

The EU's Digital Single Market Strategy: a worthy aim, but does it work?

Kenny Mullen writes that regulators need to be careful that the single EU market does not simply throw up new artificial boundaries between 'digital fortress' Europe and the rest of the world

When Jean-Claude Juncker, the President of the EU Commission, ran for election in 2014 the creation of a connected single digital market was at the forefront of his five key priorities. One year on and the EU Commission has now published its Digital Single Market for Europe Strategy paper.

There is little doubting the scope of Commission's ambition, with no less than 16 initiatives to create this digital single market, anchored around three general policy areas or 'pillars' headed 'access'; 'environment'; and 'economy & society'.

While statements like the 'internet and digital technologies are transforming the lives we lead' could have easily been lifted from EU policy documents written 15 or more years ago, many European consumers would not argue against the sentiments expressed by Mr Juncker in a 'high-tech' promotional video posted on Facebook to accompany the launch of the Strategy. Juncker notes that you can drive within the EU from Tallinn to Turin without facing a single passport check, but cannot then access your favourite Estonian TV shows online.

Unveiling the paper, European Commission Vice-president Andrus Ansip also stated that EU-wide GDP could be increased by £300 billion a year if such a harmonised digital market is established which, again, is difficult to argue against. But what does the Digital Market Strategy say, and is it realistic in its objectives?

It is fair to say that the Strategy document itself – contained in a 20 page communication – amounts to an eclectic mix. For a start there are a number of legislative initiatives that seek to harmonise the laws for digital business. These range from those that appear reasonably specific, such as introducing mandatory consumer laws that will apply to all B2C e-commerce transactions and the setting up of an EU-wide online disputes resolution platform in 2016, to high-level regulatory proposals that are yet to be spelled out in any detail, such as 'reducing VAT-related burdens and obstacles' for traders selling across borders.

The Strategy paper also talks about ‘modernisation’ of copyright law across European Union states with measures aimed at improving portability and reducing ‘territoriality’ of access to legally purchased content across the EU; ‘clarifying’ rules for intermediaries in relation to copyright protected content; and greater legal certainty of exemptions relating to use of copyright material in pan-EU research.

The Commission refers to some sweeping, but as yet non-specific, measures aimed at rectifying perceived market deficiencies or barriers to pan-European digital commerce. For example, taking steps to improve price transparency and regulatory oversight of the cross—border parcel delivery market and undertaking an overhaul of EU telecoms regulation. Most immediately for consumers, this reform of telecoms rules could mean an end to cross-border voice and mobile data roaming charges, but the Commission also talks in more general terms about ‘levelling’ the playing field in the communications market and incentivising investment in broadband networks.

There are also worthy sounding but more nebulous aims with very little detail being provided at the moment, such as a ‘partnership with industry’ on cybersecurity; a ‘European data free flow initiative’ to tackle restrictions on flows

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of data between member states; and a European cloud initiative which promises to look at a system for cloud services certification. In relation to a couple of initiatives it is not clear what proposals, if any, are being put forward. First, the Commission has promised a comprehensive assessment of the role of online 'platforms' in the market which, on the face of it, appears to simply mean that existing EU competition rules be applied to Google and other powerful platform providers in the market. The Strategy paper also refers to the Commission's intention to analyse online 'intermediaries' in deciding how best to tackle illegal content on the internet, although it is not entirely clear what deficiency in existing e-commerce laws this is intended to address.

Proposals aimed at what's called 'unjustified' geo-blocking, where providers of online goods, services or content block access to their sites or material to other parts of the EU, have been more contentious. It's clear that in this instance the Commission has broadcasters and content rights holders in their sights – Commissioner Ansip, for example, previously criticised the BBC (the UK's primary public broadcaster) for only permitting access to its iPlayer within the United Kingdom. For the moment, the crucial issue of what is or is not 'unjustified' has not been addressed. The iPlayer is probably an unfortunate example for Commissioner Ansip to have chosen in this regard, since the fact that the BBC is funded by UK licence payers means it is legally barred from commercial revenue generation and arguably has more justification than most in limiting its services to within UK borders.

Ultimately, as with all proposals emanating from Brussels, the Commission has the difficult task of 'balancing the interests of consumers and industry'. It is clear from looking at the Strategy there is a tension throughout between market-driven measures aimed at reducing regulation and a more interventionist approach that will inevitably result in more regulation.

The Commission aims to deliver on its stated initiatives by the end of 2016. That said, it seems there are still many questions that need to be answered and the timescale seems improbably short for drafting, negotiating and finalising the legislation on such a broad ranging programme which, despite its 'digital' focus, will impact a wide range of sectors (telecoms, on-line retailers, e-health, energy, transport, delivery services to name a few). In meeting its

'Roadmap' of commitments over the next two years, the Commission may be partially helped by the fact that some of the announced initiatives are perhaps not all that new.

In the telecoms area for example, some proposals are recycled from previous policy pronouncements or in other cases, for example the proposal to create an EU-wide Data Protection Regulation, based on legislative programmes that are already in motion. Albeit the deadline for adoption of final legislation in this case has been pushed back a few times, perhaps illustrating the problems the Commission faces with its wider programme.

The other point to a single digital market is that creating common rules and standards cannot be seen solely through the prism of European integration. While the general goal of breaking down unnecessary technical boundaries that exist between EU member states should be applauded, as previous experiences have shown, regulators need to be careful that the single EU market does not simply throw up new artificial boundaries between 'digital fortress' Europe and the rest of the world. A single market which is created through a plethora of ill-considered, prescriptive rules which take no account of the inter-connectedness of Europe or its markets with the rest of the world, risks isolating EU digital commerce, undermining the good intentions of the proposals and harming business and consumers alike. ■

Kenny Mullen is the EU Head of IP and Technology at Withers LLP