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European Commission Announces E‑commerce Package

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As noted in earlier alerts from May and October, the European Commission is in the process of implementing a wide-ranging strategy to create a genuine 'Digital Single Market' across the EU. Essentially, the Commission's objective is to enable businesses and consumers across the EU to take advantage of the wide range of available services that are facilitated by new digital technologies, regardless of national borders. More controversially, certain interest groups and some national governments have viewed the 'DSM agenda' as an opportunity to increase the regulatory burden placed on new and innovative business models that are threatening incumbents' existing business models. So far, the Commission appears to be attempting to strike a balance between these two, largely opposing, objectives, rather than coming down firmly on one side or the other.

This uneasy balance is demonstrated by the Commission's hotly-anticipated announcement of a number of measures on 25 May. Specifically, the Commission is proposing to:

1. boost e-commerce by proposing new legislation to prohibit unjustified geoblocking and other forms of discrimination between customers, make cross-border parcel delivery cheaper and more efficient and improve consumer protection enforcement for online commerce;
2. update the rules that govern audiovisual media in a manner that more closely aligns the regulatory framework for broadcast and online services; and
3. study the role of online platforms, with a view to addressing areas of concern through greater self-regulation.

Boosting e-commerce

The Commission's first legislative proposal under this heading is a regulation to ban 'unjustified geoblocking', ie the practice by which website operators block or limit access to a site, or redirect customers to another site, based on their location. The wording of the proposed regulation is relatively straightforward, in that it simply states at Article 3(1) that "Traders shall not … block or limit customers' access to their online interface for reasons related to the nationality, place of residence or place of establishment of the customer". A similar prohibition applies to redirecting customers to a different "version of their online interface" without explicit prior consent (Article 3(2)). The only exception that appears to be anticipated by the regulation is situations where geo-blocking takes places "to ensure compliance with a legal requirement in Union law or in the laws of Member States". This is presumably to allow for the fact that such practices are often required to protect copyright in digital content.

The proposed regulation also contains a prohibition on applying different conditions of access to goods and services based on nationality, place of residence or place of establishment and a prohibition on discriminating on the basis of payment method used. Although the relevant articles do carve out situations where the service concerned involves the provision of content protected by copyright and the provision of services in the trader's premises, the proposal with respect to the supply of goods is rather strange. Mindful of the practical implications of imposing an obligation on all EU businesses to sell their goods across the EU, irrespective of their size and inclination to do so, the proposed regulation simply requires a business that does not ship its products to another Member State to give a consumer in that Member State the ability to order a product from it for delivery to the Member State where it is present or does deliver. How many consumers living in France would take up the option of ordering a product from Germany and getting it delivered to Austria remains to be seen… In a sign of the power of publishers and physical booksellers, the proposed regulation also contains a specific exception allowing retailers to continue to sell books at different prices based on customer location, where this is required by national book price fixing laws.

In a second legislative proposal, the Commission is aiming at increasing price transparency for cross-border parcel services and increased regulatory oversight, to address the fact that consumers and businesses often

face much higher costs for cross border delivery compared with prices for delivery within the same country. Prices also vary widely according to the country involved. Although this proposal is likely to prove less controversial than the geoblocking regulation, its reliance on softer measures to encourage competition may not prove effective in the face of resistance by local postal monopolies. Recognising this risk, the Commission has promised to take stock of progress in 2019 to assess whether further regulation is required to improve competition in this area.

Thirdly, the Commission proposes to revise the existing Consumer Protection Cooperation Regulation[1] to extend the enforcement powers of national authorities in online consumer rights matters, in the hope that increased consumer trust in online retail through more stringent enforcement at a national level will make consumers less reluctant to shop online and (by implication) cross-border. New powers will include the authority to order the immediate take-down of scam websites and access to domain registers to identify end-traders in the event of non-compliance with consumer protection law.

Audiovisual media

For the past 30 years, the provision of audiovisual media has been governed at an EU level by what is now the Audiovisual Media Services Directive (AVMSD).[2] The origins of that directive in the old media world are clearer from its previous name of the Television without Frontiers Directive. The key principle established by the AVMS Directive and its predecessors is that, with limited public interest exceptions, an audiovisual service that complies with the AVMSD and the national law of the Member State in which it is first broadcast must be made available in all Member States (the country of origin principle). Recognising the increased popularity of video-on-demand, IPTV and video sharing platforms, the Commission is now proposing incremental revision of the AVMSD, particularly with respect to the protection of children and clamping down on incitements to hatred. Although the Commission has rather controversially proposed that the AVMSD's regime mandating European production quotas be extended to online content providers, its proposal is less far-reaching than was originally feared. Noting this approach, Commission Vice President Ansip noted his desire for "the audiovisual and creative sectors to be powerhouses in the digital economy, [that should not be weighed] down with unnecessary rules. This means not changing existing rules that work [but] deregulating where necessary [and] extending certain obligations […] to improve user protection and reach a level playing field."

Online platforms

The Commission's review of the role of online platforms in the digital economy promised to be the most explosive element of the digital single market strategy when it was first announced, given its origin in calls by some European businesses and the French and German governments for new and widespread regulation to curtail the perceived market power of a small number of large American technology companies. The Commission's latest announcement will have therefore come as a welcome relief to businesses that rely on a platform-based model, with the Commission limiting itself to supporting industry-led movement towards self and co-regulation to ensure "responsible behaviour". While the Commission has promised an additional "fact-finding exercise" on a range of issues raised by its earlier consultation, including regarding the level of transparency over access terms, the next step on that front will simply be a further announcement in "spring 2017". In the meantime, the Commission's Communication on Online Platforms and supporting Staff Working Document make interesting reading for those with an interest in the area.

Conclusion

While the measures announced on 25 May fall short of what was in prospect a year ago in certain key respects, this is probably no bad thing, given the scope for ill-judged regulation to choke off the very innovation that the digital single market initiative was supposed to promote. Nevertheless, implementation of what has been proposed raises a number of challenges and fundamental questions remain to be resolved, most notably the extent to which underlying copyright law will be revised to take account of online reality. It is also important to remember that these are simply legislative proposals from the Commission. As a result, they still face a long and tortuous path through the Parliament and Council before they can come into force. Although the Parliament hailed the proposals as "a step in the right direction", much still remains to be resolved in the months and years ahead.

Notes

1. Regulation (EC) No. 2006/2004/
2. Directive 2010/13/EU.

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