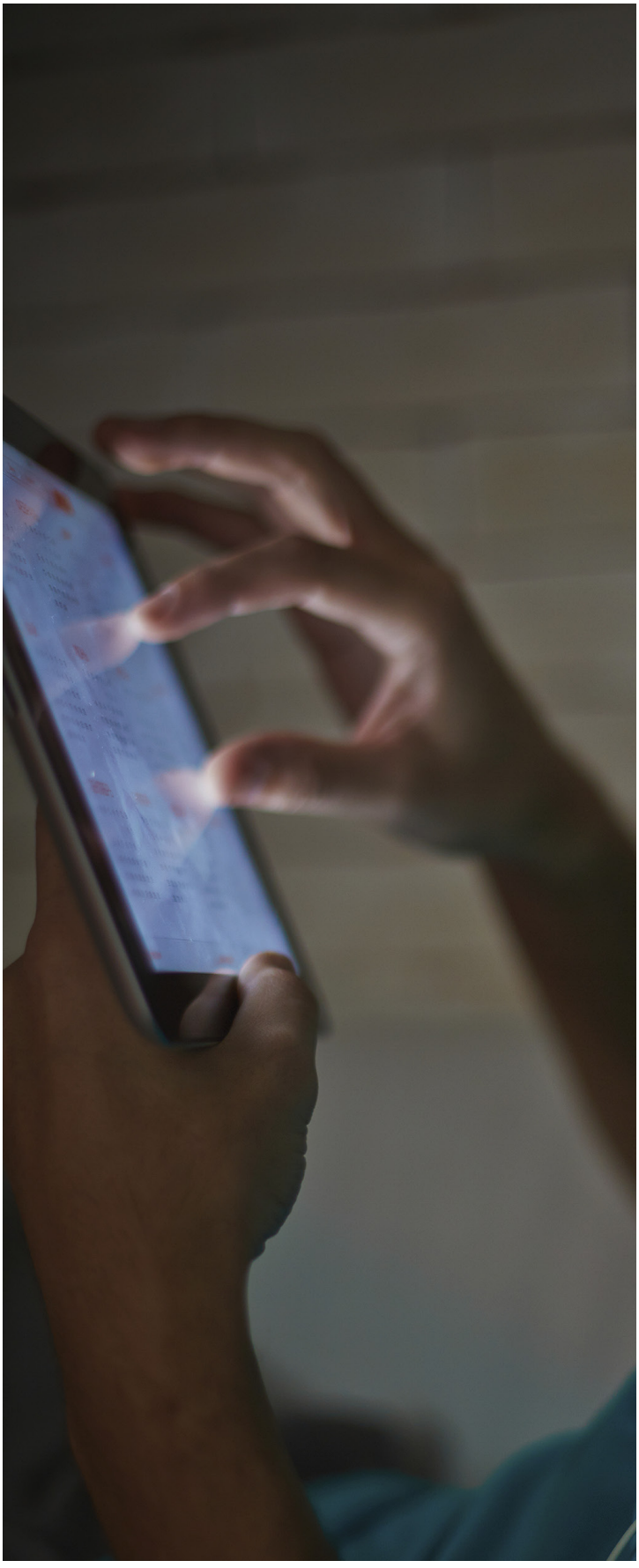
The Commission's proposals in part reflect the concerns of competitive operators in the EU. The fear is that national incumbent operators are gradually re-monopolizing fixed-line communications infrastructure under the guise of broadband deployment. Competitive providers similarly view the deployment of copper-based broadband solutions with skepticism because, unlike fiber to the home, copper-based solutions, such as vectoring and other line-grooming technology, can create barriers to competitive entry by limiting access to end users.

In the US, private sector broadband investment reached $75 billion annually in 2013, and the industry has invested more than $1.3 trillion since 1996, as noted in the FCC's 2015 Broadband Progress Report. The $75 billion in 2013 investment is up approximately ten percent from the previous year, surpassing the pre-recession level of $71 billion in 2008.

Section 706 requires the FCC to report annually whether broadband "is being deployed to all Americans in a reasonable and timely fashion" and to take "immediate action" if it is not; yet this influx in investment has not equated to the universal deployment of broadband in the US. The 2015 US Broadband Report found that the US is lagging behind in terms of construction and that the country has not met previously set benchmarks because it is failing to keep pace with today's advanced, high-quality data and video offerings and with market demand.

In 2010, the FCC set a fixed broadband benchmark for all Americans to receive speeds of at least 4 Mbps for downloads and 1 Mbps for uploads ("4 Mbps/1 Mbps service"). Five years later, the FCC found that the 4 Mbps/1 Mbps fixed service benchmark was outdated. To reflect new advances in technology and market offerings, the FCC updated this fixed broadband service benchmark to 25 Mbps for downloads and 3 Mbps for uploads ("25 Mbps/3 Mbps service").

Applying the updated benchmark, the 2015 US Broadband Report found that 55 million Americans—seventeen percent of the population—lacked access to advanced fixed broadband service. Similar to the Commission, the FCC remains concerned with a possible "digital divide" between the level of advanced fixed broadband service offered in urban versus rural America. In particular, the FCC noted that over half of all rural Americans and nearly 2/3 of tribal residents and US territory residents lack access to 25 Mbps/3 Mbps fixed broadband service.



Having failed to find broadband is being deployed in a reasonable and timely fashion, the FCC has said it will try to remove barriers to infrastructure investment, especially in rural and tribal areas, and promote overall competition in the market. Among other things, the FCC has said that it will seek federal support for funding opportunities to assist service providers which face difficulties with infrastructure building. Similarly, the FCC has highlighted its incentive auctions and spectrum-sharing schemes as major measures to allow mobile broadband service providers to offer a competitive alternative to fixed broadband service and to help ensure that all Americans have access to a 25 Mbps/3 Mbps service.

Leveling the Playing Field

Following Internet Protocol ("IP") convergence and a demand shift from voice to data traffic, end users increasingly consider over-the-top ("OTT") services—such as Voice over Internet Protocol ("VoIP"), messaging and social networks—as substitutes for traditional electronic communication services ("ECS"), such as voice telephony and Short Message Service ("SMS").

In both the EU and the US, these OTT services are not subject to the same regulatory regime as traditional ECS. In the EU, ECS requires, among other things, a 'conveyance of signals,' which regulators have generally found lacking in OTT services. The current regulatory consensus appears to be that only VoIP services, which can 'break out' of the internet into the phone network, are subject to some of the same regulatory obligations as traditional ECS.

The European Commission wants to ensure that ECS-related rules are applied consistently to OTT and ECS providers offering similar or competing services. The issue is between regulating 'down,' which would simplify the existing regime to include the OTT services in question, and regulating 'up,' which would apply the current ECS regime in full to OTT service providers.

In the US, the FCC has slowly begun applying traditional telephony rules to OTT service providers. Through a declaratory ruling, the FCC expanded the Telecommunications Consumer Privacy Act of 1991 ("TCPA") to apply to OTT services. Initially, the TCPA restricted telephone solicitations and the use of automated telephone equipment, such as automatic dialing systems and artificial or pre-recorded messages. The FCC has now decided that the TCPA's consent requirement applies to SMS, voice calls and some types of social media applications that have text message and voice call capabilities. The FCC found that internet-to-phone text messaging technology constitutes the kind of autodialer that the TCPA prohibits, which allows the US to sanction unsolicited messages from these types of services.

Both the EU and the US have acknowledged that the playing field is not level, and the US, in particular, has begun to extend more traditional rules to OTT service providers.

Next Steps

Regulators in the EU and US will have to weigh the uncertain effects of regulation on investment, job creation and capital accumulation against the desire to remove barriers to entry, encourage competition and promote innovation. The balance is a delicate one. The wrong regulations could misallocate resources, raise the cost of entry and damage national competitiveness. Yet failing to act may permit companies with market power to frustrate competitive entry, offline capital investment and to avoid transformative change. The hard choices the EU and the US make now will affect the market for years to come.

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The DSM and e-commerce reforms: the consumer rules

Introduction

Towards the end of 2015 the European Commission delivered two proposals for reforms to the EU's e-commerce regulatory landscape (the "**Draft Directives**"):

– a proposal for a directive to harmonize rules regarding the supply of digital content (the "**Digital Content Directive**"); and

– a proposal for a directive to harmonize rules regarding the distance sale of goods (the "**Distance Goods Directive**").

These proposals form part of the Commission's Digital Single Market strategy and were promised in the wide-ranging working paper produced earlier in 2015. Together with a proposal regarding the portability of digital content, they form the first legislative proposals coming out of that strategy.

This articles looks at the Commission's objectives, how the proposals were arrived at, a summary of the substance of the proposals, and whether the objectives will be fulfilled.

Objectives

The key goal of both draft Directives is to increase cross-border online trade. There are two aspects to this:

– making businesses more comfortable selling across the EU (because the Draft Directives would prevent Member States from introducing higher levels of consumer protection); and

– making consumers more comfortable buying from across the EU (because the Draft Directives would prevent Member States from introducing lower levels of consumer protection).

This aligns with the Commission's legal justification for acting in this area: the improvement of the internal market that is the focus of Article 114 of the Treaty on the Functioning of the European Union.

Death of an EU sales law

The Commission has tried something similar before with the Common European Sales Law, the culmination of a long-term project that grappled with differences in the contract laws of Member States. This project considered various options, at one stage even going as far as envisaging, albeit as an "outlier" proposal, the replacement of all national contract laws with a single EU-wide law.

Ultimately the Commission settled on a proposal for the creation of a contract law system that would sit alongside Member States' national laws and which parties could opt into if they wished. However, the wide-ranging and unconventional nature of the proposal, as well as some doubt about how often it would be used, led to it being killed off in the Council of Ministers (the branch of the EU's institutions that represents Member State governments).

The Commission has clearly learned some lessons from this experience and the proposals are now much more limited in scope - the Draft Directives cover consumer sales only and seek to overlay specific protections onto existing contract law principles, rather than creating a wholly new contractual framework. They also seek (more or less) to develop what is already in place under EU law, with a lot of the substance of the Distance Goods Directive being derived from the existing Sales and Guarantees Directive (1999/44/EC).

Politically, this enables the Commission to sell the package to the Council of Ministers as essentially part of the body of consumer-protection legislation – an area in which Member States (and others) accept that the Commission can and should legislate. It creates less of an impression of the EU trying to interfere with national contract laws… although of course the proposals will do this, as does most consumer protection legislation.

Key substantive points

The core of both Draft Directives is that digital content and goods should conform with the supply contract. If they do not, the consumer will have certain specified remedies which the trader cannot restrict.

Whilst a lot of the Distance Goods Directive is derived from the Sales and Guarantee Directive, the Digital Content Directive provides new protections for digital content. In doing this the Commission is trying to create digital content contracts as a class in their own right, alongside goods and services contracts – thereby moving away from the approach in many countries of classifying digital content provision as a service (with the weaker consumer protections that go with that).

Some of the key aspects that are relevant to both of the Draft Directives:

Key aspects of the new Directives

	Distance goods directive	Digital content directive
Scope	– Distance sales of goods. – No application to supply of services.	– Contracts for the supply of digital content, including any durable medium (such as DVDs) used exclusively to carry digital content. – Broad definition of digital content – not just the supply of data in digital form (which is the definition used in the Consumer Rights Directive (2011/83/EC)), but also the provision of a service or platform that allows the supply or sharing of such data. This would therefore capture most social media sites. – Excludes contracts that do not require the consumer to pay money or to provide active counter-performance. Active counter-performance can include the provision of personal or other data (eg name, email address, photos). – Various other exclusions apply.
Conformity	– Goods to conform to what was promised in the contract and certain objective criteria. – Objective criteria include: fitness for purpose, meeting standards that a consumer may reasonable expect, being properly installed (if the trader is installing) and being free from third party rights inhibiting use. – Parties can only agree something different if the consumer knew of the specific condition of the goods and expressly accepted this condition when concluding the contract.	– Digital content to conform to what was promised in the contract. – Digital content will not conform if incorrectly integrated (if the trader is integrating or has given deficient instructions to the consumer for integrating). It must also be free from third party rights inhibiting use. – A fitness for purpose test is also included – in this case it looks as though the contract can dictate how the test operates for the specific digital content that it covers. The drafting is not clear on this, but if this interpretation is correct then it seems that there will be scope for digital content suppliers to limit the extent of their contractual commitments.
Lack of conformity	– Lack of conformity arising within 2 years from delivery will be presumed to have existed at delivery (unless this is incompatible with the nature of the goods or the nature of the lack of conformity). – Extends the 6 month period set out in the Sales and Guarantees Directive.	– Supplier liable for lack of conformity arising at the time of supply or, if content is supplied over a period of time, at any time during the relevant period. – Burden of proof regarding conformity (or lack of conformity) generally sits with the supplier.
Remedies	– Initial remedy is to have the goods replaced or repaired (at the consumer's election provided the choice is not disproportionate, impossible or unlawful). – If lack of conformity still not remedied, consumer may terminate (either the contract as a whole or just in relation to the non-conforming goods) or to an appropriate price reduction. – Based on the Sales and Guarantees Directive but gives some more guidance as to when and how the consumer may exercise these rights.	– Right to terminate where trader fails to supply. Supply should take place immediately after contract is formed, unless agreed otherwise – this does not apply to physical products. – Initial remedy is to have the digital content brought into conformity, provided this is not disproportionate. – Failing that, the remedy is either a price reduction or termination. Termination is only available where the main performance features are affected.

The Digital Content Directive also introduces three other significant consumer rights:

– consumers will have a right to damages if a lack of conformity with the contract, or a failure to supply the digital content, causes harm to their hardware, data or network connection;

– if digital content is being supplied over a period of time, traders' ability to modify it will be subject to conditions: there needs to be an explicit right in the contract to carry out such modification, the consumer must be notified in advance by a durable medium; the consumer will have the right to terminate free of charge and with the ability to retrieve content provided by the consumer;

– consumers will have the right, on 14 days' notice, to terminate any contracts lasting more than 12 months.

Will the Commission achieve its goals?

For businesses the key question will be whether the Draft Directives allow them to use a single set of T&Cs to sell across the EU without having to investigate the local laws of all Member States that they sell to. The short answer is that the Draft Directives help to make this a less risky approach, but their limited scope and the choice of legal instrument mean that businesses can still get tripped up.

The reason for this is that the Commission has decided not to change the Rome I and II Regulations (which determine the governing law to be applied to contractual and non-contractual relationships). These provide consumers with the benefit of any specific domestic law of the consumer's country if: (i) parties to a contract cannot agree to derogate from that law; and (ii) the trader directs marketing activities at the consumer's country. In order to target a foreign market, therefore, a trader usually needs to engage a local lawyer in order to have a full view of the laws that might affect the trader's terms and conditions of sale.

By introducing the Draft Directives on a maximum harmonization basis, the Commission proposes to expand the number of areas in which there can be no discrepancy in contract laws (for consumer goods and digital content sales) across the EU:

– the Draft Directives, if implemented, cover conformity with the contract, remedies for lack of conformity (including the right to terminate) and commercial guarantees;

– the Consumer Rights Directive is on a maximum harmonization basis (mainly) and covers information requirements, cancellation rights and payment surcharges (amongst other things);

– the Unfair Commercial Practices Directive is on a maximum harmonization basis and prohibits misleading or aggressive commercial practices; and

– The forthcoming General Data Protection Regulation, although applying far beyond just sales contracts, will create a single set of rules that will have direct effect across the EU – this will also be an important part of giving traders and consumers confidence about buying online.

Businesses may therefore decide that they can start targeting a market without carrying out a local law check of their sales terms – the knowledge that there is less scope for discrepancies between national contract laws should mean that there is less risk of some unknown law applying to their sales. The Commission certainly thinks that this will be the case, stating that "businesses will largely not have to adapt their contract terms to the laws of other Member States, no matter how many Member States they sell to".

However, leaving Rome I and II untouched (a position advocated by consumer organizations) means that there will be risks to this approach - a consumer's local law can still override the trader's chosen governing law and there are areas of consumer sales law where EU law will allow Member States to take different positions. The main areas of legal uncertainty are likely to be:

– any mandatory rules specifying the point at which title in a product transfers to the consumer; and

– consumer protection against unfair terms that goes beyond the requirements of the Unfair Terms Directive - this is a minimum harmonization directive, meaning that Member States can adopt more stringent provisions.

Even if businesses can get comfortable with carrying some risk in these areas, from a consumer perspective the harmonization of laws is only one part of the equation – a lot of consumer protection legislation is only as good as its enforcement, which often requires local consumer agencies to take action. The Draft Directives require Member States to implement "adequate and effective means" of enforcement, but differences are nevertheless likely to continue. This could therefore prove to be the biggest challenge to achieving the Commission's goals.

Future of face-to-face

One interesting area to watch out for in future is that the Commission sees a problem with the rules on distance sales diverging from face-to-face sales due to the "increasing importance of the omni-channel distribution model". Whilst it may have made sense to regulate these sales channels differently when distance selling was seen as a distinct (and often minor) branch of sales, businesses don't work like this anymore – online sales are increasingly an integral part of the way businesses sell their goods. Because of this evolution, the Commission seems to want to extend certain distance selling rules to cover face-to-face sales.

It's unclear, though, which rules might be extended – would this just relate to the areas covered by the Draft Directives (issues around conformity with the contract)? Or could it go further and mean the extension of existing measures, such as cooling-off periods, for face-to-face sales?

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The DSM and digital platforms: is specific regulation needed?

According to President Ronald Reagan, a government's view of the economy could be summed up in a few short phrases: If it moves, tax it. If it keeps moving, regulate it. And if it stops moving, subsidize it. The growth of many digital platforms appear to have them becoming on the verge of moving into the second category. This article questions whether regulation is the right approach for dealing with platform markets or whether the existing instruments of EU competition law (as set out amongst others in Regulation 1/2003), and consumer protection law provide for better means of controlling platform power.

As part of its Digital Single Market strategy, the European Commission in 2015 started a comprehensive analysis of the social and economic role of online platforms. The questions mainly focus on the lack of transparency and the relation between platforms and suppliers and traders. A specific example the Commission asks about is the "parity clause" obliging suppliers to maintain parity with their best offer in other sales channels which has been subject to investigations by many national competition authorities in the online hotel booking sector. The inconsistent national handling of these national competition cases triggered calls for the Commission to intervene – but the question is: should the Commission intervene with the instruments of competition law or with new regulation of platforms?

Competition law or specific platform regulation?

The sector inquiry might suggest the second alternative. The Commission's roadmap[10] for completing the Digital Single Market foresees the introduction of legislative proposals to reform the current telecoms rules, review of the Audiovisual Media Services Directive and the e-Privacy Directive as well as the establishment of a Cybersecurity contractual Public-Private Partnership.

While no decision has been taken yet it seems questionable how the concept of regulation will affect digital platforms, a term that is not legally defined and open to different concepts from an economic, legal and political perspective. The Juncker Commission pledged to follow a "Better Regulation" approach, which requires a fairly rigorous test before introducing new regulation. Some argue that "Better Regulation" should be read as "no new regulation", in particular in dynamic digital markets where market failures are often transitory in nature, leading to false positives and the premature imposition of regulation.

The Commission's understanding is different. Mr. Juncker's agenda is more ambitious on big things, and smaller and more modest on small things. The Digital Single Market is a big thing and the Commission's agenda aims at "creating the conditions for a vibrant digital economy and society." Clearly market distortions may imperil these goals. However, competition law seems best suited to deal with these challenges. There are significant parallels between antitrust law and telecoms or media regulation, e.g. the concept of recognizing a dominant position or 'significant market power' – which is not unlawful per se – and the imposition of remedies to keep a dominant actor under control. Competition law nevertheless allows for more flexibility in dealing with emerging market players.

The mere possession of a dominant position does not in itself require any enforcement under competition law. Antitrust law does not positively define what competition on a market should look like, but rather defines which practices restrict competition. In contrast, regulation generally does not aim at maximizing the level of unrestricted competition but ensuring the replication of competition or maximum plurality for the recipients in markets where resources such as frequencies are limited. This naturally affects the perspective on the definition of markets: For instance, free-to-air television broadcasting, does not constitute a "market" from a competition law perspective as the audience does not pay for the program. Nevertheless, the audience share of a free-to-air program is of large relevance for media regulation dealing with plurality.

10 http://ec.europa.eu/priorities/digital-single-market/docs/roadmap_en.pdf

Network effects and "winner takes all"

One of the interesting questions the Commission will need to answer is whether it will focus on "bottleneck" platforms in the area of broadcast and video-on-demand or whether the review of the platform markets will span the currently much less regulated online world. Platform regulation might facilitate the replacement of the "winner-takes-all" online platform by a new dominant platform. While this could create more incentives for potential competitors to develop new platforms, the entrepreneurs or investors could also anticipate that the benefits of winning the market will be shorter. Thus, platform regulation could also create uncertainty and reduce the incentives to innovate.

Digital platforms are multifaceted, in some cases representing business models, in other cases technological platforms or enablers of other services. The very definition of what is a digital platform is fraught with difficulties making the creation of specific regulation perilous. The working definition in the Commission's consultation questionnaire demonstrates the point:

> "Online platform refers to an undertaking operating in two (or multi-) sided markets, which uses the internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers."

The complexities of multisided markets make the diagnosis of market failures particularly difficult. As pointed out in a recent paper published by the French and U.K. competition authorities, both open and closed digital ecosystems can create pro-competitive and anti-competitive effects. No single model maximizes social welfare in all situations. Because of network effects, the emergence of a relatively small number of generalist platforms, with multiple niche platforms, may in fact be efficient. As pointed out by Howard Shelanski, policymakers need to be wary of false positives, i.e. concluding too hastily that certain new digital business models are anti-competitive and require a regulatory fix.

For digital markets in a dynamic stage of their development premature regulation does not seem favorable. Any *ex ante* regulation runs the risk of misinterpreting market shares or prices in assessing market power, in particular on two-sided markets where the price is often zero for the consumer. *Ex post* competition law enforcement allows for a more targeted individual assessment of the platform in question. The involvement of the competition law authorities' economists in such investigations is another advantage as the investigation can focus on the concrete economic assessment of the respective platform market. Moreover, competition law provides for flexible instruments that have been tested in a variety of cases. For instance, the possibility of settling cases by accepting commitments of a platform is enshrined in many national competition laws and also in Article 9 of Regulation 1/2003 on the EU level. Commitments are intended to address the competition concerns identified by the authorities without establishing an infringement.

Competition law commitments are de facto regulation

While commitments seem a suitable way to address platform markets outside formal regulation, it should be noted that they may *de facto* set standards for acceptable market behavior from the authorities' perspective. Thus, the competition authority may act in a kind of regulatory fashion for which it lacks legal competency. There is a danger that individual landmark cases shape competition policy which should be left to the legislator. The antitrust regulators are well advised to strive for balance and cautiously make use of their powers in competition cases.

But there are also examples of a staggered antitrust investigation followed by regulatory actions. Following the Commission's initial antitrust decisions in the Multilaterally Agreed Interchange Fees ("MIF") cases in 2007 and 2010 (COMP/34.579 and COMP/39.398), the European Union introduced Regulation (EU) 2015/751 which as of 9 December 2015 capped interchange fees for card-based payment transactions. The legislative


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process in this case benefitted from the experiences the Commission made in its competition law investigation – a different way to achieve "Better Regulation".

Protecting consumers against lock-in

Another area of potential concern for regulators is the potential lock-in effect of certain platform strategies. Network effects will draw users to the platforms that have the highest number of other users. This can lead to a phenomenon where the large platforms are more and more successful simply because they have a large number of existing users. The question then is whether this phenomenon unduly harms innovation and competition from other service providers. The proponents of regulation argue that consumers are locked-in to the service environment of certain large platforms. Proponents of regulation believe that large platforms succeed because they are large, not because they are better. Some legislative proposals, including one in France, go as far as to require that users be able to port all their data, including all files that they have uploaded onto the platform and "associated usage data", to competing service providers. These proposals will go beyond the portability of personal data required by the General Data Protection Regulation.

Telecom regulation is not a good analogy

The European Commission is not going so far, at least not for now. Wisely, the Commission is gathering evidence to determine whether the alleged market failures caused by platforms are in fact real. The skeptics of new regulation, including the authors of this article, point out that many users participate in multiple platforms (a phenomenon called multi-homing), and that switching costs are low compared to other situations where lock-in is a concern. Lock-in concerns are acute when the consumer must purchase a costly piece of equipment, and would have to buy a new piece of equipment if he or she changed service provider. In that situation, regulators may intervene to ensure that competing service providers can have access to the existing equipment so that the consumer does not have to buy a new one. Similarly, access regulations in the telecommunications industry are necessary to ensure that consumers are not tied to the service provider who happens to own the copper network connecting the person's house. For most online service providers, none of these lock-in features appear to be present. Online service providers will naturally try to make their service environment "sticky" so that consumers will remain in the environment as long as possible. However, this is no different from practices that exist in many businesses in the offline world.

Platforms facilitate multisided business models of all kinds. Platforms have existed for many years in the offline world. Examples include trade fairs and newspapers. Digital platforms simply make transactions easier, thereby facilitating the emergence of multisided business models in new contexts.

When analyzed from a legal and economic perspective, platforms are simply a collection of services offered to two or more different groups of customers. The services that are offered on different sides of the platform are generally subject to different legal rules. Services on the platform must comply with applicable laws, including competition law, data protection law and consumer protection law. Where providers of platform-based services do not comply with law, they are sanctioned. Any initiative to create specific rules for digital platforms needs to be assessed rigorously in light of existing law. Where existing law provides a remedy, lawmakers should refrain from adding an extra layer.

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