

May 21, 2015

On 6 May 2015, the European Commission (Commission) finally unveiled its plans for a wide range of measures designed to create a functioning Digital Single Market in the EU. Attention is therefore now switching to how the measures will be implemented and what this means for businesses operating in the EU.

The achievement of a meaningful single market for digital services was identified as a key policy objective by Commission President Juncker during his candidacy and accordingly became a key priority for the new Commission when taking office in November last year. The importance of this initiative was reflected in the new Commission's structure, with a Vice Presidential role (held by former Estonian Prime Minister, Andrus Ansip) being created specifically to lead policy in this area.

The creation of a single internal market, characterised by the free movement of goods, services, capital and businesses, is a fundamental objective of the EU. There is a widespread concern, however, that the rules of the single market, which were originally developed primarily to facilitate the cross-border sale of goods, have failed to adapt to the modern economy. In particular the movement from physical to digital business models (which are inherently borderless) has highlighted the continued existence of national barriers to cross-border service provision across the EU's 28 Member States that make it harder for digital businesses to exploit the enormous potential of the single market. Such barriers can also lead to consumer dissatisfaction, for example when expectations of easy access to digital services, regardless of location, are not met in practice.

According to figures cited by the Commission, removing these barriers could contribute as much as €415 billion to European GDP. At a time of sluggish economic growth, when European businesses appear to be lagging behind their American peers in developing online markets and the European project has at times struggled to demonstrate its value to European citizens, it is easy to see why the Digital Single Market initiative has gained widespread support within the Commission, Parliament and Member State governments.

The Commission has announced 16 areas of action under the Digital Single Market heading, which it is aiming to deliver by the end of 2016. These areas of action, which are described in more detail in a 20 page Commission communication and accompanying 109 page Staff Working Document, are grouped under three broad headings or 'pillars', as follows:

I. Better access for consumers and businesses to digital goods and services across Europe

1. Proposing new rules to promote cross-border e-commerce, including harmonising EU contract rules and consumer protection for online purchases;
2. Reviewing the Regulation on Consumer Protection Cooperation to facilitate more rapid and consistent application of consumer rules;
3. Improving cross-border parcel delivery, to address current wide disparities between national and international rates;
4. Ending unjustified geo-blocking (defined as blocking access to websites or re-routing online inquiries based on a consumer's end location);
5. Launching a competition inquiry into the e-commerce sector;
6. Creating a more modern, "more European" copyright law to facilitate online access to works across the EU

and ensure cross-border portability of legally acquired content;

7. Reviewing the Satellite and Cable Directive to facilitate cross-border access to services;
8. Reducing the administrative burden of compliance with different VAT regimes for businesses selling across borders within the EU;

II. Creating the right conditions for digital networks and services to flourish

1. Overhauling EU telecoms rules on a wide range of matters including spectrum allocation and broadband investment;
2. Reviewing the regulatory framework for audiovisual media, including consideration of how existing rules should be applied to new business models;
3. Analysing the role of online platforms to assess whether new regulations are required;
4. Reinforcing trust and security in digital services, including by reviewing the e-Privacy Directive;
5. Proposing a partnership on cybersecurity;

III. Maximising the growth potential of the Digital Economy

1. Proposing a European 'free flow of data' initiative to promote the free movement of data in the EU;
2. Adopting a priorities plan for ICT standards and extending interoperability for public services; and
3. Promoting e-government and digital skills.

From this rather diverse list, it can be seen that the Digital Single Market is a rather broad umbrella term that covers initiatives ranging from legislative measures to more general studies and aspirational goals. On closer examination, many of the above 'measures' are in fact merely commitments to study issues, seek views and review rules, which may or may not lead to concrete action. The range of measures on the list also demonstrates a fundamental tension within the European institutions between those who view the Digital Single Market initiative as a genuine opportunity to remove regulatory barriers, and thereby give digital businesses greater freedom to innovate, and those who view it as an opportunity to extend existing regulations to such businesses and thereby 'level the playing field' to protect 'old economy' competitors from disruptive competition.

This tension is particularly evident in the proposal to investigate the role of online platforms, in relation to which the Commission has suggested that the "growing market power" of some (unnamed) platforms, and the way in which this is exercised, "raises a number of issues that warrant further analysis beyond the application of competition law in specific cases". Just what is meant by this (probably deliberately) opaque term remains to be seen.

The e-commerce sector inquiry

While many of the announced measures will take some time to emerge, the Commission's sector inquiry into competition in e-commerce was launched on the same day as the main Digital Single Market strategy. Notwithstanding this fact, the Commission has so far provided only high level information on the scope of the inquiry.

The Commission has the power under Regulation 1/2003 to conduct sector inquiries where the level of trade between Member States, rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the internal market. Although Regulation 1/2003 does not give the Commission any powers directly to address any competition concerns identified by a sector inquiry, such inquiries can serve as a prelude to targeted enforcement of the rules of the Treaty on the Functioning of the

European Union (TFEU) that prohibit anticompetitive agreements (Article 101 TFEU) and the abuse of a dominant market position (Article 102 TFEU). As such, sector inquiries are essentially fact-finding exercises, as well as an opportunity for the Commission to develop its thinking on the scope for competition enforcement in a priority area and a signal of future enforcement intent (or, in the words of the Competition Commissioner, a "token of resolve").

According to the limited information released by the Commission so far, the sector inquiry will not extend to every potential competition issue that could conceivably arise in the e-commerce sector but will rather focus on identifying the prevalence of contractual restrictions that may hinder cross-border e-commerce within the EU. Based on the Commission's press release launching the inquiry and public comments by the Danish Competition Commissioner, Margrethe Vestager, the Commission appears to be particularly concerned with restrictions on the cross-border sale of goods that are most commonly sold online "such as electronics, clothing and shoes". Such restrictions could arise, for example, from outright territorial exclusivity provisions in distribution agreements or restrictions on resellers' use of the internet to sell goods.

This relatively narrow focus is interesting. It has been clear since the early days of European competition law that outright territorial sales bans will almost always be unlawful. Since the Commission's last update of the Vertical Restrictions Block Exemption Regulation and the related Guidelines on Vertical Restraints (the Guidelines) in 2010, as well as the subsequent judgment in 2011 of the European Court of Justice in the *Pierre Fabre* case, it has also been clear that outright bans on internet sales (or equivalent measures such as applying discriminatory conditions to such sales) are highly likely to infringe EU competition law, since they are treated in law as a *de facto* restriction of cross-border sales.

While a sector inquiry is not therefore needed to clarify the legal position of such restrictions, it may help to uncover instances where they continue to be used by suppliers. The inquiry also presents a potentially valuable opportunity for the Commission to revisit issues that were left unresolved in the Guidelines, and that have not been settled by subsequent EU-wide enforcement, such as the extent to which brands operating selective distribution systems are entitled to ban authorised resellers from using online sales platforms to reach consumers or to exclude pure-play online retailers from their networks. Although some national competition authorities have taken action against such restrictions, which have also been subject to national litigation in some instances, the overall picture is mixed and is likely to benefit from consideration at an EU level.

National-level enforcement action against more complex issues related to vertical agreements, including the use of best price guarantee clauses by online hotel booking sites and of 'most-favoured nation' clause in other contexts, has had mixed, and sometimes contradictory, results. Notwithstanding the likely temptation for the Commission to clarify the law in this area, such issues do not currently appear to form part of the inquiry.

The Commission will also examine limitations on cross-border access to digital content, for example through the use of geo-blocking technologies. The issues raised by territorial restrictions in the distribution of digital content are more complex and less clear-cut than restrictions on the sale of goods, given the role of copyright law and the fact that distribution along national lines continues to underpin many content exploitation models. While it may well be frustrating for the Competition Commissioner to be prevented from accessing a Danish online TV service in Belgium, even though she has paid for it in her home country, most consumers continue to purchase and consume digital content in a single country. Also, although the current situation is clearly not ideal, it has still proved possible for digital content businesses to roll out their services on a pan-European basis over time and the take-up of such services is growing rapidly. The interaction between the sector inquiry, ongoing enforcement cases in the sector and the preparation of new legislative measures on copyright reform and geo-blocking will also raise significant challenges and introduce additional complexity.

So far, the Commission seems to be glossing over the fact that the relative lack of cross-border e-commerce (as opposed to e-commerce taking place within a single Member State) may stem more from consumer preferences, the (perfectly lawful) unilateral decisions of businesses to focus on selling in a single country and the regulatory barriers such as differential VAT rates that may deter businesses from selling across borders. Since such barriers are being tackled by other Digital Single Market initiatives, the

main significance of the sector inquiry may be that it appears to herald a shift in enforcement activity with respect to vertical agreements back towards the Commission, in contrast to the position over the last decade whereby the enforcement of EU competition law in this area has been largely left to the national competition authorities of the Member States.

Next steps

Companies that are active in the e-commerce sector, including manufacturers, broadcasters, online retailers, content rights holders and online platforms, can expect to receive detailed questionnaires from the Commission in the next few weeks. While responses are likely to be voluntary in the first instance, the Commission has the power to require responses should it feel this is warranted and may even launch on-site inspections or 'dawn raids' to gather specific evidence.

The Commission is not expected to publish its preliminary report until mid-2016, with its final report being due in early 2017. In the meantime, the likelihood of heightened enforcement activity in the sector means that consumer-facing online businesses operating in the EU should review their contracts and practices to ensure compliance with European competition law.

As far as the other Digital Single Market measures are concerned, each will now move forward at its own pace. While the Commission has given an overall target for delivery of the entire Digital Single Market package of the end of next year, this is likely to prove challenging, given the complexity of the package and the need for the Commission to gain the support of the Member States (acting via the European Council, which is due to discuss the Commission's proposal at its meeting of 25–26 June) and the European Parliament. Past experience with reform proposals in areas such as telecoms rules, data protection and copyright is not encouraging.

The Digital Single Market initiative has been hailed by some as a much needed liberalising measure to facilitate future digital growth and innovation by breaking down barriers and removing unnecessary red tape, while simultaneously being viewed by others as an opportunity to protect European businesses from (mainly American) competition. (It has even been described by one commentator as a declaration of "war against the internet" by the EU.) As noted above, this apparent contradiction to a degree reflects an internal disagreement over objectives within the European institutions, as well as within and between national governments and across society at large. Indeed, this tension was apparent at the Commission press conference launching the initiative, with Vice President Ansip stressing the goal of helping home-grown technology companies to enable them to "scale up not move out", while German 'Digital Economy and Society' Commissioner Oettinger, with whom the Vice President shared the rostrum, emphasised that the measures would return Europe's "digital sovereignty" and "level the playing field" with US companies. The cacophony of voices emanating from the Parliament shows an even wider range of views across MEPs.

This apparent confusion over ultimate goals is reflected in the breadth and complexity of the measures themselves, which appear to have been put together in a way that ensures that both sides of the debate are able to interpret the Digital Single Market initiative in a way that supports their objectives. Which side ultimately wins out remains to be seen. While it is hard to see how this internal contradiction can be maintained without threatening the entire exercise, it should also be borne in mind that horse-trading and compromise is built into the European legislative system. If the vision of a Digital Single Market is to become reality, however, Europe will at some point have to make a choice.

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