



The DSM@2: where now for tech in the EU?

10 May 2017

Spring 2017 marks two years since the launch of the Digital Single Market strategy - one of the flagship policy areas identified by European Commission President Jean-Claude Juncker to bring much-needed jobs, economic growth, innovation and digital infrastructure to the EU.

To mark the occasion, the Commission has published its DSM Mid Term Review – a stock-take to assess progress on the initiatives that emerged in the wake of the DSM Strategy of 2015 and emerged during 2015 and 2016. In parallel, the Commission published the Final Report of its E-commerce Sector Inquiry. This snapshot considers whether this should be a cause for celebration in the EU tech sector.

The issues addressed via the Digital Single Market (DSM) Review and E-Commerce Sector Inquiry (SI) are numerous, encompassing a wide range of issues and policy areas. As a reminder, the original DSM and SI examined:

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Content Portability – how to enable consumers to access legally-acquired digital content when travelling in the EU.

Platforms – to assess their role, including B2B relations.

Copyright – a new framework fit for the realities of the digital age was proposed.

Geoblocking – how best to address “unjustified” geoblocking, to prevent online traders differentiating between customers by residence.

Free Flow Of Data – a pet project of Vice-President and Digital Commissioner Andrus Ansip, to ensure free movement of data within the EU by removing requirements for local data storage.

Telecoms – the creation of a regulatory environment that enables investment, competition and innovation.

Audiovisual – the rise in popularity of non-linear broadcasting (Video-on-Demand, online) and viewing on portable devices required an overhauling of the Audiovisual Media Services Directive (AVMSD).

E-Privacy – to enhance trust, privacy and security of personal communications in the online world.

E-Commerce - sought information from a variety of actors in e-commerce markets throughout the EU.

“Digital is easy”?

At the press conference on 10 May to launch the DSM Review, Vice President Commissioner Andrus Ansip proclaimed that “digital is easy”. In fairness, he was responding in jest to a question related to the imminent arrival of new Bulgarian Commissioner Mariya Gabriel (currently a Member of the European Parliament), but the reality, as evidenced in this Review, is that digital is hugely complicated.

Of all the original DSM initiatives from 2015, only the **content portability** legislation has been agreed by the EU’s co-legislators (i.e. the European Parliament and Member States in Council); from 2018 onwards, consumers should be able to access their legally acquired content when on the move in the EU.

But this remains an exception – most are subject to debate and amendments in the Parliament in Council, or, as in the case of the **Free-Flow of Data**, without even a legislative vehicle to their name.

“ the Commission’s take in this Review has elicited feelings of both unease and missed opportunity

In many respects, the Commission is blameless; once legislation is formally adopted, it is then over to the Parliament and Council to thrash things out. This is where difficulties lie – it is no exaggeration that on digital matters, MEPs and Member States are deeply divided.

Crudely speaking, the digital charge tends to be led by Nordic Member States in Council – and MEPs representing the mainstream centre, centre-right and right parties (ALDE, EPP and ECR) in Parliament. This pro-market, anti-regulatory approach is at odds with the more interventionist, and consumer-protectionist approach espoused largely by left and centre-left parties in the EP (S&D) and by an alliance of Germany, France and southern Europe in Council.

However, the Commission is still in a position of considerable influence; it participates in policy discussions in Council and Parliament, and when negotiations enter into trialogue (the stage at which the last remaining details are agreed at prior to a final deal is reached). In short, it can set a tone.

But a lack of oomph within the Review has elicited feelings of both **unease** and **missed opportunity** from those in the digital and tech sector.

Opportunity missed?

Firms - particularly startups and SMEs - looking to invest with confidence, position themselves as sectoral leaders, and offer all manner of goods and services cross-border were looking for strong signals from the Commission, in the form of harmonisation to remove fragmentation and a liberalised approach to regulation.

But in key areas for the EU’s digital future, companies seeking certainty will be left kicking their heels for a while yet.

On the **Free flow of Data** or example, as Ansip made clear, the Commission intends to present legislation on free flow of data later in 2017 to be followed by a second one that promotes data accessibility and reuse of public data.

FinTech offered even less to sink one’s teeth into, with the Review simply referring to a previously launched consultation.

Even on **Artificial Intelligence (AI)** – highlighted by Ansip as an area of undoubted potential which many companies operating in the EU feel can be a game-changer - the Commission merely notes its potential, signals its intention to monitor the issue further, offering little for those looking to position themselves favourably here.

In areas where legislation has at least been launched – such as **copyright**, **AVMSD** and **telecoms** – the Review merely recaps the current state of play and calls for the speedy adoption of legislation by the Parliament and Council, offering no solutions to overcome the major sticking points associated with each – a somewhat perplexing oversight.

With **copyright**, the divisions are raw and deep. In September 2016, initiatives to provide legal exceptions for text and data mining were lost amidst moves to strengthen the rights of rightsholders and media publishers (introduction of a neighbouring right, or “link tax”; steps to

enhance artist and creator remuneration, including the “value gap”) which have dominated discussions and frustrated progress in Parliament, Council (and beyond).

Similarly, bitter infighting has emerged on **AVMSD** – around levies on VOD cross-border providers, whether video-sharing platforms should be in scope, and the thorny issue of jurisdiction – which threaten to derail the entire piece of legislation.

Telecoms has also thrown up sharp divisions in the Parliament and Council – particularly on Spectrum, which Ansp, to his credit, highlighted during the press conference – but you would never guess from the Review, which blandly states the need for “all stakeholders” to work together to meet the ambitious targets the Commission has proposed.

All three areas would benefit from a firm steer from the Commission – but it is seemingly unable to offer a way out of the various impasses, suggesting long battles lie ahead.

Platforms: a basis for trouble?

Worse, the Review has actually added to the feeling of unease gathering amongst many in the tech community.

In the original DSM Strategy and subsequent Platform Communication (May 2016) little of substance was offered, effectively buying the Commission more time and noting its preference for dealing with platform-related issues via a mixture of existing legislation and co- and self- regulation rather than sector-specific regulation.

The Review, however, effectively serves online platforms with a warning they are in the Commission’s immediate sights.

Online retailers and travel websites should be under no illusions that the Commission is exploring the need for further action regarding B2B relations, in the areas of dispute resolution, fair practices criteria and transparency. Whereas previous leaked versions of the Review referred to self and co-regulation, the official version places more emphasis on the potential for a legislative instrument.

Social media platforms, meanwhile, face the prospect of further guidance related to harmful and illegal content beyond the self- and co-regulatory measures they have signed up to previously. The Review provides more details on the Commission’s approach – better coordination of platform dialogues, guidance on procedural aspects such as the notification and removal of illegal content, and guidance

on liability rules and support to platforms on voluntary measures. Here at least, no mention is made of legislative instruments as a possible solution.

More to come from Vestager?

Launched at the same time as the DSM, the SI sought information from a variety of actors in e-commerce markets throughout the EU. Margrethe Vestager, Commissioner for Competition, led on this initiative whereby the Commission gathered evidence from nearly 1,800 companies operating in e-commerce of consumer goods and digital content and has analysed around 8,000 distribution contracts. The Preliminary Report was published on 15 September 2016 and was followed by a public consultation. The Final Report published today summarises the main findings and incorporates comments from stakeholders.

The powers vested in DG Competition allow it to open investigations into particular companies’ behaviour, as in previous sector inquiries (Pharma, Energy and Roaming).

As Vestager made clear, “Certain practices by companies in e-commerce markets may restrict competition by unduly limiting how products are distributed throughout the EU. Our report confirms that.”

She hinted there would be further investigations, although of course any decision will be subject to a case by case assessment – with the likely focus on vertical relationships and restrictions placed on online sales, for example.

What is interesting is that companies including clothing brands Mango, Oysho, Pull & Bear, Dorothy Perkins and Topman, coffee machine-maker De Longhi, and photo equipment maker Manfrotto had “reviewed their practices” following questions from enforcers – a clear signal that companies who amend their practices might avoid investigation.

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DSM: momentum stalled?

In adopting the DSM Strategy, Vice President Ansip offered a glass half-full appraisal – noting successes (content portability) and areas for improvement.

One could put the case that the Commission has adopted a “less is more” approach – preferring not to drown everyone in new initiatives, preferring instead to concentrate on the job in hand and add much-needed momentum to those pieces already out there.

While less Brussels intervention may appear a shrewd move in the current, wider, political environment – one in which the EU and its institutions face opprobrium in many quarters for too much interference - the Commission’s approach, as made clear in the Review, offers the worst of all worlds: lacking ambition where renewed impetus would help focus minds, coupled with a failure to address very real issues of fragmentation that could bolster, rather than remove, online barriers.

Without such renewed impetus from the Commission, there is a real danger that the co-legislative process will confer additional delay on the DSM initiatives, or risk killing them off altogether. All the while, in the real world the tech sector moves ahead at pace - meaning any legislation that does eventually emerge will be obsolete at best; fatally damaging to the development of a DSM at worst.

Looking at things as they stand, it is hard to escape the feeling that in another two years’ time, we will all be looking back at the DSM’s initial release in 2015 with a gnawing sense of “what if?” The tech sector will be hoping such a scenario does not come to pass, but on current evidence, it is hard to offer much in the way of optimism.

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