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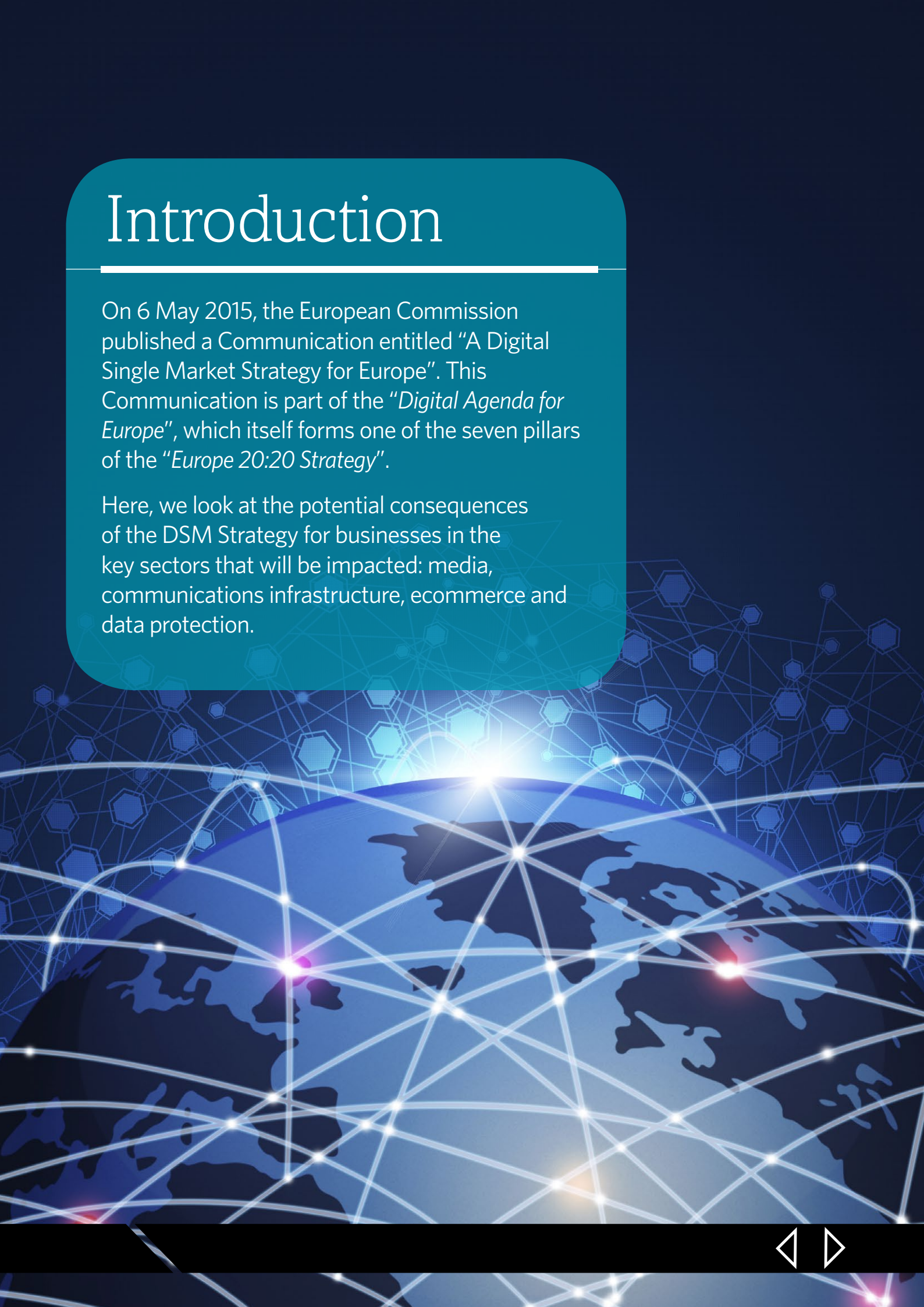
What does the DSM Strategy mean for businesses?

Introduction

On 6 May 2015, the European Commission published a Communication entitled "A Digital Single Market Strategy for Europe". This Communication is part of the "*Digital Agenda for Europe*", which itself forms one of the seven pillars of the "*Europe 20:20 Strategy*".

Here, we look at the potential consequences of the DSM Strategy for businesses in the key sectors that will be impacted: media, communications infrastructure, ecommerce and data protection.



1. What does it mean for media businesses?

Fieldfisher issued a report on the DSM following the EU Commission's objective to streamline EU Copyright Law. The report was based on feedback from our Media Crammer session on 3 February 2015. Attendees included representatives of TV broadcasters, film producers, intermediaries and others, all with different takes on the EU Commission's agenda.

The results from the survey were fascinating, with the following being the highlights:

(a) 78% of attendees believe the market should be left to address any need for reform: they would like to create and foster industry initiatives where market operators can experiment with new business models and respond to the fast moving evolution of the digital market place.

(b) A substantial majority were against a single unitary copyright title, to substitute the current systems of national copyright titles.

(c) 70% believe geo-blocking in the online distribution of audio-visual content is necessary, saying restrictions on territorial licensing would be a hindrance to business models, jobs and diversity of content in the industry.

In summary, it appears that the creative industries are concerned that reform of the kind advocated by the Commission may disrupt the market conditions required to enable a healthy environment for the creation of high quality content.

For further information from the survey and to download the report itself, please click here.

As anticipated by the report, the Commission released its Communication entitled "*A Digital Single Market Strategy for Europe*" on 6 May 2015. Announcing the Commission's DSM Strategy, Jean-Claude Juncker repeated his vision of "*pan-European…digital services that cross borders…*"

The Commission's Communication is a strategy paper, so is short on specific detail, but gives a clear roadmap for the direction its initiatives will take.

It covers a wide range of initiatives, from consumer protection to digital infrastructure and, of course, the breaking down of geographic barriers. They are grouped on what the Commission refers to as three *"pillars"*: better access, creating conditions for digital networks and services to flourish and maximising growth.

Almost all the initiatives will have an impact on the media sector: for example initiatives to drive digital infrastructure will have the indirect benefit of allowing greater and faster access to media content across Europe, enhancing the media sector's online audience.

In terms of specific initiatives that directly affect the media sector, the Communication reiterates the Commission's view that unfair discrimination against consumers when they try to access content online in the EU needs to be prevented (and that this discrimination can come in the form of geographical location), with a promise this year to make a proposal covering harmonised EU rules for online purchases of digital content and to make legislative proposals in the first half of 2016 to end unjustified geo-blocking.

The Commission also indicates its desire for a more harmonised copyright regime "*which provides incentives to create and invest while allowing transmission and consumption of content across borders*" indicating that it will make legislative proposals before the end of 2015. This will include addressing the portability of legally purchased online services and ensuring cross-border access to legally purchased online services, although the Communication adds the following qualification: "*whilst respecting the value of rights in the audiovisual sector*." The Commission will also look at extending the Cable and Satellite Directive (which addresses copyright in relation to cross border transmissions) to online transmissions and examine whether changes are needed to the way in which the Audiovisual Media Services Directive applies to traditional and new media services.

Whilst being wary of measures that might undermine the existing economic model for content licensing in Europe, industry players may take some comfort from the fact that the Commission accepts that there could be some cases of justified geo-blocking and that there is a balance to be struck between greater access and the incentives to create and invest. They might also take comfort from phrases such as "*whilst respecting the value of rights*" and Gunther Oettinger's (Commissioner for the Digital Economy and Society) comment that the proposals will balance *"interests of consumers and industry"*.

One measure that will likely be music to the ears of many media sector businesses will be the commitment before the end of 2015 to review the need to improve measures to tackle illegal content on the internet.

In summary, the Strategy continues a direction of travel already sign-posted in previous statements and comments from the Commission, but does, at least, seem to leave open the opportunity to make the case for protecting legitimate business interests to some degree in the process of freeing up the digital market. All interested parties should ensure they engage actively in the Commission's consultation process.

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UPDATE: On 25/26 June 2015, the European Council met in Brussels to discuss a number of key European issues – one of which was the portability of the DSM. Instead of "ensuring" cross-border access as was initially mooted, the Council shifted its emphasis by clarifying that the DSM will "facilitate" cross-border access to online material protected by copyright (paragraph 12b of the report). This may signal that concerns raised by the audio-visual industries with regard to the territorial licensing model are being taken into account to some degree.

2. What does it mean for communications infrastructure businesses?

Can the Commission turn the tide on network investment for European telcos?

The European Commission's recent publication on the DSM contains some interesting proposals which seek to stimulate investment in communications networks and, more ambitiously (and arguably controversially), to overhaul the current telecoms rules and create a "*level playing field*" between European-based mobile network operators and OTT players (such as Whatsapp, Skype and Facebook). A burning question at the heart of these reforms is the extent to which the Commission's objectives of enabling pan-European telecoms networks, digital services that cross borders and a wave of European start-ups will be reflected in proposals for more progressive and "*light-touch*" models of regulation aimed at benefiting all digital companies or are hampered by individual Member States which want to protect outmoded forms of regulation that are used to raise barriers against US tech giants.

The Commission has for some time been concerned about the level of investment in the EU's communications and broadband networks: a decade ago, the EU accounted for one-third of the world's communications infrastructure capital expenditure. That amount has fallen to less than one-fifth today. Americans, on the other hand, account for 4% of the world's population, but enjoy one-fourth of the world's broadband capex. In fact, per capita investment in the U.S. is twice that of Europe, and the gap is growing: the American broadband approach of market-led, technology-neutral, infrastructure-based competition has won over the EU approach of managed access and unbundling. This dawning realization was reflected in Neelie Kroes' observations when the Connected Regulation was first published in 2013, that EU companies were not global Internet players and that 4G/LTE reached only 26% of the European population whereas in the US, one company (Verizon) reached 90% of the US population.

Reform of telecoms rules

The reform of the telecoms rules (which is due to take place next year) seeks to achieve the following:

- a consistent single market approach to spectrum policy and management;
- delivering the conditions for a true single market by tackling regulatory fragmentation to allow economies of scale for efficient network operators and service providers and effective protection of consumers;
- ensuring a level field for market players and consistent application of the rules;
- incentivizing investment in high-speed broadband networks (including a review of the Universal Services Directive); and
- a more effective regulatory institutional framework.

It is worth pausing to reflect on the second and third objectives in particular. The existing telecoms rules were created in 2002 at a time when the prevailing view was that communication services were intimately tied to the physical networks over which they operated.

This view was reflected in a set of regulatory classifications that have not passed the test of time, a situation which is further exacerbated by inconsistent application of the rules by national regulatory authorities.

A good example of the practical issues that this gives rise to is found in the diverse regulatory treatment within Member States of VoIP services. Most VoIP services will fall outside the definition of a publicly available telecommunication service and, depending on the extent to which the service offers connectivity to the PSTN, would be classified either as an electronic communications service or should arguably fall outside the ambit of telecoms regulation altogether (and be classified e.g. as an information society service under the E-Commerce Directive).

In practice, most Member States continue to apply PATS-style regulation to these services irrespective of whether the service meets the relevant criteria or alternatively create a unique regulatory classification that is not reflected in any of the Directives! So a business seeking to launch a pan-European digital service has to contend with a diverse, unpredictable set of regulatory requirements which arguably do not even reflect the nature of the service. One solution to these problems would be to introduce a "*country of origin*" rule similar to the one which applies to information society services under the E-Commerce Directive: at least businesses seeking to launch pan-European digital services would have a reduced level of regulatory uncertainty (although clearly the issue of protecting divergent consumer rights in Member States would remain). What is significant is that the proposed reforms will be introduced by way of a Regulation: the hope is clearly that this will give individual Member States less room to "*interpret*" the reforms and should lead to much-needed regulatory harmonisation.

The first essential step highlighted by the Commission is the adoption of the Telecoms Single Market package which the Commission anticipates will provide clear and harmonised rules for net neutrality and will seek to finally eradicate roaming surcharges (in particular for data).

Net neutrality

The main thrust of the net neutrality reforms is to prevent network operators who are vertically integrated in the content market from requiring content owners to pay a "*toll*" to use the higher speed networks that they offer to consumers (and to prohibit ISPs from blocking or discriminating against certain types of traffic).

Previously, the general approach of the Commission to concerns relating to net neutrality had been to:

- impose obligations of transparency on ISPs regarding their traffic management policies and the quality of their Internet access services;
- improve the ability of consumers to switch providers;
- consider applying traditional competition law principles to the problem; and
- if the above steps were unsuccessful, granting national regulatory authorities the right to impose minimum quality of service requirements "*in order to prevent the degradation of traffic and the hindering or slowing down of traffic over networks*".

The last limb above was the Commission's attempt to deal with a perceived threat of a "*two-tier*" Internet whereby content owners with the means to do so can pay ISPs for superior service levels rendering less-wealthy content owners and/or start-ups at a competitive disadvantage.

The latest version of the Connected Continent Regulation seems to be more lenient/permissive towards these "*traffic prioritisation*" deals provided the deals do not materially degrade the availability and quality of internet access services for other end-users. Questions remain as to how wide the right to offer "*paid prioritisation*" services will be: at present it looks like ISPs will be able to enter into *"paid prioritisation deals"* for any services other than Internet access services. This would appear to allow ISPs to begin to charge providers of services such as Facebook and Netflix for enhanced access to the bandwidth which they currently enjoy free of charge (as has happened in the US) and this will mean that new and smaller content providers may be foreclosed from the market. As a consequence, the definition of *"specialised services"* within the Connected Continent Regulation is likely to be hotly debated!

The Commission's traditional stance remains in respect of prohibiting internet access providers from blocking, slowing down, altering, degrading or discriminating against specific content, applications or services except where it is necessary to apply traffic management measures. Traffic management measures are only permitted to implement a court order, to preserve the integrity and security of the network and to prevent or mitigate the effects of temporary and exception network congestion (provided that equivalent types of traffic are treated equally).

Eradication of roaming surcharges?

A key (and much-trumpeted!) element of the original Connected Continent Package (which was released in September 2013) was the abolition of roaming charges when travelling in Member States by the end of 2015 - in effect allowing all mobile customers to *"roam like at home"*. In December 2014 BEREC published a report setting out its analysis of the impact of roam like at home (*"RLAH"*) which demonstrated that the removal of retail roaming surcharges across Europe was not currently sustainable or feasible in practice and that it was not possible at this stage to design a single sustainable solution for RLAH across Europe. Nevertheless, the Latvian Presidency published a roadmap for reform of roaming surcharges in January of this year which has formed the basis for a revised proposal put forward by the Council of the European Union.

The key items in the proposed text include:

- A basic roaming allowance has to be available for a minimum number of days per calendar year which allows a minimum daily consumption (yet to be quantified in terms of call-minutes) of regulated roaming voice calls made, regulated roaming voice calls received, regulated roaming SMS messages sent and a yet to be quantified number of megabytes of regulated data roaming services;
- Roaming providers have to publish and include in their contracts detailed information on how the basic roaming allowance is to be applied, by reference to its main pricing or volume parameters;
- If a roaming provider applies a surcharge for consumption of regulated roaming services in excess of the basic allowance:
- it must not exceed the maximum wholesale charges in terms of regulated calls made, regulated roaming SMS messages sent and regulated data roaming services;
- the surcharge cannot exceed the weighted average maximum mobile termination rates across the Union for regulated calls received;
- A wholesale roaming market review and proposed legislative reforms to apply from 30 June 2016.

Since the publication of the text, the Latvian Presidency of the Council has been given the mandate to negotiate with the EU Parliament on the fine detail of this proposal – so we continue to monitor its progress.

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3. What does it mean for consumer ecommerce?

28 Shades of Grey – Europe's Ray of Hope for dealing with the Digital Consumer?

In a Single Market, companies should be able to manage their sales under a common set of rules. But any business that has considered online presence across more than one EU Member State will quickly tell you Europe's digital regulatory and ecommerce landscape is far from harmonised. What's more, even in areas where there have been past attempts at harmonisation, gaps or national differences remain. In fact, conducting online business in Europe from a single platform is intrinsically difficult.

All too often an online business has to approach this multi-faceted conundrum with triage and a process of risk analysis assessing the consequences of non-compliance because full localisation and compliance with each and every local law is impracticable or uneconomic. Factor in the myriad of language, VAT and cultural differences and the rule calibration may either scale back launch plans or drive risk mitigation rather than compliance strategies.

The consequence is unsatisfactory: consumers lack the protection they are entitled to and the EU's single market cannot function. The DSM Strategy's own statistics indicate 61% of EU consumers feel confident about purchasing via the Internet from a retailer located in their own Member State, while only 38% feel confident about purchasing from another EU Member State. Of course currency and language differences can also impede trade; but the status-quo is sub-optimal if you aspire to be a uniform trading bloc and the market is increasingly moving online.

One more push for harmonisation

In the EU, today's regulatory landscape is hard to navigate even for EU based online actors. Any US based retailer or service provider discovering the rules and level or prescription and preponderance of consumer rights has a steeper learning curve. Not least when the existing platform was developed and is already successfully deployed in an online market subject to far lighter regulation.

Europe's DSM Strategy announcements raise the prospect of a tsunami of regulatory change for businesses dealing with the digital consumer. Not since the emergence of the Internet and .com have we seen so much EU rhetoric around B2C online regulatory reform.

Better online access for consumers and businesses across Europe

The first pillar of this Strategy targets *"better online access for consumers and businesses across Europe"*. The Strategy's wider intent should be welcomed as to break down the borders that currently exist in respect of online trade in the EU could potentially simplify operations, incentivise compliance and stimulate trade. After all, a long term objective for the European Union has been to build a level playing field with unrestricted commerce between Member States.

The announcements contained some significant headline grabbers (harmonising approaches on VAT, facilitating better cross-border parcel delivery and reform of copyright laws) but the Commission also prepared us for more harmonisation around online contracting. The Commission's rallying call is for *"free trade"* and the policy aspiration is clear: in a single market, companies should be able to manage their sales under a common set of rules.

Existing online transparency and distance selling rights but inconsistency

Some aspects of contract and online regulation have already been harmonised. Today, EU rules touch upon:

- Vendor identity disclosures and transparency around the online contract process;
- The information that should be provided to consumers before they enter into a contract; and
- The rules that govern a consumer's right to withdraw from the deal if they have second thoughts.

But, there is imperfect or no harmonisation around issues such as:

- The basics of consumer contract law;
- The remedies available if tangible goods are not in conformity with the contract of sale (there have been attempts to harmonise but certain Member States have gone further); and
- The remedies applicable for defective digital content purchased online (such as e-books, online games or in-app purchases for virtual goods).

In some instances, in the UK for example, specific national rights have been introduced (think the new Consumer Bill of Rights 2015) shortly to impose new remedies for consumers purchasing digital content and refreshing other statutory remedies. These only confuse the picture for an Ecommerce vendor targeting online EU sales and aspiring to operate uniform processes and systems. Each year we see more national rights, or specific online behaviours driven by national enforcement activity. There is no *"single"* online marketplace. The online actor faces 28 different consumer law environments.

Ambitious plans for a common European Sales law

The EU has long debated a common European sales law, one standardised approach for all 28 of its Members. This proposal which appears from time to time has frequently been buried in debate around the practicalities of adoption as well as political and cultural rhetoric. Back in 2011 the European Parliament published another version of just such a proposal (see COM(2011) 635, 2011/0284/COD).

As of today, in a cross-border transaction, pursuant to Article 6 of Regulation 593/2008 on the law applicable to contractual obligations (or Rome I as we all know it!), whenever a business directs its activities to consumers in another Member State, it has to comply with the contract law of that Member State. Additionally, in cases where another applicable law has been chosen by the parties and where the mandatory consumer protection provisions of the Member State of the consumer provide a higher level of protection, these mandatory rules of the consumer's law need to be respected. In essence, the consumer holds "*home advantage*" and the vendor has no choice but to conform to local mandatory rules.

Here's the rub. In its Work Programme for 2015, the Commission has stated that it will make an *"amended legislative proposal to allow sellers to rely on their national laws, further harmonising the main rights and obligations of the parties to a sales contract."* Just as the existing rules for privacy and data protection permit, an online vendor may soon be able to select a Member State and its laws as the applicable rules for all B2C dealings across the 28 Member States.

We don't have much insight into these plans as of today, but the Strategy indicates *"this will be done notably by providing remedies for non-performance and the appropriate periods for the right to a legal guarantee"*. In the future online traders may be subject to a single set of mandatory rules – the EU's *"country of origin"* principle logically applied in another context. A new framework where a vendor would no longer face differences in mandatory protections, product rules or labelling concerns. Don't cheer yet; thanks to the pre-existing Consumer Rights and Ecommerce Directives (assuming they remain unchanged), they'll still face some of the most complex transparency, disclosure and withdrawal rights enjoyed by consumers anywhere in the world.

So vendors can "forum shop" and avoid the most aggressive EU regulators?

With these proposals in mind, the immediate response of a savvy online business is a realisation they could establish in the Member State with the most favourable (or most benign) consumer regulators. Not so fast, aside from addressing the rules to make cross-border ecommerce easier, the Strategy aspires to "*to enforce consumer rules more rapidly and consistently*".

Proposals for a single omnipresent *"super-regulator"* appear to have fallen at the first political hurdle (though rumoured, they didn't even make it into the published Strategy). The Commission is proposing a review of the Regulation on Consumer Protection Cooperation. This Regulation already aims for cooperation between EU authorities (believed to be essential to ensure that consumer rights legislation is equally applied across the internal market and to create a level playing field for businesses). If these plans are successful (and accepted by those Members better known for their enforcement), there may less scope to avoid or evade sanction based on place of establishment. Practically, if this ambition does ever reach the statute books, we suspect it is inevitable that cultural attitudes, available resourcing for enforcement activity and political prioritisation will always play a role vis-à-vis the nature and manner of national enforcement.

The main take home is that this represents the ambitions of a new regime at the Commission and this is far from being new law. When faced with varying online sales rules from 28 different jurisdictions or a future single set of online rules for the entire EU – which would you choose?

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4. What does it mean for data protection?

In our view, data protection and privacy issues are a key part of these proposed reforms. There are four particular initiatives that arise from the European Commission's concerns about EU consumers' data protection and privacy rights.

Review of data collection practices by online platforms

As part of the DSM, the Commission is proposing a *"comprehensive analysis"* of online platforms in general, which includes anything from search engines, social media sites, ecommerce platforms, app stores and price comparison sites. One of the concerns of the Commission is that online platforms generate, accumulate and control an enormous amount of data about their customers and use algorithms to turn this into usable information. One study it looked at, for example, had concluded that 12% of search engine results were personalised, mainly by geo-location, prior search history, or by whether the user was logged in or out of the site. The Commission found that there was a worrying lack of awareness by consumers about the data collection practices of online platforms: most consumers did not know what data about their online activities was being collected and how it was being used. In the Commission's view, this not only interfered with consumers' fundamental rights to privacy and data protection, it also resulted in an asymmetry between market actors. As platforms can exercise significant influence over how various players in the market are remunerated, the Commission has decided to gather *"comprehensive evidence"* about how online platforms use the information they acquire, how transparent they are about these practices and whether through use of this information they seek to promote their own services to the disadvantage of competitors. Proposals for reform will then follow.

Review of the e-Privacy Directive

The e-Privacy Directive is currently a key piece of privacy legislation within the EU – governing the rules for cookie compliance, location data and electronic marketing, amongst other things.

At this stage, only very little has been said about this review in the DSM documents. All that we know is that the Commission plans to review the e-Privacy Directive after the adoption of the EU General Data Protection Regulations (due in late 2015-2016), with a focus on *"ensuring a high level of protection for data subjects and a level playing field for all market players"*. For instance, the Commission has said that it will review the e-Privacy Directive to ensure *"coherence"* with the new data protection regulations, and consider whether it should apply to a much wider set of service providers. It further states that the rules relating to online tracking and geo-location will be re-evaluated *"in light of the constant evolution of technology"* (Staff Working Document, p. 47).

Cloud computing and big data reforms

Cloud computing and big data services haven't escaped the grasp of the Commission either. The Commission sees these types of services as central to the EU's competitiveness. In its research, the Commission found that European companies are lagging significantly behind in their adoption and development of cloud computing and big data analytics services.

The Commission diagnosed a number of key reasons for this lag:

- EU businesses and consumers still do not feel confident enough to adopt cross-border cloud services for storing or processing data because of concerns relating to security, compliance with privacy rights, and data protection more generally.
- Contracts with cloud providers often make it difficult to terminate or unsubscribe from the contract and to port their data to a different cloud provider.
- Data localisation requirements within Member States create barriers to cross-border data transfers, limiting competitive choice between providers and raising costs by forcing businesses to store data on servers physically located inside particular countries.

The Commission are therefore proposing to remove what it sees as a series of *"technical and legislative barriers"* – such as rules restricting the cross-border storage of data within the EU, the fragmented rules relating to copyright, the lack of clarity over the rights to use data, the lack of open and inter-operable systems, and the difficulty of data portability between services.

Step up of cyber-security reforms

Cyber threats have led to significant economic losses, huge disruptions in services, violations of citizens' fundamental rights and a breakdown in public trust in online activities. The Commission proposes to step up its efforts to reduce cybersecurity threats by requiring a more *"joined up"* approach by the EU industry to stimulate take up of more secure solutions by enterprises, public authorities and citizens. In addition, it seeks a *"more effective law enforcement response"* to online criminal activity.

Although data protection and privacy issues may not have been the primary driving force behind the DSM Strategy, we should not overlook the potential impact that the DSM initiatives and investigations may have within this field. It is clear that several of the key DSM initiatives were borne out of an underlying concern by the Commission about consumers' data protection rights and the transparency of online data gathering practices.

Specifically, online platforms, cloud computing and big data services should be alert to the particular scrutiny that will be placed on their operations during the DSM investigations. Such organisations may want to keep abreast of any calls for stakeholder/public consultations on these issues. In due course, the Commission may release more detailed data protection & privacy requirements for these types of services than currently exist now, which may impact on their everyday operations and their commercial competitiveness within the market.

We will report in more detail on any developments once the DSM Strategy has progressed further.

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