

EU Digital Policy Agenda

Throughout the 2014 – 2019 period, the European Commission presented 38 initiatives, of which 23 were legislative proposals, within a Digital Single Market strategy. Of the major pieces of legislation, those in the fields of telecommunications, cybersecurity and the audiovisual media sector and copyright were adopted, while a few notable exceptions in the area of data protection and law enforcement remained “unfinished business”.

The next Commission will not rely on a stable majority within the European Parliament, as did the outgoing Commission. The so-called “Grand Coalition” - composed of the two power blocs representing the center-right and the center-left, i.e., the Europe’s People Party (EPP) and the Socialists & Democrats (S&D) group - did poorly in the May 2019 elections. A more fragmented Parliament could spend more time impelling the Commission to issue specific proposals.

The same method has been used by the other co-legislators, Member States in Council, for instance in the area of taxation, where a widely reported package on taxing the digital economy side-tracked mature discussions on creating a common corporate tax base in the European Union (EU)

The level of support enjoyed by the upcoming Commission, both in Parliament and Council, will be weaker than that the incumbent Commission has been able to rely on. The possibility that the future digital agenda may be shaped progressively, based on the “demands” of co-legislators, should therefore not be ruled out.

Overview of EU policy developments during the 8th legislature

Data protection and privacy

- After the entry into force of the General Data Protection Regulation (GDPR), the hype around supervisory authorities’ inquiries and the cases brought before the courts marked EU-level discussions. The Commission is now preparing its first GDPR review for mid-2020, to which supervisory authorities. EU Member States intend to share a common input and, from their preliminary assessment, it looks that they could call for more clarity/ guidelines around children’s privacy and data protection rules and compliance tools.
- Its outcomes could impact the ongoing revision of the ‘e-Privacy’ Directive and the Commission’s approach on data transfer rules, unless the EU Court of Justice changes plans with two decisions concerning the transfer of EU citizens’ personal data to the US expected end 2019/ early 2020.
- Stakeholders are now looking at a practical implementation of the Regulation on the free movement of non-personal data adopted in 2018. In that regard, a Code of Conduct on data portability between business services is under discussion at EU level.

Platform regulation

- After Member States started regulating platforms, the European Commission presented proposals in a piecemeal fashion to avoid fragmentation and sectorial issues.
- A Platform-to-Business Regulation adopted in 2019 sets new transparency requirements for online intermediation services in the B2B area. An expert group, Observatory on the Online Platform Economy, should now issue guidelines on measuring the online platform economy.

- The revised Audiovisual Media Services Directive and the Copyright Directive both mark a shift with regards to the liability of platforms. They are now being transposed into the national law of Member States, which will have a significant leeway in dovetailing the objectives pursued by the two directives with their own policy goals.
- A proposed regulation on preventing the online dissemination of ‘terrorist content’ could shift more responsibilities from public authorities to online service providers with regards to the content transmitted through the latter’s facilities. The inter-institutional negotiations kicked off in October 2019 will run in parallel with the discussions on a possible overhaul of liability rules for service providers through a much-awaited “Digital Services Act”.

Law enforcement access to data

- A legal package on the cross-border access to electronic evidence, proposing an alternative to the existing mutual legal assistance instruments, is still under discussion at EU level.
- Its progress will interweave with the negotiations between the Commission and the Council of Europe and the US respectively on a common framework to avoid conflict of laws and respond to other sensitive issues such as protecting EU citizens’ data.

Cybersecurity

- Member States’ preparedness in cybersecurity varies widely, despite the harmonization objectives of the 2016 Network and Information Services Directive (NIS Directive). The European Network and Information Security Agency, ENISA, worked with national authorities to deliver guidelines on the notification of incidents for companies falling within the scope of the NIS Directive, i.e., Operators of Essential Services and Digital Service Providers.
- The Commission will now oversee the implementation of the “EU Cybersecurity Act” adopted in July 2019, which provides for the design of EU cybersecurity certification schemes with a voluntary mandate. A multi-stakeholder group making proposals for certification schemes should soon be launched.

Consumer protection

- The Commission achieved the adoption of a Sale of Goods Directive and a Digital Content Directive that should increase harmonization of contract rules between Member States. Both texts entered into force in June 2019 and must be transposed into national laws before 2022.
- But other proposals that sought to tackle the specificities of online marketplaces acting as intermediaries are still “unfinished business”. A proposed Directive on better enforcement and modernization of EU consumer protection rules should strengthen contractual obligations for the provision of services relying on consumers’ personal data. Another proposed Directive could introduce the possibility of running representative actions for the protection of the collective interests of consumers across the EU.

Open data

- Member States must transpose a new Directive on Public Sector Information (PSI II Directive) which entered into force in July 2019 within the next three years. The PSI II Directive notably gives the Commission the power to issue delegated acts identifying high-value datasets in the public sector that are required to be provided free of charge in readable formats.

Taxation

- The Commission has repeatedly failed to find consensus on EU tax reforms, which require unanimity among Member States. Lengthy discussions on proposals for a Common Consolidated Corporate Tax Base and a Common Consolidated Corporate Tax Base have been side-tracked, after the presentation of a legislative package on the taxation of the digital economy (also undermined).

Expected priorities of the forthcoming Commission

The Commission's services are now shaping what could be the future EU digital agenda, but the choice will be in the hands of the future Commissioners. The following proposals could be put forward:

Review of the e-Commerce Directive

- The legislation on the provision of online services remains highly fragmented among Member States as the EU legal framework is shaped by a Directive, the e-Commerce Directive 2000/31/EC. The Commission's services have already started reviewing it and should produce the first outputs in 2020, potentially paving the way for a legislative proposal today called the "Digital Services Act".
- The aim is to address new challenges raised by online platforms, social media, search engines and online advertising services. A few ideas have been scrutinized in this connection, namely:
 - Modifying rules on intermediary liability and interoperability to better reflect online platforms' specific roles in transactions, and potentially imposing new obligations on platforms in a dominant position;
 - Modifying rules on content regulation, notably the use of general monitoring and automated filtering and moderation principles;
 - Establishing rules on algorithmic accountability and the use of AI systems in decisions that affect consumers;
 - Creating additional specific obligations for online advertising services, including rules on political advertising, adequate possibilities for auditing and accountability, as well as rules with a view to "lowering entry barriers for competitors and alternatives".

Artificial intelligence

- Many stakeholders advocate for an "ethical" approach towards new technologies or technological processes. An AI strategy must be presented in the first 100 days of the new Commission. It could take the form of a legislative proposal to address specific issues in sensitive sectors (*e.g.* healthcare) or technologies (*e.g.* facial recognition) such as liability.
- One of the proposals under scrutiny could set requirements for transparency and fundamental rights impact assessments in the field of AI. This could be coupled with voluntary initiatives such as certifications or codes of conducts.

Competition in the digital space

- Stakeholders, including regulators, have been calling into question the means available to EU competition regulators to address the challenges of digitalization as they paid attention to the growing dominance of a few large online platforms. Competition Commissioner Margrethe Vestager bolstered the debate on adapting antitrust rules to the digital age and is now vested with the mission to implement her own legacy.
- The Commission's decision of June 2019 in the Broadcom case marked a first and significant change in the way that the institution handles antitrust investigations in digital markets. Indeed, for the first time in 18 years, the Commission imposed interim measures aimed at putting a stop to market

practices that could cause a “serious and irreparable harm to competition” during the period of investigation.

- The Directorate-General for Competition (DG COMP) of the European Commission plans initiating inquiries in sectors shaken up by digitalization instead of ruling only in ex officio cases. The areas of interest could concern mobility, connected devices and other businesses based on data processing.

Cybersecurity

- Commission’ services are also of the opinion that the rules governing the liability of digital products and services should take cybersecurity risks and threats into account. They mainly argue for a new distribution of risks between end users, manufacturers and vendors.
- This could be achieved through the introduction of a “duty of care” principle requiring the industry to implement predefined baseline cybersecurity requirements.

Access to data

- After running consultations on the possibility of opening private sector data to public authorities, the Commission discarded the idea of taking a legislative approach and started instead working on guidance to encourage private data sharing in specific sectors such as health, energy or manufacturing. An Expert Group on Business-to-Government Data Sharing (B2G) tasked with assessing the legal, economic and technical obstacles preventing B2G data sharing should issue policy recommendations end 2019 or early 2020.
- The services of the European Commission are contemplating the need for a “Private Sector Data Act” that would enshrine into law the principles of B2G data sharing. Internal deliberations tend to embrace proposals for setting ex ante obligations and portability requirements for non-personal data generated by connected devices. The proposal could evolve significantly over the next few months and even get side-tracked by the new Commission.

‘Digital for Planet’

- The Commission’s services are looking at ways to address the environmental footprint of the digital sector, an area in which it appears likely to easily build political consensus, after several governments and EU political groups have taken up climate change issues in their electoral programs.
- The results of a study on current and future energy consumption of cloud computing services in Europe and of ongoing consultations with stakeholders, including through an online questionnaire, should help finetune future initiatives. Two approaches are being examined:
 - Changing the methodology for measuring and limiting the environmental footprint of the sector – for instance, the European Commission’s “Code of Conduct for Energy Efficiency in Data Centres” adopted in 2008 and revised nineteen times already appears out of date, which the Commission is considering replacing with a whole range of new measures such as a mandatory energy label for data centers (including criteria related to their design, and to use of liquid cooling systems) and green public procurement criteria for cloud solutions.
 - Reviewing the ‘wider legal framework currently governing environmental data’.

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