The EU Digital Agenda: Key Issues for Business

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On May 19, 2010, the European Commission launched the Digital Agenda for Europe.[1] The initiative, one of the flagship programs under President Barroso's Europe 2020 strategy, has substantial implications for a range of business sectors.

Presented formally by Commission Vice-President Neelie Kroes (former Competition Commissioner and now in charge of Telecommunications and the Internet), the Digital Agenda foresees legislative and regulatory activities in several key policy areas. They include the creation of a 'single market' for digital, telecommunication and e-commerce services; greater digital interoperability across EU countries, technologies and services; increased research and development (R&D) funding; certain changes to Intellectual Property Rights (IPR) regimes; increased focus on online data protection and security; and the application of information and communication technologies to address challenges facing society such as energy and climate change, the ageing population, healthcare and pharmaceuticals, and eGovernment.[2]

For businesses that offer or rely on information and communication technology (ICT) services, infrastructure or hardware, the actions envisaged in the Digital Agenda merit further review. Companies should consider the

potential implications for their overall corporate strategies, IPR, and regulatory and legislative compliance, as well as upcoming opportunities to get involved in and help shape the various legislative and regulatory actions foreseen. Harmonization of eCommerce rules, a recommendation on the regulation of Next Generation Network Access, guidelines on *ex-ante* disclosure of essential IPRs, and an upcoming consultation on issues of online free expression, transparency and open networks are key examples.

We highlight below several areas of activity that are likely to be of greatest interest.

1. Fast Internet: net neutrality, regulatory tools and investment

A key objective of the Digital Agenda is to bring fast Internet to all Europeans – basic broadband to *all* Europeans by 2013, and 30 Mbps connections for all and 100 Mpbs+ connection for 50% of European households by 2020. Additional government funding, including under EU and European Investment Bank programs, is scheduled to become available to support further broadband uptake and the development of the required broadband infrastructure. The recently adopted Commission guidelines on subsidies for broadband infrastructures are relevant in this context. They provide a framework for both governments and industry stakeholders concerning aid to basic broadband networks (such as ADSL, cable, wireless or satellite solutions), and provide a catalogue of options for supporting broadband networks without distorting competition, including measures that do not involve public funds (such as administrative measures) and traditional state aid ('subsidies').

The Agenda also foresees the development and adoption of a Recommendation on Regulated Access to Next Generation Networks, as

well as a number of other regulatory tools, scheduled to be further detailed in a new Broadband Communication later this year. The Commission has, however, already presented to EU telecom ministers its initial conclusions as to three possible policy options: (i) phasing out sector-specific regulation at EU level; (ii) providing clarity and legal certainty within the current EU legislative provisions on universal service, in particular regarding national flexibility on internet/broadband access; and (iii) amending the EU legislative provisions on universal service in order to meet the universal coverage objective. Finally, while the Commission's Digital Agenda is relatively silent on the issue of net neutrality, it promises to monitor closely the implementation of relevant EU-level legislation as a means to "safeguard users' rights to access and distribute information online and ensure transparency about traffic management." The Commission will launch a public consultation before summer 2010 to determine whether additional guidance is required to ensure freedom of expression, transparency, investment in efficient and open networks, fair competition and openness to innovative business models.

2. Harmonization of online commerce

The Digital Agenda proposes a number of regulatory and legislative initiatives aimed at harmonizing the regulatory framework for electronic commerce in Europe, creating a single electronic commerce market. Concrete actions include the development of interoperable, pan-European ePayment and eMoney frameworks, including through implementation of the (2009) eMoney Directive, the completion of, and migration to, a Single Euro Payment Area (SEPA) by 2010, and the development of Communication on eInvoicing and a multi-stakeholder forum to establish an interoperable European eInvoicing framework. In addition, the European eSignature Directive is slated for revision in order to create a legal

framework for cross-border recognition and interoperability of secure eAuthentication systems.

In parallel, the Commission will continue work on an 'Optional Contract Law Instrument' to help overcome the non-uniformity of contract law in the online environment and complement the Consumer Rights Directive. The Agenda also proposes a Code of EU Online Rights to 'codify' digital user rights in a clear and accessible way. Finally, it anticipates the development of a Green Paper to be published this year or next on a possible Alternative Dispute Resolution mechanism for eCommerce transactions.

3. Interoperability, standards and IPRs

Defining and promoting open standards is a controversial issue even within the European Commission, with different Directorates General (DGs) taking different views. While the final version of the EU Digital Agenda has dropped explicit references to 'open standards' as an ultimate EU rulemaking objective, it continues to include explicit calls for more effective interoperability between IT products and services. It also commits to continuing the ongoing EU standardization policy review, with an explicit focus on establishing rules for *ex-ante* disclosure of essential IPRs and their licensing in standard setting contexts (specific guidelines are scheduled to be developed by 2011). Finally, the Digital Agenda suggests that, by 2013, individual EU Member States must apply a revised European Interoperability Framework for government procurement (due later this year) at national level.

The Digital Agenda also aims to advance the objective of a single European market for digital content through appropriate rules for IPRs, including a new framework directive on collective rights management which will

establish a pan-European licensing system for online rights management of copyright-protected works and a directive on 'orphan works' for which the right holder cannot be identified and/or located. Many of the most controversial policy questions, however, have been avoided, including, most notably, issues related to online IPR enforcement, which some consider an area of disagreement between Commissioner Kroes and her Internal Market colleague, Commissioner Barnier. These issues may instead be reviewed as part of the EU's Intellectual Property Rights Enforcement Directive, stakeholder consultations, and a report to be published by 2012, which are likely to be the next battlegrounds.

4. Online privacy, data protection and cyber-security

The Digital Agenda continues the Commission's active focus on privacy and data protection. It reiterates that privacy and the protection of personal data are fundamental rights in the online world and endorses wider implementation of the principle of 'privacy by design' (i.e. ensuring privacy and data protection throughout the entire life cycle of technologies, from the early design stage to their deployment, use and ultimate disposal). It also proposes further review of the EU data protection regulatory framework, including a possible extension of the obligation for online service providers to notify data security breaches, and more general consideration of data and network security. With respect to cyber-security, the Digital Agenda contemplates a number of measures, including legislative initiatives to combat cyber attacks against information systems, and the development of European and international-level rules governing jurisdiction in cyberspace.

5. Telecommunications, digital roaming and spectrum use

The Digital Agenda also ties into broader ongoing European

telecommunications reforms aimed at facilitating further uptake of cross-border mobile Internet services, including telecommunication services, numbering, licensing, spectrum allocation schemes, and mobile data roaming fees. The Digital Agenda proposes additional action in a number of key policy areas, including implementation of the newly adopted Telecoms Reform Package, together with greater coordination of spectrum use and, if necessary, harmonization of spectrum bands in accordance with the European Radio Spectrum Policy Programme. The overarching objective of these various initiatives is to create new opportunities for economies of scale in equipment markets and allow consumers to use the same equipment and avail themselves of the same services across the EU.

6. Other online services and technologies affected

A range of other areas of economic activity that rely increasingly on ICT and online services are affected by the Commission's new plans. In the Commission's view, Information and Communication Technologies are becoming a critical element for delivering policy objectives like supporting an aging society, climate change, reducing energy consumption, improving transportation efficiency and mobility, the provision of online government services, empowering patients and ensuring the inclusion of persons with disabilities. Detailed discussion of these other policy initiatives and the range of legislative and non-legislative actions foreseen with respect to eGovernment, eHealth, climate change and energy, etc., goes beyond the scope of this basic note. A copy of the Digital Agenda, which contains a full list of the legislative actions foreseen, can be found here.

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[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Digital Agenda for Europe, Brussels, 19.05.2010 COM(2010) 245, available here.

[2] The Digital Agenda identifies the following seven priority areas within the ICT industry in: the creation of a digital single market, greater interoperability, faster internet access, more secure and trusted online transactions, better investment in research and development, enhancement of digital literacy skills and inclusion, and the application of information and communications technologies to address challenges facing society like climate change and the ageing population.

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