



The Digital Single Market mid-term review outlines the European Commission's plans until the end of its term in 2019.

The DSM review takes stock of the EU's digital policy actions over the past two years and is the last chance of the Juncker Commission to create its legacy.

Expect policy actions on cybersecurity, online platforms and the free flow of data by the end of 2017.

In parallel, the European Commission published the long awaited results of its competition inquiry in the e-commerce sector, paving the way for future enforcement action(s).

Outstanding or underwhelming?

Two years ago, the European Commission came up with a bold plan to make Europe a world leader in information and communication technologies: the Digital Single Market (DSM) Strategy. It pledged to give the EU the tools to succeed in the global digital economy, to make better use of the opportunities offered by digital technologies.

Halfway through the implementation of its strategy, the Commission congratulates itself for its bold approach to deliver tangible and noticeable benefits to the EU through digital policy, and for doing its share of the work through its legislative initiatives.

But in reality, the Commission has started with low-hanging fruit and has mostly delivered some quick, easy wins, aimed at reconnecting the EU with its citizens such as the abolition of roaming charges, the cross border portability of online content and the ban on unjustified geo-blocking.

Other initiatives are instead progressing slowly. Too progressive for Member States and not ambitious enough for the European Parliament, several bold projects to overhaul sector legislation – such as on copyright and telecoms law - are stuck in the gridlock that is typical of EU decision-making.

The review is therefore being used to apply pressure and - perhaps - to play the blame game: the Commission says the ball is now in Member States' and the European Parliament's court. It is now up to them to show political responsibility and implement the DSM

strategy that was agreed.

The Commission has also been criticized for its creative use of competition policy, as a way to short-circuit the legislative process. The e-commerce sector inquiry is the latest example of this approach, with a focus on high profile, political, competition cases.

What is the DSM Strategy?

The Digital Single Market (DSM) Strategy is a policy paper published by the European Commission on 6 May 2015. It outlined a plan to create a single European market with harmonized rules for digital products and services.

The DSM Strategy is one of the 10 priorities of the current European Commission led by Jean-Claude Juncker. It intended to boost European jobs and growth, to open up digital services to all citizens and strengthen business competitiveness in the digital economy.

The European Commission estimates it can unlock €415 billion in additional annual European GDP, €250 billion of which could be delivered during the Commission's current mandate ending in 2019.



The triple win

The Commission claims success for the delivery of what it calls its “triple win” for European consumers - three, soon to be implemented initiatives that are supposed to bring tangible, visible, benefits to European consumers. Those are :

- The abolition of retail roaming charges. Consumers will be able to travel the EU and use their phone without paying roaming surcharges as of June 2017.
- Cross-border portability of online content. Consumers will be able to enjoy films, music, sports, and broadcasts while on holiday or temporarily abroad.
- The ban on unjustified geo-blocking. Consumers will be free to purchase goods and services from providers in other countries without discrimination based on nationality or location.

The more substantial elements of the Digital Single Market Strategy, from the deployment of 5G across Europe to the revision of privacy rules for electronic communications or the overhaul of copyright law, may still take years to materialize.

The e-commerce sector inquiry results

In parallel to the policy work on digital issues, the European Commission’s competition department has been investigating potentially abusive practices in the e-commerce sector.

Two years and hundreds of questionnaires after starting an inquiry into the e-commerce sector in 2015,

the Commission has published the final results and outlined future actions.

The Commission’s findings assert that certain common practices in the online environment may be in breach of EU competition law.

For traders of consumer goods these controversial practices largely relate to selective distribution systems, enforced through contractual restrictions on pricing, platform bans, restrictions on the use of price comparison tools and exclusion of pure online players from distribution networks. Unexpectedly, the European Commission also identified the use of big data in e-commerce as a potential anti-competitive practice under certain conditions.

For digital content, the Commission highlights certain licensing practices, such as bundling of rights or the length of contracts, that make it more difficult for new players to enter the market and ultimately result in limited consumer choice.

As a result, new antitrust investigations will be launched targeting companies in the e-commerce sector, giving the European Commission a new opportunity to make use of its competition enforcement prerogative.

In parallel, the Commission will strengthen the dialogue between national competition authorities to ensure the consistent application of competition law in this area among the Member States.

The Commission also plans to review the framework for vertical selective

distribution agreements – a common practice in luxury and high end tech goods – and will use the inquiry’s results in its reform, set to start in 2022.

The whole e-commerce value chain will be impacted, from content rights holders to broadcasters, but also manufacturers, wholesalers and online marketplaces for both goods and services.

Competition: the alternative to policy- making

The European Commission has strong powers in competition policy allowing for swifter action than through legislative reform. The results of these investigations are therefore also likely to shape future digital policy.



Brexit and the Digital Single Market

The Digital Single mid-term review closely follows the triggering of Article 50 of the EU Lisbon Treaty, which launches the Brexit formal procedure. While the Commission wants to push for an ever more inclusive market among Member States, the withdrawal negotiations risk creating additional digital barriers.

The EU and UK will have to reconcile their diverging interests with the need to support the European tech industry (including the UK).

A key issue in the negotiations will be to prevent regulatory divergence in the field of data protection, and to ensure data flows to and from the UK. Data protection and the right to privacy are both enshrined in the EU's treaties which will make discussions difficult.

With Brexit, the EU also loses one of its digital champions, and the Commission may think that its time to push forward an ambitious reform agenda is limited.

The essence of the review

The DSM review also includes plans for new reforms, which could potentially have a great impact on business.

■ Cybersecurity

The increasing exposure of European businesses and citizens to cyberattacks have led the Commission to announce the review of its 4-year old cybersecurity strategy.

Work on cybersecurity standards, certification and labelling, to make ICT-based systems more cyber-secure, is expected.

The European Union Agency for Network and Information Security, which currently only acts as quasi think-tank, should get a new, wider, mandate. Expect the 10 year old agency to gain in influence and play a bigger role in standard setting.

These cybersecurity measures could pave the way for European cybersecurity standards. Companies will need to ensure those are adequate and do not diverge from those being developed in other parts of the world (i.e. USA).

■ Online platforms

While businesses often say that innovation does not rhyme with regulation, many have loudly called for more fairness in the platform economy, as platforms are more and more the enablers – or even gate keepers – of the digital economy.

In the DSM review, the Commission announces possible legislative action on unfair contractual clauses and trading practices in platform-to-business relationships.

The Commission also wants to address the issue of removing illegal content online and will issue guidance setting out when companies are liable for the content posted on their platforms.

Through these measures, the Commission wants to create a fairer and more predictable legal environment in the platforms ecosystem. This is likely to have an impact on any company running or using digital marketplaces and app stores.

■ The data economy

The data economy, one of Juncker's Commission's favorite causes, is at the center of the review. While a proposal to break down barriers to the free flow of data in the EU was expected, the Commission is even more ambitious than anticipated.

We can now expect a free flow of data framework that will not only support data flows in the EU, but also set out rules on the porting of non-personal data when switching business services, and on cross border access to data held in other EU countries for regulatory control purposes (think tax).

These measures are a double edged sword for companies: data localization is a burden that most want gone, but data portability can make it easier for customers to switch service providers, bringing (non-personal) data with them.



■ **Digitization of industry**

The Commission wants to support the digitization of a number of sectors. Smart mobility, e-health, financial services and energy are under the spotlight. The Commission is considering potential actions to ensure a smooth digital transition and has pledged to secure dedicated funding. Initiatives supporting the development of connected and automated mobility are to be expected by spring 2017.

Support from the Commission often means funding opportunities for companies. It is thus likely to put more money on the table for companies involving digital solutions in their business operations.

■ **Digital Skills**

For the European Commission the DSM is not just about regulation, but also about creating a tech-savvy workforce and population at large. This implies designing and supporting national tech literacy plans and digital skills trainings.

Business has a crucial role to play. Because of national budgetary restraints, business-led initiatives in this area are highly regarded by EU institutions, opening up many opportunities for corporate social responsibility and to develop a positive brand image.

The future of the DSM

With only half its term left to run, the Junker Commission is under pressure to deliver concrete results to EU citizens and business. So far, priorities were set and bold strategies were developed but they have led to limited outcomes.

While some of the Commission’s objectives are starting to come to

fruition, such as the so-called “triple win for EU consumers,” more pressing challenges remain unaddressed.

There is a mismatch between the ideals and the real needs of citizens and businesses. While it can be useful to access your online content while on holiday, it is hardly life changing. The Commission, by focusing on these types of initiatives, is perhaps not prioritizing well.

In the current context of rising cybersecurity threats and increasing measures by countries to restrict the free flow of data, it is imperative that the Commission finally delivers on its commitments.

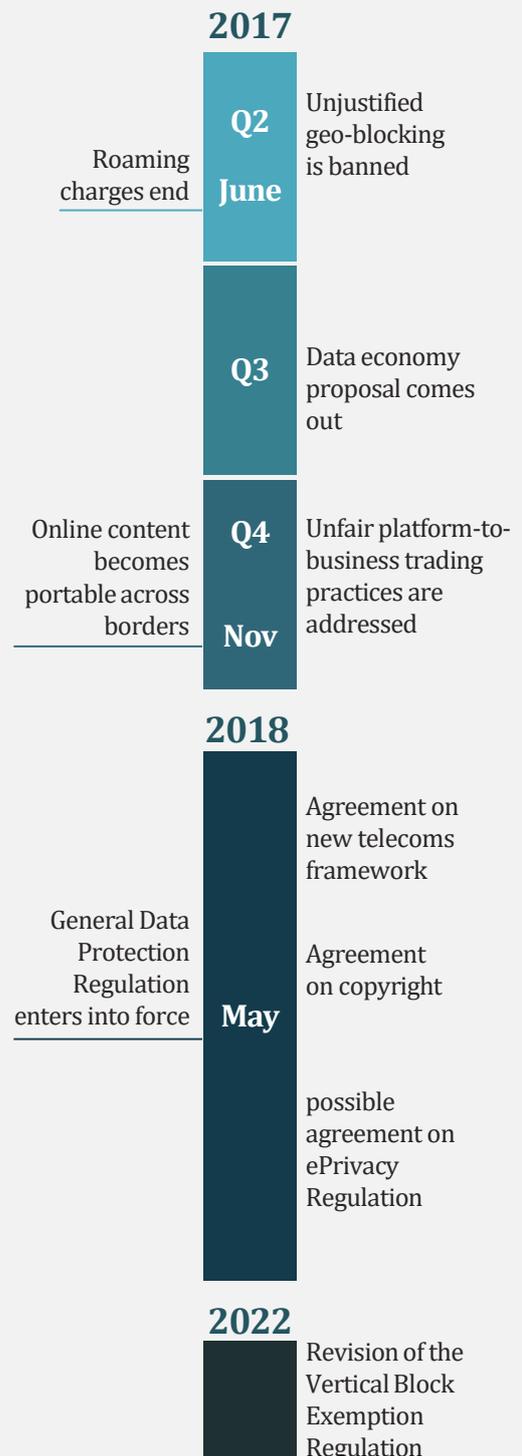
Fortunately, the stars seem aligned for the Commission. The new proposals announced in the review fill a real need for business and citizens.

Data localization measures are costly and burdensome for businesses; the Commission has wanted to act for quite some time but the process was blocked by France. The recent election of President-elect Emmanuel Macron with a pro-business and tech-friendly agenda, and expected shift in the position of his government may unlock the process.

The political climate is also ripe for a push on cybersecurity as terrorism, leaks, and interference with elections routinely make headlines.

As the uncertainties brought by Brexit are slowly subsiding following the beginning of the formal Brexit process, the Commission has a window of opportunity to deliver positive reforms that can support business and citizens. Let’s hope it makes use of it.

Coming up



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