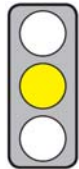


## KEY ISSUES

**Objective of Communication:** The Commission wishes to promote the digital single market by setting new framework conditions and removing obstacles.

**Parties affected:** Consumers, online service suppliers, telecommunication network operators.



**Pro:** (1) The removal of obstacles to online trading strengthens the single market.

(2) The collective management of copyrights facilitates the cross-border supply of digital content.

(3) One-stop shops for VAT liabilities reduce administrative costs.

**Contra:** (1) A revision of the aid guidelines for broadband development is urgently needed.

(2) The Commission should not adopt a recommendation on access-pricing schemes in the wholesale market in order to stimulate investment in fibre deployment.

## CONTENT

### Title

**Communication COM(2011) 942** of 11 January 2012: A coherent framework for **building trust in the Digital Single Market for e-commerce and online services**

### Brief Summary

Note: The pages quoted refer to the Communication unless otherwise provided for.

#### ► Background and targets

- According to the Commission, the “patchwork” of national rules and practices hinders the development of online services in the EU. Failure to exploit the full potential of the digital single market will incur costs of at least 4.1% of the Gross Domestic Product (GDP) of the EU by 2020. (p. 2)
- The aim of the action plan is:
  - the creation of a “single harmonised framework for e-commerce and other commercial online services” (p. 4) and
  - the doubling of online sales and the share of the internet economy in EU GDP by 2015 (p. 2).
- The Commission sets five targets for removing the obstacles to the digital single market (p. 4).

#### ► Target 1: Develop the cross-border range of online products and services on offer

- The Commission wishes to:
  - ensure that the Regulation for selective distribution [(EC) No. 330/2010] – where a product is distributed through certain distributors only – is rigorously applied, since small and medium-sized enterprises (SME) have claimed “cases” of infringement (p. 6);
  - prevent well-established enterprises from misusing their bargaining power to obstruct the activity of new online operators, and therefore, in 2012 they will be examining “unfair business-to-business commercial practices” (p. 6, p. 83 of the Accompanying Document SEC(2011) 1641),
  - examine whether or not further measures are needed to preserve an equal data transmission on the internet (“net neutrality”) (p.6).
- The Commission finds that the choice of cross-border and European digital contents (e.g. music) on offer is too limited. Therefore, it wishes to (p. 6 and 7; p. 73 of the Accompanying Document SEC(2011) 1641):
  - revise the Copyright Directive (2001/29/EC) in 2012;
  - propose a legal framework for the “collective management of copyright” in 2012 to facilitate the cross-border marketing of licenses;
  - submit in 2013 comprehensive legislative measures for copyright fees on technical devices (e.g. DVD recorders), since different rules and tariffs in Member States impede the cross-border exchange of digital contents.

These legislative measures are to contribute to the European strategy of intellectual property [Communication COM (2011) 287, see [CEP Policy Brief](#)].

- The Premier-League-Decision of the ECJ (C-403/08 and C-429-08) declared that exclusive territorial license agreements for soccer matches are unlawful. The Commission comments as follows: The fact that copyright protection is based on territoriality “should not be seen as leading automatically” to territorial licensing (p. 71 Accompanying Document SEC(2011) 1641).
- The Commission holds that differing VAT rates for comparable goods and services and also the complexity of VAT systems constitute obstacles to online trading. To this end it intends to
  - by the end of 2013, submit proposals aimed at converging VAT rates for comparable goods and services which are distributed in a different mode (online vs. offline) (p. 7);
  - by 2015, create central contact points (“one-stop shops”) for suppliers of telecommunications, broadcasting television and electronic services; enterprises operating at cross-border level can thus carry out VAT obligations vis-à-vis other Member States centrally; as of 2015 the Commission wishes to expand the system to other goods and services. (p. 7)
- ▶ **Target 2: Improve operator information and consumer protection**
  - In 2012, the Commission wishes to present a “European Consumer Agenda” aimed at strengthening consumer protection for the acquisition of goods and services, in particular those with digital contents.
  - There are data protection related concerns about behavioural advertising and other new online services. Therefore, the Commission wishes to revise data protection [cp. COM (2012) 11 and 12]. (p. 9)
  - In 2012, the Commission wishes to submit an action plan regarding online gambling and betting, in order to combat illegal offers and fraud, as well as to strengthen consumer protection and administrative cooperation between national authorities. (p. 9)
  - In a report planned for 2013 or 2014 on the efficiency of the Directive in combating counterfeit medicines (2011/62/EC, see [CEP Policy Brief](#)), it also wishes to focus on developments in the entry of falsified medicinal products through online trading (p. 10).
  - In 2013 or 2014, the Commission intends to develop non-binding “codes of good conduct, good practice guides and guidelines” and where necessary quality seals for websites which carry out price comparisons, (pp. 8 - 10).
  - The Commission wishes to better inform suppliers as to their rights and duties in the digital single market (p. 7).
- ▶ **Target 3: Reliable and efficient payment and delivery systems**
  - According to the Commission, many internet users tend to avoid online trading as they have doubts concerning security of payment. Therefore, simultaneously with the Communication the Commission published a Green Paper on card, internet and mobile payment [Green Paper COM (2011) 941]. By mid-2012, it wishes to submit a strategy on the integration of the payment market. (pp. 11 - 12)
  - In 2012, the Commission intends to publish a Green Paper on parcels services and by the end of the year adopt “next stages”. The Commission’s major concerns are high costs and low quality in the delivery. (pp. 11 - 12)
- ▶ **Target 4: Combating abuse and resolving disputes more effectively**
  - The Commission sees the need for action to combat illegal contents (e.g. child pornography) in the internet. According to the Commission, the Directive on e-commerce (2000/31/EC) does not provide enough legal certainty with regard to such contents. Therefore, in 2012 the Commission wishes to (p. 13):
    - regulate by means of EU-wide notice and action procedures how internet service providers should proceed in the case of illegal contents and abuse;
    - revise the Directive on the enforcement of intellectual property rights (2004/48/EC).
  - The Commission wishes to counter the threat of cyber attacks in the EU by means of an EU-wide strategy for internet security (2012) (p. 14).
  - The Commission wishes to facilitate the settlement of online disputes and promote out-of-court “alternative” dispute-settlement mechanisms. In addition to its proposals for a Directive on alternative dispute settlement [COM (2011) 793] and for a Regulation on online disputes [COM (2011) 794] it wishes to propose a legal act on dispute settlement between enterprises in 2012. (p. 14)
- ▶ **Target 5: Develop high-speed networks and cloud computing**
  - As the EU “lags behind” in the development of new broadband networks (NGA networks), in 2012 the Commission wishes to (p. 15):
    - adopt a recommendation on access-pricing schemes in the wholesale market in order to stimulate investment in fibre deployment (see also [CEP Policy Brief](#) on Consultation),
    - revise the 2009 guidelines for state aid for broadband network deployment (s. [CEP Policy Brief](#)).
  - In 2012, the Commission wishes to submit an overall strategy for outsourcing IT infrastructure, e.g. of software or storage space to external service suppliers (“cloud computing”) (p. 16).

### Statement on Subsidiarity by the Commission

The EU Commission does not address the issue of subsidiarity.

## Policy Context

The Communication is intended to help implement the “Digital Agenda for Europe” [Communication COM (2010) 245, see [CEP Policy Brief](#)] and serves to achieve the targets of the “Europe 2020” Strategy [Communication COM (2010) 2020, see [CEP Policy Brief](#)]. It is a continuation of cross-border electronic trade between enterprises and consumers in the EU [Communication COM(2009) 557].

In June 2011, the Council asked the Commission to develop a roadmap for the completion of the digital single market by 2015. Thereupon, the Commission carried out a public consultation from August to November 2011. In March 2011 the Commission submitted a Green Paper on online betting in the single market [COM (2011) 128], in April it published a Communication on net neutrality in the EU [KOM (2011) 222], and in December a Communication on the future of VAT [COM (2011) 851].

## Options for Influencing the Political Process

Leading Directorate General: DG Single Market

# ASSESSMENT

## Economic Impact Assessment

### Ordoliberal Assessment

**The planned framework conditions and the related removal of obstacles to cross-border online trade** can in general contribute to the further opening up of the markets, to fostering cross-border competition and **strengthening the single market**. Enterprises benefit from a larger sales market, consumers from increased product variety and reduced prices. **However, the Commission should not set any targets**, such as the doubling of internet sales. Firstly, such conduct would not be neutral towards retail shops and, secondly, consumers and suppliers should decide for themselves whether or not internet trade offers them added value. Even the Commission admits that many consumers do not shop online because they feel the proximity to the trader is important (p. 31 of SEC 1642). Consequently, **it should suffice to only set the framework conditions for a functioning online trade market instead of regulating the market**. However, the Commission would then have to accept whatever developments actually follow.

An EU-wide copyright protection is the absolute precondition for the development of online trading in the EU. Only with such protection would enterprises be ready to invest in innovative products and services, which in the end strengthens legal digital contents and creates a wider range of offers.

**The collective management of copyright facilitates the cross-border supply of digital content at the same time as making it cheaper**, for instance through the possibility of licensing several territories simultaneously. **Territorial exclusivity agreements for licensing** (e.g. for broadcasting rights of football matches such as the Premier League case) **should be generally possible**. Interventions into the management of such rights represent severe interventions into entrepreneurial freedom. They are permitted only if they affect monopoly products which cannot be replaced.

**The creation of one-stop shops** to handle cross-border VAT obligations **reduces the administrative burden and costs** and thus facilitates the development of cross-border internet trading **and strengthens the single market**. VAT rates for comparable products that differ from each other only due to their distribution channels distort the competition between online and offline trade. Therefore, its adjustment is advisable from an ordoliberal standpoint. However, inconsistent tax rates constitute a distortion of competition at national level and are therefore not a problem of cross-border dimension. So an adjustment should be subject to national action.

Although measures to promote out-of-court settlement of disputes between enterprises can reduce the uncertainty, risks and related costs of cross-border business deals and stimulate the single market, the existence of a functioning out-of-court procedure should not exempt Member States from the obligation to provide an efficient jurisdiction.

**The planned revision of the guidelines for state aid for broadband network deployment is urgently required**. It would be even better to eliminate this aid completely. It is highly problematic from an ordoliberal point of view, as it leads to distortion of investment decisions and infringes the principle of technological neutrality. Enterprises which have already invested in the development of broadband without receiving any aid are put at a disadvantage compared to those who receive financial support. This also distorts competition for services, as unequal starting conditions are created. The decision as to whether or not investments should be made in the development of quicker internet infrastructures and with which technology – fibre glass, cable or via radio (LTE) – should be left to the market forces. If, as expected, the development of broadband continues to be supported by regional aid, at least the regulation of telecommunications networks should be differentiated regionally (see [CEP Analysis](#)).

**The Commission should not adopt a recommendation on access-pricing schemes in the wholesale market in order to stimulate investment in fibre deployment: The harmonisation of cost schemes** to calculate access fees, as presented in the previous Consultation (see [CEP Analysis](#)), **restricts the independence of national regulatory authorities** in the regulation of prices. From an ordoliberal point of view, the underlying political target to stimulate investment in fibre glass infrastructures is somewhat questionable.

**Whether or not fibre glass networks are needed should be regulated by the market** on the basis of supply and demand. Like aid for broadband deployment, the intervention into price regulation distorts competition and investment decisions of market players and constitutes an unjustifiable preferential treatment of glass fibre technology vis-à-vis other technologies.

#### Impact on growth and Employment

Currently not foreseeable.

#### Impact on Europe as a Business Location

Currently not foreseeable.

## Legal Assessment

### Competency

The EU may base proposals for the approximation of laws in the single market on Art. 114 TFEU. The competency for projects regarding copyright protection is laid down in Art. 118 TFEU. The EU has the power to harmonise indirect taxes such as VAT on the basis of Art. 113 TFEU. The Commission's competency to adopt a recommendation on NGA network access-pricing schemes in the wholesale market is based on Art. 19 (1) of the Framework Directive (2002/21/EC). However, it is very doubtful whether the Commission could also adopt a legally binding Decision (for a detailed explanation see [CEP Policy Brief](#) on the Consultation and [CEP Analysis](#) on mobile termination).

### Subsidiarity

**In promoting and regulating out-of-court settlement of disputes** between enterprises **the EU must limit itself to matters of cross-border relevance**. The German *Bundesrat* and the first Chamber of the Dutch Parliament have both expressed subsidiarity complaints with regard to the Commission's proposals for a Directive on alternative dispute settlement [COM(2011) 793] and for a Regulation on online dispute settlement [COM(2011) 794]. As not enough other national parliaments followed suit, although the Commission must now "take complaints into account", it does not have to "examine" the drafts in detail (Art. 7 of the Subsidiarity Protocol).

### Proportionality

Depends on the formulation of the legal act.

### Compatibility with EU Law

**With regard to the notice and action procedures** to combat illegal contents in the internet, it is important to make sure that a generalised supervision obligation is not imposed on internet service providers [Art. 15 Abs. 1 of the E-Commerce Directive (2000/31/EC)]. Moreover, the following **rights must be taken into appropriate consideration**: internet providers' **entrepreneurial freedom** (Art. 16 of the Charter of Fundamental Rights, CFR) **the users' right to protect personal data** (Art. 8 CFR) **and of freedom of information** in receiving and delivering information (Art. 11 CFR) (cp. ECJ, C-70/10 of 24 November 2011 and C-360/10 of 16 February 2012).

## Conclusion

The removal of obstacles to online trading strengthens the single market. However, the Commission should not set any targets; it suffices to define the framework conditions. The collective management of copyrights facilitates the process of offering digital contents across borders. Territorial exclusivity agreements on licensing should be principally possible. One-stop shop schemes for VAT obligations reduce administrative costs. The revision of the aid guidelines for broadband deployment is urgently needed. Even better, however, would be if aid for broadband deployment were eliminated completely. The Commission should not adopt a recommendation on access-pricing schemes in the wholesale market in order to stimulate investment in fibre deployment. In promoting and regulating out-of-court dispute settlements, the EU should limit itself to matters of cross-border relevance. Rules regarding notice and action procedures must take account of entrepreneurial freedom rights, the freedom of information and personal data protection.