

European Commission Unveils New Digital Single Market Proposals

The Commission's proposals aim to drive cross-border e-commerce in the EU and level the regulatory field across audiovisual media services and online platforms.

On 25 May 2016 the European Commission (Commission) announced new proposals with potentially far-reaching implications for digital market participants. These include in particular:

- Modernization of the Audiovisual Media Services Directive (AVMSD)
- Communication on online platforms
- Regulation on geo-blocking
- Regulation on cross-border parcel delivery

The proposals, as part of the Commission's Digital Single Market Strategy (DSM), aim to stimulate increased cross-border commerce within the EU and modernize some of the legislative frameworks that govern content diffusion and communications.

Please note that even with the current proposals, the Commission's DSM work is far from complete: More proposals (some of which may be seen as even more impactful and controversial than the current proposals within the audio-visual sector) are likely to take place later this year. The preliminary report of the Competition Directorate on its sector inquiry is also rumoured to be published very soon, which may also provide hints as to whether the Commission is likely to open any antitrust investigations as a parallel effort to break down barriers to e-commerce and promote the DSM.

Background – DSM Strategy

Just over a year ago, the Commission formally announced its DSM Strategy.¹ The aim of the Strategy is to make the EU's single market 'fit' for the digital age by focussing on better online access to digital goods and services, creating a growth environment for digital services, and networks and ensuring that the European economy takes advantage of the opportunities that digitalization has to offer.

As part of its DSM initiative, the Commission has embarked on numerous public consultations and has already proposed legislative action in areas such as online content portability.² The current proposals move the Commission's strategy forward and should be of particular interest to companies active in the digital space in Europe.

Audiovisual Rules and Online Platforms

Proposal to Revise the AVMSD

The AVMSD governs EU-wide coordination of national legislation on all audiovisual media, *i.e.* both traditional TV broadcasts and on-demand services, albeit imposing different levels of regulation for each one. The AVMSD provides some level of harmonization in areas such as accessibility for people with disabilities, promoting and distributing European works, commercial communications and protection of minors.

The proposed revision to the Directive (partly) extends its application to “video-sharing platforms”³ that tag, organize and target advertising on the content. More specifically, the Directive proposes to introduce an obligation to ensure that these content providers implement measures to protect minors from access to harmful content and protect all citizens from incitement to hatred.

Perhaps more controversially, in order to create a level playing field in the promotion of European works, the draft Directive obliges on-demand services to ensure that 20% of the works in their catalogues is European and that these works are provided with adequate prominence. Importantly, the Directive proposes to allow Member States to require on-demand services to invest in local content (either through direct investments or levies payable to a fund). The new rules allow Member States to require contributions from on-demand services that are established in a different Member State, but that are targeting the first Member State’s audiences. Companies with a low turnover or low audiences as well as small and medium enterprises are exempt from this requirement. This provision appears to be targeted at solving some Member States’ concerns about how to levy the parafiscal taxes that finance their State Aid schemes for cinema on digital broadcasters established outside their territory.

Finally, the Directive also proposes more flexibility in advertising arrangements going forward, a measure that will be particularly beneficial for TV broadcasters.

Online Platforms Communication

The Commission had been explicit when launching its DSM strategy last year that it would carefully consider the role of online platforms.⁴ The outcome of the Commission’s consultations, workshops and studies is a Communication entitled “*Online Platforms and the Digital Single Market; Opportunities and Challenges for Europe*”⁵ that proposes ways to foster development for online platforms.

The Communication shies away from proposing an all-inclusive ex-ante regulatory approach and proposes some basic principles about how it will ensure its DSM objectives through more piecemeal legislative action or even soft regulation or voluntary action. Some key points from the communication include:

- **Liability:** the Communication proposes to maintain the intermediary liability regime under the e-Commerce Directive.
- **Level playing field:** a key issue in the Commission’s strategy is to ensure that comparable digital services are subject to comparable rules. The Communication indicates that (as part of this review of the EU Telecoms rules) the Commission is considering, for instance, partial deregulation of traditional communication services rules and applying some communications-specific rules to other services.
- **Platform responsibility:** despite maintaining the intermediary liability regime, the Communication does propose that platforms are accountable to some extent for their content. First, the AVSMD

described above does include proposals in this respect (for protection of minors and incitement to hatred). Second, the Communication questions whether online content distribution platforms that make available copyright-protected content are sharing the value generated from the content with the right holders in a fair manner. This issue will be addressed through sector-specific regulation in the copyright field. Voluntary action is also encouraged in this field — the Commission is, for example, working with major online platforms on a code of conduct to combat hate speech online.

E-commerce Proposals

Geo-blocking Regulation

The Commission's proposed Regulation addressing geo-blocking covers the sale of goods and the provision of services in the EU in cases where the customer is not a national of, or not residing or established in, the Member State in which the provider is established. The proposal covers both goods and services sold to consumers but also to businesses (unless the goods/services are purchased for resale).

A number of services are, however, excluded from the scope of the Regulation — most importantly audiovisual services, and copyright-protected works (such as music or e-books), except if the copyright-protected work is supplied to the customer in the premises of the trader or in a physical location where the trader operates.

The proposal's key principle is that providers of goods and services operating in the EU cannot directly or indirectly discriminate between customers based on their nationality, place of residence or place of establishment. In particular traders cannot:

- As a general rule, block or limit customers' access to their websites or a particular version of their website, unless the customer explicitly consents (and even in that case customers must continue to be able to easily access the original version of the website they wanted to access)
- Apply different "general conditions of access" (including price) to their goods or services

The draft proposal also states that traders are required to offer the same payment conditions to customers, regardless of their nationality, place of residence or place of establishment. The trader will therefore be required to accept credit cards from other Member States if it accepts credit cards from the Member State in which it is established.

Quite surprisingly, however, traders are not required to offer physical delivery to other Member States. So, while customers may purchase a good in another Member State, customers cannot demand for the good to be delivered to their home, but could be required to pick it up at their own initiative. Traders would also be allowed to discriminate with "targeted offers" directed to specific Member States or groups of customers.

The proposed Regulation states that the rules on competition contained in the Treaty on the Functioning of the European Union will remain unaffected. The Regulation nevertheless states that agreements imposing on traders obligations regarding passive sales to act in violation of the Regulation would automatically be void.

Parcel Delivery Regulation

The proposed Regulation on parcel delivery is meant to increase price transparency and regulatory oversight of cross-border parcel delivery services so that consumers and retailers can benefit from affordable deliveries and convenient return options even to and from peripheral regions.

The Regulation obliges parcel delivery service providers with more than 50 employees to provide information to national regulatory authorities on the nature of service offered, the general conditions of sale, annual revenues, number of employees and volume of parcels handled.

Universal service providers would also be obliged to submit an annual public tariff list to the national regulatory authority for certain services. The Commission proposes to publish tariffs by 30 April of each calendar year on a dedicated section of its EUROPA website.

The draft Regulation also imposes an obligation on national regulatory authorities to assess the affordability of the tariffs of universal service providers on the basis of objective elements.

Finally, the Regulation proposes a general obligation on universal service providers to meet all reasonable requests for access to all network elements and associated facilities and relevant services, necessary for the provision of cross-border parcel-delivery services.

The Regulation is not proposing a cap on delivery prices, but is meant to give national postal regulators the data they need to monitor cross-border markets and check the affordability and cost-orientation of prices. The proposed legislation will also encourage competition by requiring transparent and non-discriminatory third-party access to cross-border parcel delivery services and infrastructure. The Commission will publish publicly listed prices of universal service providers to increase peer competition and tariff transparency.

Next Steps

The current legislative proposals will now be discussed by the European Parliament and the Council and will most likely evolve and be amended in the process. Final adoption by both legislators is not expected before some point next year⁶. As mentioned in the introduction, a further package of legislative reforms is currently expected to be proposed in the autumn.

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Endnotes

- ¹ “A digital Single Market Strategy for Europe”, 6 May 2015.
- ² “Proposal for a Regulation of the European Parliament and the Council on ensuring the cross-border portability of online content services in the internal market”, 18 December 2015.
- ³ A video-sharing platform is defined as a commercial service addressed to the public which (a) stores a large amount of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility; (b) where the content is organised in a way determined by the provider of the service, in particular by hosting, displaying, tagging and sequencing; (c) where the principal purpose of the service (or a dissociable section thereof) is devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate; and (d) is made available by electronic communications networks.
- ⁴ The Commission considers online platforms to share certain key characteristics (e.g. the use of information and communication technologies to facilitate interactions between users, collection and use of data about these interactions and network effects) but acknowledges that online platforms cover a diverse range of activities (e.g. online advertising, marketplaces, search engines, social media).
- ⁵ SWD(2016) 172
- ⁶ After adoption, the Commission’s legislative proposals are forwarded to the two co-legislators, the Council and the European parliament, which will have to agree on common texts through a process of several reiterations. Once approved, a directive needs to be transposed into national legal acts of the Member States, while regulations are directly applicable and enforceable. It is not likely, therefore, that the rules proposed by the Commission with this package will become binding in the Member States for at least three to four years.