

# Client Alert

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## The Digital Single Market Strategy: One Year On

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In May 2015, the European Commission announced its Digital Single Market Strategy to accelerate the creation of a digital single market (DSM) across the EU. The EU's aim is to broaden access to e-commerce, media and entertainment, telecoms and online services, and to ensure that the optimum conditions exist to allow these sectors to grow, ultimately for the benefit of Europe's consumers and the wider economy.

In this Alert, we consider the progress of the Commission's plans and the likely impact of the legislation so far issued on EU-based and non-EU digital and technology businesses.

The Commission's objectives in the Digital Single Market Strategy are to break down regulatory walls and ensure that competitors operate in a free and fair market; and also to move away from the fragmented and eclectic mix of laws and regulations that currently govern the online environment in the EU's 28 Member States. The Commission believes that the need to comply with multiple local laws across different member states can be difficult for businesses, and increase costs for consumers.

So the DSM addresses issues such as regulatory harmonisation to encourage, at the very least, companies to do more business online, take advantage of the cross-border nature of the Internet and tap in to previously unexplored European markets.

But harmonisation is just one of the key aims of the DSM. In addition, the Commission wants to do more to ensure that the DSM offers direct benefits to EU consumers of digital and online products and services. For example, the DSM will allow easier enforcement of consumer rights and reduce unfair business practices that distort the prices of goods and services available online. Most importantly, this protection will be provided irrespective of nationality or place of residence.

Over the past 12 months, there have been a number of DSM legislative developments as the Commission continues to pursue its aim of breaking down the regulatory walls that impede Europe's cross-border digital economy.

Of course, the main 2016 EU development has been the UK's well-publicised decision to leave the EU. That decision has not yet been reflected in changes in the DSM – either in policy terms or in specific legislative proposals. But it's clear that that the DSM will go forward with or without the UK. The question will be how the UK's exit process will complicate the simplified and harmonised online and digital services market that the DSM was intended to create.

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## DSM STRUCTURE

The DSM is structured around three “pillars” – access, environment, and economy & society. What this really means is: (i) creating better access for consumers and businesses to digital goods and services around Europe; (ii) creating the right conditions and a level playing field for digital networks and innovative services to flourish; and (iii) investing in a Europe-based and Europe-owned digital economy with long-term growth potential.

Each of the three DSM pillars includes a number of key actions which provide details of how the Commission expects to achieve its aims, ultimately breaking down into 16 specific target actions.

In this Alert, we provide an outline of the major developments that have occurred over the past year in relation to each of the Commission’s 16 “key actions”, which form the backbone of the DSM. We also examine the potential implications of Brexit on each of these vital policy areas.

## PILLAR 1: BETTER ACCESS TO DIGITAL GOODS AND SERVICES AROUND EUROPE

Under Pillar 1, the Commission plans the rapid removal of key differences between the online and offline worlds to break down barriers to cross-border online activity. This includes differences in contract and copyright law, reducing VAT burdens and ensuring affordable and high-quality cross-border parcel-delivery services. The DSM aims to define an appropriate e-commerce framework and prevent unfair discrimination against consumers and businesses (in terms of nationality, residence or geographic location restrictions) when they try to access content or buy goods and services online within the EU.

### Key Action 1: Rules to Make EU Cross-Border E-Commerce Easier

Cross-border e-commerce within the EU can be inhibited by differences among the framework of contractual rights and obligations provided by each of the EU Member States. Those differences create legal barriers and increase costs for pan-European businesses that have to comply with up to 28 separate regimes. According to the Commission’s most recent proposal, 39% of businesses selling goods and services online, but not cross-border, cite different national contract laws as one of the main obstacles to cross-border sales.

As promised by the Commission in 2015, the EU has already begun to legislate in this area, and the Commission has now proposed two new directives dealing with contracts for the supply of digital content (**Draft Digital Content Directive**) and sale of online goods (**Draft Online Goods Directive**).

We set out a more in-depth discussion of the wider implications of the Draft Digital Content Directive and Draft Online Goods Directive in [Digital Single Market Strategy Update: Europe Proposes Further Harmonisation of Consumer Protection Laws](#). However, a summary of both directives is set out below.

### ***Draft Digital Content Directive***

The Draft Digital Content Directive would apply only in business-to-consumer (B2C) sales, and would not extend to small or medium sized enterprises (SMEs). In addition, digital content providers in certain sectors, such as financial services, gambling or health care, are outside the scope of the directive.

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The key provisions of the Draft Digital Content Directive include:

- **Supplier's liability for defects.** If the digital content is defective, the consumer can request that the defect be fixed. There will not be a time limit to the supplier's liability for such defects because, unlike physical goods, digital content is not subject to "wear and tear".
- **Reversal of burden of proof.** If the digital content is defective, it will be the supplier's responsibility to prove that the defect did not exist at the time of supply. The Commission believes that this is important because the technical nature of digital content means that it can be difficult for consumers to prove the cause of a problem.
- **Right to end a contract.** Consumers will have the right to terminate long-term contracts and contracts to which the supplier makes major changes.
- **Contract established in exchange for data.** If the consumer has obtained digital content or services in exchange for personal data, the new rules clarify that the supplier should stop using the data when the contract terminates.

## *Draft Online Goods Directive*

As with the Draft Digital Content Directive, the Draft Online Goods Directive would only apply in B2C sales. Only goods sold online or otherwise at a distance fall within this Directive's scope, so any face-to-face sales are not covered. Furthermore, contracts for the supply of services would not be subject to this Directive.

The key provisions of the Draft Online Goods Directive include:

- **Reversal of the burden of proof for two years.** Under existing law, a consumer asking for a remedy for a defective product does not have to prove that the defect existed at the time of delivery; it is up to the seller to prove that the defect did not exist. Currently, the time period during which the seller has this burden of proof varies by Member State; under the new law, this period will be extended to at least two years throughout the EU.
- **No notification duty.** Consumers will not lose their rights if they do not inform the seller of a defect within a certain period of time (as is currently the case in some Member States).
- **Minor defects.** If the seller is unable or fails to repair or replace a defective product, consumers will have the right to terminate the contract and also be reimbursed in cases of minor defects.
- **Second-hand goods.** For second-hand goods purchased online, consumers will now have the possibility to exercise their rights within a two-year period, as is the case with new goods, instead of the one-year period that currently applies in some Member States.

## **Key Action 2: Consumer Protection**

The existing piecemeal system of national arrangements is seen as inadequate for the enforcement of EU consumer laws in a cross-border context. The Commission considers that EU-wide cross-border enforcement

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cooperation among public authorities plays a crucial role in preventing non-compliant traders from exploiting gaps, territorial boundaries and other limitations in the enforcement capacity of each Member State.

Regulation 2006/2004 on cooperation between national authorities responsible for enforcement of consumer protection laws (**CPC Regulation**) is already in place and was the first attempt at harmonising the cooperation framework amongst national authorities in the EU so that their enforcement actions in relation to consumer protection could cover the full dimension of the Single Market.

The Commission has now proposed a new regulation to address the inadequacies of the CPC Regulation, which is quickly becoming irrelevant in the rapidly evolving digital sphere.

The key provisions of the revised regulation largely address powers of national authorities and include giving authorities the ability to:

- **Make information requests** from domain registrars and banks to detect the identity of rogue online traders.
- **Carry out mystery shopping** to check for geographical discrimination or after-sales conditions.
- **Order the immediate take-down of websites hosting scams** or otherwise abusing the rights of European consumers.

## Key Action 3: Parcel Delivery

It is clear from recent statistics that EU consumers and retailers do not take full advantage of the Single Market when consuming online and digital goods and services. In 2014, only 15% of consumers bought online from other EU countries. Although 44% did so in their own country, over three quarters (84%) of online sales in 2014 came from the country in which the selling company was located.

According to the Commission, one practical barrier to cross-border e-commerce is a lack of affordable cross-border parcel-delivery services and consequently, a new regulation has been proposed to address this issue.

The main elements of the proposed regulation are:

- **Price transparency** to encourage a greater level of competition between service providers. This will be achieved through the publication of domestic and cross-border prices. A cap on delivery prices and price regulation is seen as a last resort and so has not been proposed, but the Commission will re-assess the need for controlled pricing in 2019.
- **Increased regulatory oversight** to give national postal regulators the data they need to monitor cross-border markets and check the affordability and cost-orientation of prices. This will only apply to parcel-delivery providers that have 50 or more employees or are active in more than one EU country.
- **Transparent and non-discriminatory third-party access** by universal service providers to multilateral cross-border agreements, in particular on terminal rates, to encourage competition in cross-border parcel markets.

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## Key Action 4: Geo-Blocking

Geo-blocking – the practice of denying access to users in one jurisdiction to services based on the user's geographic location – is cited by the Commission as another obstacle to harmonised cross-border e-commerce, and a cause for significant consumer dissatisfaction and the fragmentation of the EU's digital market. The Commission undertook a recent consultation which showed that geo-blocking is increasingly common. Replies from more than 1,400 retailers and digital content providers from all 28 Member States show that 38% of the responding retailers which sell consumer goods and 68% of digital content providers geo-block consumers located in other Member States. The Commission has therefore proposed another regulation to address this issue.

The main elements of the proposed regulation are set out in our separate Alert – but summarised below:

- **Sale of products and services.** The proposed regulation points to specific situations when there can be no justified reason for geo-blocking or other forms of discrimination based on nationality, residence or location. In these circumstances, customers from another Member State should have the same access to goods and services as domestic customers. For digital services (such as cloud services, data warehousing, website hosting), the application of the proposed regulation would be delayed until mid-2018, in order to allow service providers enough time to prepare for the changes.
- **Access to websites.** Blocking access to websites or using automatic re-routing based on geographic location without the customer's prior consent will also be prohibited under the proposed regulation. In theory, this will increase price transparency by allowing consumers to compare prices across a greater number of websites. This provision also applies to non-audio-visual digital services, such as e-books, music, games and software.
- **Non-discrimination in payments.** While traders remain free to impose whatever payment methods they want, the proposed regulation includes a specific provision on non-discrimination within those methods.

The proposed regulation undoubtedly makes inroads in relation to solving the wider issue of geo-blocking, but what has not been made clear is just how the Commission plans to grapple with distinguishing between justified and unjustified geo-blocking. The current copyright framework deems some degree of geo-blocking to be acceptable and the Commission needs to adequately address this, at least to begin with, when deciding what types of geo-blocking it will prohibit.

## Key Action 5: Competition

Competition lies at the heart of the Commission's plans for the DSM, and the Commission is determined to eradicate what it considers to be artificial barriers to trade which impede the development of the digital economy in the EU. One key example uppermost in the Commission's mind is inclusion of contractual restrictions in distribution agreements that prevent retailers from selling goods or services purchased online or cross-border to customers located in another EU country.

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The Commission's year-long inquiry, which looked into competition in a number of industries, with a particular focus on consumer electronics, clothing and creative industries, recently concluded, and the findings are expected to be released later this year.

## **Key Action 6: Digital Content: A Modern, More European Copyright Law**

The Commission has announced a proposal on cross-border portability of online services aimed at ensuring that consumers who buy or subscribe to films, sports broadcasts, music, e-books and games can access them when they travel in other EU countries.

The proposed regulation – summarised in our Alert [Travelling with Your Online Account in Europe](#) – will force service providers to allow consumers to access services purchased in their home territory while they are temporarily in other Member States. The regulation also addresses barriers to cross-border portability of online services that may arise from contractual provisions negotiated between service providers and rights-holders (including all those who hold rights relevant to the use of content services offered online, not just copyright holders), by making any contractual provisions that restrict the portability of online content unenforceable. However, rights-holders will be entitled to require a service provider to provide effective verification that it is providing access to existing subscribers. There are immediate practical difficulties associated with this proposal, not least that it will be hard for service providers to track consumers across Member States.

## **Key Action 7: A Review of the Satellite and Cable Directive**

The Commission has yet to propose draft legislation in this area; however, it has released a [Roadmap announcing its evaluation of the Satellite and Cable Directive](#), which is aimed at assessing the Directive's relevance, effectiveness, efficiency and coherence, as well as the added value of extending the EU's scope to cover online services.

## **Key Action 8: Value Added Tax**

The Commission has published a [Roadmap on modernising VAT for cross-border ecommerce](#).

The Roadmap identifies a number of different options for this, although the document does not preclude the possibility that alternative approaches may emerge through further public and stakeholder consultations. The options are set out in the Roadmap as follows:

- No change to the current situation and a retention of: current distance sales thresholds for goods, no threshold for intra-EU supplies of services, VAT exemption for the importation of small consignments into the EU, and no simplification for B2C imports of goods above the small consignments exemption and below the customs exemption of €150.
- The removal of the distance sales thresholds and the small consignments exemption.
- Along with the removal of the distance sales thresholds and the small consignments exemption, the introduction of a common VAT exemption threshold for intra-EU sales of both goods and services.

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- The addition of a Single Electronic Mechanism that would apply to intra-EU supplies of goods and services and to the import of all goods under the customs threshold of €150.
- The addition of fully harmonised EU rules for a Single Electronic Mechanism, subject to applying the rates/exemptions of the Member State of consumption.

## PILLAR 2: CREATING THE RIGHT CONDITIONS AND A LEVEL PLAYING FIELD FOR DIGITAL NETWORKS AND INNOVATIVE SERVICES TO FLOURISH

The Commission considers that the DSM requires reliable, trustworthy, high-speed and affordable networks and services that safeguard consumers' fundamental rights to privacy and personal data protection while also encouraging innovation.

### Key Action 9: Telecoms Rules

The demand for wireless connectivity has exploded in recent years and is, in part, being driven by smart devices and the widespread consumption of video and Internet. In 2015, the Commission set its sights on a dramatically reformed EU telecoms sector. Telecoms infrastructure such as radio spectrum is not only outdated, but also incredibly fragmented across each Member State.

Radio spectrum, which is a vital building block for the deployment of broadband services, is managed at a national level. Member States receive valuable revenues from the sale of spectrum rights – and, furthermore, these revenue streams remain exclusively with Member States. The Commission proposes that spectrum rights be managed by Member States under a more harmonised framework that would be consistent with the DSM's goals.

Although the Commission has yet to release any proposed legislation, there have been a number of consultations and Roadmaps launched since last year in this area, including:

- A [consultation](#) in relation to a possible review of the regulatory framework for electronic communications networks and services.
- A [consultation](#) to look into the need for better Internet speed and quality beyond 2020.
- A [consultation](#) on the national wholesale roaming markets, fair use policy and the sustainability mechanism.
- A [Roadmap](#) on an EU strategy for the future use of the UHF broadcasting band (470–790 MHz), including the 700 MHz band (694–790 MHz).

### Key Action 10: Audio-Visual Media Framework

Another key action at the centre of the creation of the DSM is a comprehensive reform of the law surrounding audiovisual media.

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The Commission recently announced a proposal for new legislation to amend the AVMS Directive, which provides rules for television broadcasts and on-demand programmes that are similar to, or compete with, television content.

The main elements of the proposed regulation are set out in our separate [Alert](#) – but summarised below:

- **Video-sharing platform services.** The scope of the AVMS Directive will be extended to video-sharing platform services that organise and tag a large number of videos. Video on demand service providers will be required to devote 20% of their catalogues to European works and to ensure prominence of this content in their services.
- **Non-EU Video-Sharing Platform Service Providers.** If a non-EU provider has a parent or subsidiary or other affiliate that is established in such Member State, such non-EU video-sharing platform service must comply with the national laws of the Member State falling within the scope of the e-Commerce Directive.
- **Age-appropriate content.** Programmes that may impair the physical, mental or moral development of minors must only be made available in such a way so as to ensure that minors will not normally hear or see them.

## Key Action 11: Online Platforms

Online platforms are some of the biggest contributors to the European digital economy and possess substantial market power. However, as a UK House of Lords Select Committee recently remarked in its response to the Commission's plans to legislate in this area, this does not necessitate the creation of a platform-specific regulatory regime. Instead, the existing matrix of competition law should be sufficient to protect consumers from market abuse, with continued support, cooperation and vigilance from national regulators.

Since it first announced its plans to tackle market distortions perpetuated by online platforms last year, the Commission has yet to propose legislation in this area. However, a consultation was launched into the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy. This consultation broadly covered the social and economic role of online platforms; transparency; terms of use; ratings and reviews; the use of information by platforms; the relationship between platforms and their suppliers; and the conditions of switching between comparable services.

On 25 May 2016, the Commission issued a Communication setting out its conclusion that, broadly, no new regulation is required at this time. The Commission believes that existing rules (including, in terms of competition, consumer protection and data privacy) are sufficient. Instead, the Commission proposes a light-touch approach based on the principle of harmonisation and with an emphasis on self-regulation and co-regulation. For more details on this consultation, see our separate [Alert](#).

## Key Action 12: Personal Data

The EU views personal information as an essential commodity of the DSM and, as such, the Commission is determined to ensure that there is an adequate data privacy regime that reinforces consumer trust and confidence in digital services and e-commerce.



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The EU data privacy regime is already the subject of a significant review that extends beyond the concept of the DSM. However, in April of this year, the Commission launched a public consultation to seek stakeholders' input on a retrospective performance evaluation of the current law and the potential changes to these measures, with a view of presenting a new legislative proposal on ePrivacy by the end of 2016 in relation to the DSM.

The objectives of the consultation can broadly be described as follows:

- Ensuring consistency between the ePrivacy rules and the incoming General Data Protection Regulation.
- Updating the scope of the ePrivacy Directive in light of the new market and technological reality.
- Enhancing the security and confidentiality of communications.
- Addressing inconsistent enforcement and fragmentation.

## **Key Action 13: Cybersecurity**

Securing networks and information systems and protecting individuals from cybercrime is also central to ensuring that consumer confidence in the digital economy remains high. No proposed legislation has been announced yet, but the Commission has launched a recent consultation seeking stakeholders' views on the areas of work of future cybersecurity public-private partnerships, as well as on potential additional policy measures that could stimulate the European cybersecurity industry.

## **PILLAR 3: MAXIMISING THE GROWTH POTENTIAL OF THE DIGITAL ECONOMY**

The Commission believes that the EU needs a range of measures to ensure that European industries are at the forefront of developing and exploiting digital technology, automation, the Internet of Things, sustainable manufacturing and processing technologies to serve the markets of the future.

## **Key Action 14: European Free Flow of Data Initiative**

As data-reliant technologies begin to play a larger role in Europe's wider economy, the facilitation of free movement of data across the EU has become a vital policy area in terms of establishing the DSM. The Commission has committed to removing national restrictions on data flow in the hope that this will stimulate growth in areas such as cloud computing, Big Data, robotic process automation and the Internet of Things.

Building on this, the European Cloud Initiative was recently launched by the Commission. The principal aims of this initiative are to improve European data infrastructure to store and manage data; introduce high-speed connectivity to transport data; and promote the growth of high-performance computers for processing data.

The European Cloud Initiative will also make it easier for researchers, businesses and public services to fully exploit the benefits of Big Data by making it possible to move, share and re-use data seamlessly across global markets and borders, and among institutions and research disciplines.

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## Key Action 15: Standards and Interoperability

The Commission believes that the constant emergence of new services, applications and technologies necessitates the need for a degree of interoperability between systems – partly on the basis that interoperability is essential to allow businesses and consumers to mix and change suppliers. Standardisation in key areas by the Commission is therefore aimed at greatly helping this interoperability – without compromising innovation.

So far, the Commission's plan of action is two-pronged. First, the Commission plans to set standards in relation to core technologies such as: 5G, the Internet of Things, Cloud Services, and Cybersecurity. Second, the Commission plans to propose a series of measures to ensure research and development results are better linked to new standards, as well as for improved collaboration between standard-setting organisations in Europe and internationally.

No legislation has been released in relation to this key action.

## Key Action 16: eGovernment

eGovernment can broadly be described as the use of IT to improve the activities of public sector organisations. As the technological sphere continues to expand unabated, eGovernment policies have the potential to apply new technology to reduce the cost and administrative burden of processes and ultimately make public services more efficient. In Denmark, for example, electronic invoicing saves taxpayers on average €150 million and businesses €50 million a year.

The European Commission recently launched a consultation on a forthcoming EU eGovernment Action Plan 2016–2020. The consultation collected EU citizens' and businesses' needs and expectations from eGovernment services in the EU, and what public administrative bodies can or plan to deliver.

The new eGovernment Action Plan 2016–2020 aims to:

- modernise public administration;
- achieve the digital internal market; and
- increase engagement among citizens and businesses to deliver high-quality services.

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