Cooley

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Introduction

The European Commission's Digital Single Market (DSM) strategy is a wide-ranging initiative aimed at creating better access for consumers and businesses to digital services across Europe (for more details see this Cooley alert). Indicating the frustration felt within the Commission at the barriers imposed by a patchwork of often divergent national laws that persist across the EU's 28 Member States, it has promised "tearing down regulatory walls and moving from 28 national markets to a single one", leading to annual benefits of up to €415 billion for the EU economy.

Nevertheless, press reports on the launch of the DSM strategy earlier this year were accompanied by rather lurid headlines, variously claiming that Europe "hates Silicon Valley", "hates American tech companies" and "hates US Internet giants". Although Commissioners have taken steps to dispel such concerns, including by personally visiting Silicon Valley in recent weeks, the possibility of intervention in markets to create a more 'level playing field' remains an explicit Commission objective. As a result, there is certainly a risk that the Commission's laudable goal of achieving a fully-integrated EU-wide digital marketplace will in fact provide cover for the introduction of new regulations that may make it harder for technology companies to do business in Europe, irrespective of their national origins.

Implementation of the DSM strategy remains at an early stage. As a result, concrete legislative proposals have not yet been put forward. The launch on 24 September of two new Commission consultations—on the regulatory environment for 'platforms, online intermediaries, data and cloud computing and the collaborative economy'; and 'geo-blocking', respectively—give a good indication of the areas of focus.

While the Commission has expressly identified the geo-blocking consultation as a precursor for legislative proposals, the outcome of the other consultation (referred to in this note as the 'platforms consultation', for simplicity) is less clearly defined, reflecting its wider scope. Given the importance and prevalence of platforms in the online world, and the often highly vocal criticism from some quarters in the EU of the disruptive impact of (predominantly American) platform-based providers of sharing economy services in particular, it is perhaps unsurprising that this specific aspect of the DSM strategy has attracted a high level of attention. As a result, it is particularly interesting to see the questions asked by the Commission on this topic.

Platforms consultation

The 46-page platforms consultation document actually covers four discrete topics:

- online platforms;
- liability of online intermediaries;
- facilitating the free flow of data and use of cloud computing; and
- the collaborative economy.

1. Online platforms

The first part of the consultation questionnaire is essentially an information-gathering exercise, with the Commission posing a number of general questions concerning the role of online platforms and issues faced by their providers and users. The consultation document defines an online platform for these purposes as "*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*." This very broad definition encompasses a wide range of online services, including general search engines, specialised search tools, news aggregators, online marketplaces, music and video sharing platforms, payment systems, social networks, app stores, gaming sites and sharing economy services, with internet access provision being the only activity specifically excluded from the scope of the questionnaire. Depending on how 'value' is defined, even dating sites and apps could be included. In other words, a large proportion of the online and app

economy comes within the scope of this review.

The Commission's questions cover:

- the social and economic role of platforms;
- platform transparency, for example with respect to terms of use and methodology for presenting search results;
- provision of information by platforms (e.g. concerning the use of data collected from users and pricing);
- the relationship between platforms and suppliers, traders, app developers and holders of rights in digital content, including the extent to which such businesses may be dependent on platforms, issues faced by owners of digital content, constraints that may currently prevent platforms extending their activities across the EU and the potential for improving the relationship between platforms and suppliers by additional regulation;
- constraints on the ability of consumers and traders to move between platforms; and
- problems relating to access to data experienced by users of online platforms.

Overall, the questions are rather general in nature, with the Commission's main objective appearing to be to verify the extent to which issues that have been raised with officials (particularly by those whose commercial interests may be harmed by the expansion of platforms) arise in reality. What is less clear is the extent to which identification of any issues may justify additional regulation, especially given the fact that at least some of the practices covered in the questionnaire are already amenable to review under existing rules relating to, for example, data protection, consumer contracts or antitrust. (It is notable, for example, that there is a significant overlap between some of the issues covered, including search methodology, parity clauses and platform dependency, and live Commission antitrust investigations.)

2. Tackling illegal content online and the liability of online intermediaries

The second section of the platforms consultation is much more specific, focusing on the question whether the ability of online intermediaries that passively transmit, store or host data to limit their liability for issues related to that data, as provided by the 2000 E-Commerce Directive, should be removed or amended. In particular, the Commission appears to be looking for evidence that the limitation may be over-generous to intermediaries and hence should be revised to create a more 'level playing field' with other market participants.

3. Data and cloud in digital ecosystems

The penultimate section of the platforms consultation focuses on Commission initiatives to tackle restrictions to the free movement of non-personal data in the EU and the development of a 'European Cloud'. On the first of these topics, the Commission is looking for information on restrictions on the free movement of non-personal data within the EU and suggestions of ways in which these could be addressed. (The free movement of personal data being the subject of separate legislative action, under the new General Data Protection Regulation.) The second part of this section concentrates on the potential for encouraging the adoption of cloud computing services in the EU, including consideration of how consumer and business confidence in such services can be increased. Questions concerning the ease of switching cloud provider and providers' bargaining power create some ambiguity, however, over whether (at least for some stakeholders) the 'European Cloud' may be as much about helping European cloud providers win market share from their American competitors as facilitating greater use of cloud services by European businesses.

4. The 'collaborative economy'

The final section of the platforms consultation questionnaire considers issues raised by the 'collaborative economy' (which appears to be the preferred EU term for what is more usually referred to as the sharing economy). The consultation defines this as linking "*individuals and/or legal persons through online platforms (collaborative economy platforms) allowing them to provide services and/or exchange assets, resources, time, skills or capital, sometimes for a temporary period and without transferring ownership rights*." The questions are general in nature and appear to be aimed more at improving the Commission's understanding of the issues raised by sharing economy platforms; their effect on suppliers, innovation and consumer choice; and the regulatory environment in which they operate. Based on the questions asked, the Commission appears to be particularly interested in the impact of the collaborative economy on transport, tourism, accommodation, the audiovisual sector and professional services.

This focus presumably reflects the explosive growth of certain ride-sharing and accommodation sites and the

attendant backlash from incumbents. Consistent with this, the Commission appears to be particularly concerned with ensuring that there is a 'level playing field' between providers in the collaborative economy and traditional providers, by exploring whether specific legislation is required (without specifying whether this would be to assist or constrain sharing economy services) or whether the focus should be the improvement and enforcement of existing rules.

Geo-blocking consultation

'Geo-blocking' (i.e. a range of practices by which businesses block access to certain websites or content on the basis of a user's location) tends to be viewed as a particularly tangible challenge to the concept of a single EU-wide market in goods or services. Commission Vice-President for the Digital Single Market Andrus Ansip has described geo-blocking as fundamentally incompatible with the concept of an internal market, whereas Digital Economy Commissioner Günther Oettinger calls it "*one of the most visible manifestations of non-Europe*". It is therefore unsurprising that the Commission has identified such practices as a central target of the DSM strategy. For example, geo-blocking is a focus of the Commission's e-commerce antitrust sector inquiry, which was launched back in May, as well as ongoing antitrust enforcement cases.

The geo-blocking consultation questionnaire is shorter than the platforms questionnaire and is primarily concerned with gathering information on difficulties faced by those seeking to access information, or to shop for goods and services, across borders in the EU. The questionnaire asks for examples of specific geo-blocking practices, information on the impact of such practices upon consumers and businesses, whether SMEs should be exempt from any regulatory measures limiting geo-blocking, whether implementation of any policy response would be more effective at national or EU level and which bodies should have responsibility for enforcement of any new measures.

The consultation is intended to inform possible legislative changes, including revision of the e-Commerce Directive and Article 20 of the Services Directive. The latter already prohibits discrimination in the provision of services on the basis of place of residence (albeit subject to broad exceptions). The use of geo-blocking to limit access to digital content that is protected by copyright, such as movies, music and games, is outside the scope of this consultation, since it is being addressed by separate initiatives aimed at reforming European copyright laws.

Commentary

The deadline for replies to both consultations will be 12 weeks from the release of the questionnaires in all 24 official languages of the EU. Although the clock is not yet running, since the questionnaires have not yet been translated into every single official language, the Commission has indicated that the deadline is likely to expire late in December. While responses may be submitted in any official language of the EU, the Commission has tactfully indicated that responses in English, French or German are likely to be processed more quickly.

These questionnaires are just part of a flurry of consultations recently initiated by the Commission relating to the DSM strategy. The day before these two consultations were launched, the Commission initiated a consultation on technical standards and interoperability, while the following day saw the launch of a consultation on modernising value-added tax for cross-border e-commerce. These are in addition to ongoing consultations on revising the Cable and Satellite Directive and the Audiovisual Media Services Directive and a wide-ranging review of the EU telecoms regulatory framework.

Notwithstanding this deluge of consultations, it is difficult at this stage to predict quite what the result of all this activity will be (apart from in one or two specific areas where focused reviews of existing laws have been rolled up into the DSM strategy). While it is clear that the Commission is determined to break down barriers to trade within the EU, including through passing new EU-wide legislation in at least some areas, much of the detail remains unclear.

This uncertainty is in large part due to the inherent tension between the two motivating forces behind the entire DSM strategy. While public comments by Commissioners have largely focused on the need to address consumer and business dissatisfaction with the fragmented nature of digital markets in the EU and the desire to make it easier for businesses of all sizes to use technology across the EU, aspects of the Commission's strategy indicate a more defensive motive, namely to protect incumbent European businesses from disruptive competition from new rivals (which often happen to be from the US). Hidden behind the catch-all call for a more

'level playing field', which is often heard by Commission officials in DSM-related discussions, is the fact that, in many markets, traditional business models are subject to extensive EU and national regulation that may not apply to new disruptive business models. Such regulation may specify, for example, the amount of local language content that must be shown by a broadcaster, the type of vehicle that a taxi operator must use or minimum safety standards for hotels. The question whether the best response to such disparities may be to reduce the level of existing regulation on incumbents, rather than impose additional regulations on disrupters, is in many ways a philosophical one but one that will ultimately need to be addressed by the Commission once all the consultations are complete.

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