

The Digital Single Market strategy: Focused. Ambitious. Effective?

Jean-Claude Juncker, President of the European Commission, made it clear when he took office that he wanted to complete a truly integrated European Digital Single Market ('DSM'). It has been earmarked as one of his top ten priorities, one which would transform the European landscape - bringing jobs, growth and investment, positioning Europe as a leader in the digital economy in an increasingly competitive global environment.

Marzena Rembowski, Director and leading the ICT practice at FTI Consulting in Brussels, and Miroslav Pospisil, Senior Consultant, summarise the Commission's key priorities, highlight its next steps and the challenges the DSM strategy is likely to face before it becomes a reality for business and consumers across the European Union.

In a regional economy that still remains deeply affected by the global financial crisis, the European Commission estimates that by 2019 implementation of the DSM Strategy could also contribute an additional €415 billion to European GDP and potentially create up to 4 million new jobs.

Announcing the DSM strategy in Brussels today, Vice-President for the Digital Single Market, Andrus Ansip, together with Commissioner for the Digital Economy and Society, Günther Oettinger, have outlined their strategy for 2015-2016. It is a highly ambitious roadmap which is likely to have a major impact across the EU and beyond, not just within the ICT sector but across the European economy and society. A string of reactions is to be expected from consumer organisations, bound to feel a little short-changed, and industry stakeholders, fearful of over regulation. The European Parliament, who prepared for this behind closed doors, will scrutinise the strategy in detail, with two Committees, IMCO (Internal Market and Consumer Protection) and ITRE (Industry, Research and Energy) battling out who will take charge of this strategy.

How much of the strategy will make it through will depend on the European Council and Member States' willingness for increased regulation. Given the examples set by the Telecom Single Market ('TSM') and the Cybersecurity Directive currently being negotiated, the Commission faces an uphill battle and will have to deploy all its diplomatic skills to ensure some real positive results. Lessons from the past should not be ignored.

The DSM strategy focuses on three main 'pillars':

1. **Better online access for consumers and businesses to digital goods and services across Europe**

The first pillar aims to tackle cross-border regulatory issues which would increase cross-border sales for businesses and provide greater access and protection for consumers.

2. **Creating the right conditions and a level playing field for advanced digital networks and innovative services**

The second pillar reviews the digital European environment, focusing on new telecom rules, audiovisual media services ('AVMS'), online platforms and e-Privacy.

3. **Maximising the growth potential of the digital economy**

The third pillar links the DSM strategy to more traditional industry sectors, promoting skills, the flow of data and proposing harmonised standards.



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1. Tackling cross-border online access to goods and services in Europe

By the end of 2015, the Commission plans to deliver in-depth reviews and/or legislative initiatives in five areas:

1. Cross border contracts for digital sales;
2. Geo-blocking - An action plan to end unjustified practices;
3. E-Commerce - a Competition sector inquiry (announced earlier in March by Commissioner Vestager – see separate FTI Consulting snapshot); and
4. Copyright - A legislative package for a modern regime
5. Review of the Satellite and Cable Directive

In 2016, the Commission will undertake a review of the consumer protection framework to ensure it is fit for the new digital age. This will include measures on price transparency for parcel delivery following self-regulation initiatives by the industry. It will also put forward legislative proposals tackling the different VAT regimes across the EU. This will fall under Pierre Moscovici's remit, the EU Commissioner for Economic and Financial Affairs, Taxation and Customs. Member States have previously regarded this as a national competence so we can anticipate some reluctance for the Commission to take a more active role.

Key points to note:

Cross border contracts for digital sales: Achieving a unified set of European contract rules for cross-border sales has always been a challenge for the European Commission. These new legislative proposals, led by Věra Jourová, the EU Commissioner for Justice, Consumers and Gender Equality, will focus on providing harmonised EU rules for online purchases of digital content. Her team will have to consider and balance renewed concerns by businesses and

consumer organisations, whether the rules will be the same for goods bought online and offline or whether a dual approach will be considered, providing increased legal uncertainty for those concerned.

Geo-blocking: Vice-President Ansip has made this one of his top priorities. He has repeatedly highlighted the incompatibility of geo-blocking with the idea of a true EU Digital Single Market. Details of how the issue could be addressed in a regulatory environment are still unclear, which should be a concern for both content providers as well as end-users. Proposals tackling the more commercial side of geo-blocking will focus on changes to the E-Commerce Framework^[1] and Article 20 of the Services Directive^[2]. This will bring heated debate and division from stakeholders across Europe. There will also be reluctance to re-open the Services Directive, a Pandora's Box.

The weakening of the territoriality of copyright has also triggered opposition as this is closely linked to the freedom of copyright holders to make contractual arrangements. While Ansip has been clear that the Commission is not proposing to abolish it, how he manages to tackle unjustified geo-blocking will be a hard sell to content providers, end-users and also Member States who perceive a threat to their cultural identity and diversity.

In recent debates in the European Parliament and in national election campaigns in the United Kingdom and Poland, some politicians have given a clear warning that a ban on geo-blocking would represent an advantage to US companies and threaten the EU's cultural diversity. Ansip has said that he does not expect a solution in the short term; it is such a pivotal element of a harmonised digital single market that it could quickly become its Achilles' heel.

E-Commerce Sector Inquiry: Complementary to the DSM strategy, the EU's Competition Commissioner, Margrethe Vestager has launched an e-commerce sector competition inquiry. In 2014 around half of all EU consumers shopped online according to the European Commission, yet only around 15% of them bought from online vendors based in another EU Member State. Several factors contribute to this, including language, consumer preferences and differences in legislation across Member States. Targeted companies could include holders of content rights, broadcasters, manufacturers, online traders of physical goods and companies that run online platforms such as price-comparison and marketplace websites. The first preliminary findings are expected to be published mid-2016.

DG Competition has not traditionally worked closely with other Commission services. However, DG CNECT, as part of its geo-blocking practices, will also look into gathering some similar data. The question remains whether we will see closer interaction between the services, or will DG CNECT carry on regardless of any findings by DG Competition?

Copyright: The DSM identifies digital content as a key driver for Europe's digital economy. Copyright reform is likely to be another major test for both Ansip and Oettinger, impacting a broad range of stakeholders including film producers and distributors, publishers, rightsholders, broadcasters, digital intermediaries and consumers.

^[1] Directive 2000/31/EC

^[2] Article 20 deals with 'Non-Discrimination' - Directive 2006/123/EC

While Ansip has been clear that the copyright proposal would not be accompanied by a pan-European licensing plan, this proposal is expected to address portability, cross-border access, exceptions, intermediaries and enforcement.

Announcing the DSM strategy Oettinger was clear that any proposal would have to strike a fair balance between users and content providers. This copyright package is highly ambitious and one wonders if Oettinger would be best to prioritise harmonising exceptions, which would provide a more solid base for future negotiations with the European Parliament and Member States on the rest of the package.

The proposals are expected to be published around the end of October.

2. A unified environment for digital networks and innovative services

The second pillar of the DSM Strategy is centred around establishing a level-playing field for advanced digital networks and services. This will involve a regulatory review which will focus on:

- An overhaul of the telecom rules;
- A review of the Audiovisual Media Services Directive;
- A comprehensive analysis of the role of online platforms; and
- A review of the e-Privacy Directive and the establishment of a cybersecurity contractual public-private partnership.

This second set of proposals contains some of the most controversial and challenging elements of the European Commission's DSM Strategy. The comprehensive analysis of the role of online platforms is planned for 2015 with the other elements all expected in 2016.

Key points to note:

Telecoms rules and spectrum - Back to the Future: With the political negotiations on the stripped down TSM package moving at a snail's pace, the ambitions set out in the DSM strategy ring a little hollow while we still wait for agreement on roaming and net neutrality to be finalised. It seems the lessons from the recent past have yet to be learned.

This DSM strategy set out key areas in which it will present yet another new telecom regulatory proposal, focusing on:

- Spectrum policy and management;
- The fragmentation of network operators and service providers;
- A level playing field for all market players;
- Investment in high speed broadband networks, and
- An effective regulatory institutional framework.

The Commission can expect a number of battles not only with the telecom industry, but also with Member States in particular, with regards to spectrum policy. It was one of the key elements which Member States took off the table in the current TSM package, clearly reinforcing the message that this area is for them to decide. However, the Commission will be pushing for a harmonised approach for the criteria for spectrum assignment and management.

Overall, this over-ambitious plan by the Commission will concern telecom operators but also the broader electronic communications

sector as a whole and the prospect of a long regulatory battle ahead for the coming years will not help in increasing confidence and growth in this area.

Audiovisual Media Services Directive: The Commission has clearly set its sights on the reform of this Directive, currently undergoing an assessment review to understand how the existing principles have improved the European audiovisual landscape and what issues are still ongoing. The European Parliament is also feeding through its views, which should impact on any proposal expected early in 2016, with a specific focus on the protection of minors and advertising rules.

Online platforms and intermediaries: Widely reported in the media across the EU and the United States, the Commission is launching an assessment of the market power of online platforms. It is being positioned as a fight against US big tech companies with Commissioner Oettinger claiming that Europe is now "*dependent on a few non-EU players world-wide*". Given the market share of major US online platforms, the possibility of platform regulation has raised significant concerns that the EU could be taking a more protectionist approach, reacting to increased pressure from France and Germany over the last year.

In its DSM strategy, the Commission highlights the central role that online platforms play in the European digital economy when it comes to data collection, but also highlights their role as innovators in the market, supporting smaller businesses to reach new markets. This approach paves the way for a long debate ahead between institutional stakeholders, industry and Member States.

Liability of online intermediaries: The Commission is looking at ways in which online service providers could also limit unlawful proliferation of copyrighted material and other illegal content (e.g. hate speech). At the moment, online service providers are obligated to remove illegal content only if they have been made aware of it or have changed it (the so-called '*mere conduit*' principle and the '*notice and action*' provision). Since the '*mere conduit*' principle has helped to foster growth in the digital economy, any major changes to the liability regime would push for a change in the current business model of online service providers and telecommunication companies.

Increased Trust and Security: On cybersecurity the Commission's main legislative programme is already in the pipeline, specifically the Network and Information Security Directive. One new initiative relates to the revision of the e-Privacy Directive which will be another challenge as it needs the Data Protection Regulation to be finalised beforehand, which is unlikely to happen until the end of 2015, despite the Commission's confidence.

3. Driving competitiveness and growth through digitisation

In its third pillar, the Commission set out a series of measures to maximise the growth potential of the digital economy. In 2015, the Commission is aiming to adopt a priority ICT standards plan, including standards in areas such as health, transport, environment and energy. Considering the shortage of digitally skilled workers, the Commission is continuing the initiatives already put in place, and will aim to strengthen digital training in any future initiatives. Trade unions and companies have an interest in working closely with the

Commission to ensure their members and employees will be able to keep up with the new demands of rapid technological developments.

Another initiative, set for 2016, relates to data ownership and tackling the free flow of data for reasons other than protection of personal data. Finally, the Commission will also launch a European Cloud initiative, promoting research in Europe

A new dawn or déjà vu?

The DSM strategy is essentially a roadmap, setting out ambitious plans which would impact the European digital environment. Is this roadmap fit for the digital age? Both Ansip and Oettinger have been saying repeatedly over the last few months that policy making needs to pick up the pace to be more in line with the fast changes in technology.

The structure of this strategy, a mix of initiatives and legislative proposals, is not new in Brussels and will not surprise stakeholders used to classic European policy processes. Is this strategy therefore bound to follow the steps of its once very ambitious predecessors, who failed to deliver in reality?

The structure of the new Commission needs to be taken into account. Contrary to the previous Commission who only had one Commissioner solely responsible for delivery and could only fight on so many fronts, this DSM Strategy will be managed and supported by a much broader team.

With clear support from Juncker, the Commission's DSM Project team is led by both Ansip and Oettinger and includes 13 additional Commissioners, all ready to take up the fight for their own agenda. This concerted and integrated approach might just get the job done.

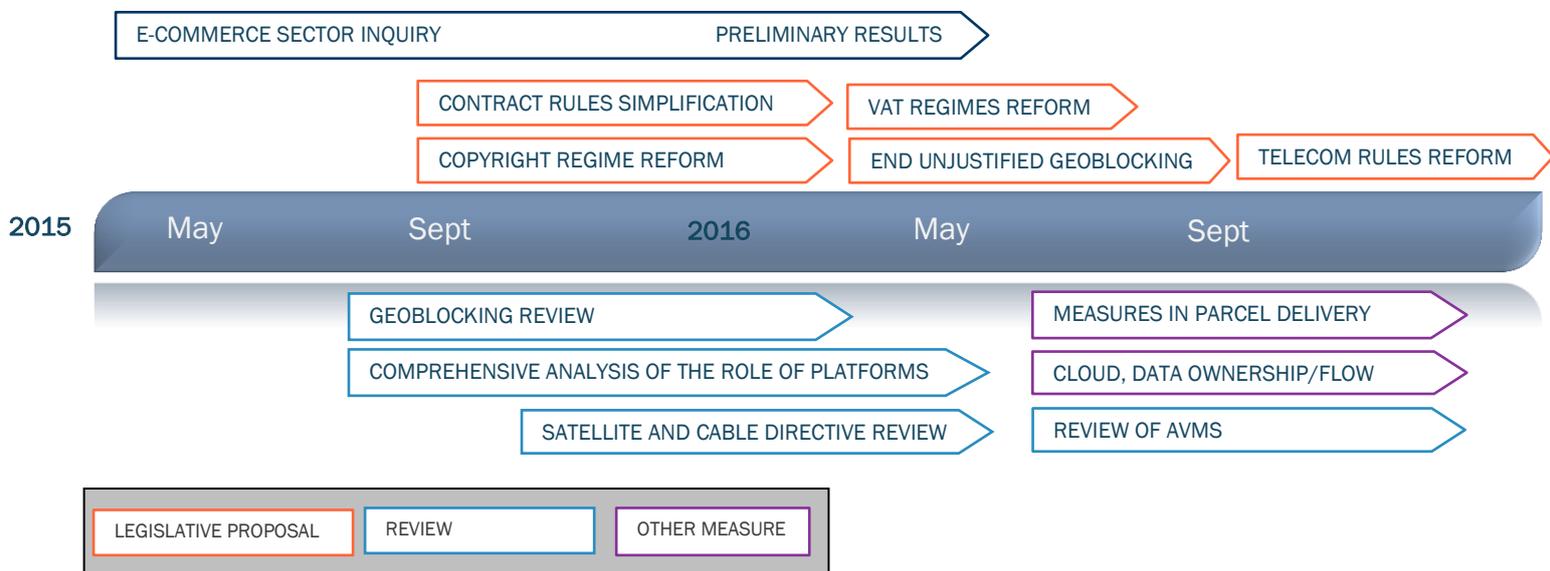
Today has shown that the Commission can deliver a strategy on time. What remains to be seen is whether it can effectively deliver each of its proposals in 2015 and 2016, starting with the very ambitious copyright package.

While compromise may be inevitable, especially considering the Member States' sensitivities, one of the main rationales behind the strategy is to provide the key tools to tackle the lack of competitiveness of the EU's digital economy. As is the case for any reform, certain industries will consider themselves losers, while others will welcome the proposed reforms.

The wide remit of topics to be addressed in the DSM strategy will clearly have an important impact on consumers, how businesses operate in the EU as well as many companies' global operations. Industry needs to engage now if they want to maintain a competitive advantage in Europe.

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European Commission's roadmap for completing the Digital Single Market



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