October 6, 2017

European Union Digital Single Market

The European Commission, the European Union's (EU's) executive body, announced the Digital Single Market (DSM) strategy on May 6, 2015, to modernize and harmonize legislation governing the digital economy across the EU's 28 member states. The strategy consists of 35 draft legislative proposals and initiatives concerning the DSM. Congress has an interest in understanding the DSM as it has generated debate among EU and U.S. policymakers, industry groups, and other stakeholders about its potential benefits and drawbacks. The DSM is expected to impact U.S. firms who operate in or trade with the EU. It also may influence the EU's position in any trade negotiations with the United States or third parties, given the significant role of the digital economy in the U.S.-EU trade and investment relationship.

DSM Objectives

The DSM "could contribute €415 billion per year ($488 billion) to [the EU] economy and create hundreds of thousands of new jobs," according to the Commission. Today, of the online services consumed by EU citizens, 54% are provided by U.S.-based companies, 42% by companies in their own country, and 4% by companies based elsewhere in the EU.

The DSM has three pillars, each with multiple initiatives:

Pillar 1 aims to improve consumer and business access to digital goods and services by updating rules for digital contracts, cross-border content portability within the EU, and copyrights; facilitating e-commerce by eliminating geo-blocking (discrimination against online consumers based on nationality or location), enabling cross-border parcel delivery, and revising consumer protection regulation; and updating the value added tax system.

Pillar 2 focuses on creating a level playing field for digital networks and services by updating rules for telecommunications, mobile Internet services, audiovisual media services, online platforms, data privacy, and establishing a cybersecurity public-private partnership.

Pillar 3 seeks to maximize the growth potential of the digital economy by defining information communication technology and interoperability standards; providing digital public services; and supporting EU and country-specific data and digital innovation efforts, the free flow of data within the EU, and a "European Cloud Initiative."

DSM Status

In its May 2017 mid-term review, the Commission calls on the European Parliament and member states (acting in the Council of the European Union) to adopt the existing legislative proposals, but this is a slow process in the EU system and further changes are still possible. Observers note that some proposals are controversial for the Parliament and the member states for a variety of political and economic reasons. The report also notes three areas where more Commission action is needed: the data economy, cybersecurity, and online platforms. The Commission has since released proposals to increase EU-wide integration on cybersecurity and to address barriers to internal EU cross-border flows of non-personal data, raising new controversies. Debate continues on defining online platforms and potential scope of any regulation.

The mid-term report also estimates a funding shortfall for infrastructure investment and identifies programs to stimulate investment. While all member states now have broadband plans, the report highlights disparities among digital strategies and the levels of private sector digitization and citizen digital literacy, calling for greater convergence.

Selected Provisions of Interest

The DSM raises several potential trade barriers for U.S. firms, as highlighted by the U.S. Trade Representative's 2017 report on foreign trade barriers. Issues include:

Intellectual Property

The DSM proposes changes to EU copyright rules to fit the digital era. The reforms aim to strike a balance between the rights of those in the copyright industries and the rights of users. However, technology industry groups criticize the proposal for limiting copyright protections, and civil society groups favoring greater access view them as inadequate.

One flashpoint is the proposed new right for publishers to protect digital use of their press publications for 20 years. This would enable them to conclude license agreements with news aggregators. Member states also would have the option to allow publishers to claim compensation for using the work even if the use falls under a copyright exception (the so-called "link/snippet tax"). Another contested area is proposed new copyright exceptions. For instance, EU member states would have to introduce in their national law mandatory exceptions to allow text and data-mining of copyrighted content for scientific research, use of copyrighted content for teaching, and copying copyrighted work for collections by cultural heritage organizations.

The reforms also appear to impose a new obligation on Internet service providers (ISPs) that store and provide access to large amounts of user-uploaded content. Such ISPs would have to take certain measures to protect this material. Some argue that the requirement to actively monitor user-uploaded content differs from the U.S. approach, which gives ISPs safe harbor from liability for infringing works on their systems if they take certain actions in response to requests from content owners.

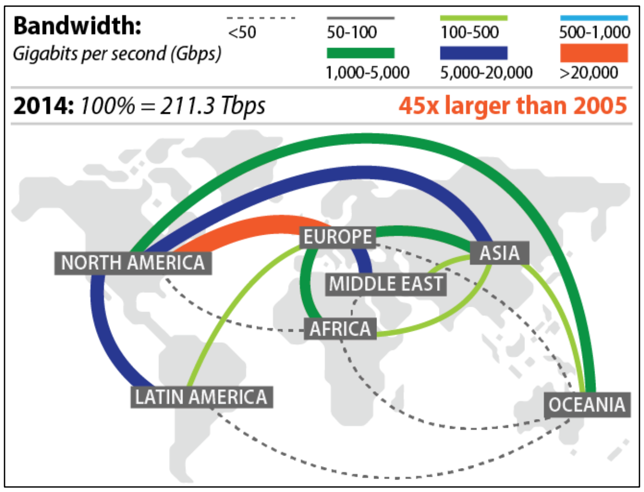
Information and Communications Technology (ICT) Standardization

The DSM includes plans for working with European and other standards development organizations to identify and build standards in five ICT areas: 5G communications, cloud computing, the Internet of things, (big) data technologies, and cybersecurity. The Commission has identified these as the "technology building blocks" of the DSM. U.S. agencies and companies may elect to participate in these efforts so that DSM standards do not diverge from other international standards and create trade barriers.

Data Flows

The United States and EU remain each other's largest trade and investment partners, and transatlantic flows of data are important for the U.S. and European economies and the largest cross-border data flows in the world (see **Figure 1**). Businesses state that existing localization requirements by member states create added costs. Some voice concern that even implementing the DSM cross-border data flows initiative would limit the free flow of non-personal data to within the EU borders and not extend outside the region, creating a "European Cloud" isolated from the rest of the world. The DSM public security exception may further allow member states to limit cross-border data flows and impose localization requirements within a given country.

Figure 1. Global Cross-border Data Flows



Source: McKinsey Global Institute.

Notes: Lines represent interregional bandwidth.

Privacy: Privacy Shield and GDPR

While not part of the DSM, the Privacy Shield and General Data Protection Regulation (GDPR) are closely linked to DSM efforts and directly impact U.S. companies operating in the EU. Under the 2016 EU-U.S. Privacy Shield agreement, companies that enroll and are certified can transfer EU citizens' personal data to the United States while complying with EU existing requirements. The Departments of Commerce and State administer the Privacy Shield on the U.S. side and conduct an annual implementation review with the European Commission.

To facilitate the DSM, EU member states and the European Parliament agreed to the GDPR in April 2016. The GDPR establishes rules and liability obligations, and provides for various rights for EU citizens. Controversial areas for U.S. businesses include implementation costs and administrative burdens, compliance with requests under the new "right to be forgotten" for individuals wanting to remove certain online information about themselves, and potential fines of up to four percent of a firm's annual global revenue for GDPR violations.

The GDPR will be directly applicable in all EU member states, thus establishing a single EU-wide set of rules for data protection when fully implemented (expected May 25, 2018). However, one observer contends that approximately 40 provisions of GDPR remain allowing individual member states to set their own standards which could lead to confusion.

U.S. officials do not expect the GDPR to impact the Privacy Shield and companies' ability to transfer data. While the UK has stated that it will continue to adhere to the GDPR after its expected exit from the EU in 2019 ("Brexit"), many experts suggest that the UK would no longer be covered by the EU-U.S. Privacy Shield.

Issues for Congress

Impact on U.S. Relationship and Economy

Potential positive outcomes from the DSM initiative include transparency, predictability, and a harmonized single set of rules for U.S. firms doing business in the EU. However, firms may face additional costs and regulatory burdens if the EU rules or standards diverge with U.S. policies or international standards. Critics see the EU's desire for "digital sovereignty" driven by protectionist and anti-competitive motives targeting U.S. Internet firms. During its public consultations on proposed regulations, the EU collects feedback from interested parties, including U.S. stakeholders, but not all of it is publicly available.

Impact on Trade Negotiations

As Congress considers digital trade provisions for free trade agreements, it may review the EU's positions that may include issues in the DSM. The EU and United States have expressed similar goals in recent World Trade Organization (WTO) digital trade-related discussions, including proposals to facilitate e-commerce, enhance transparency, and address trade barriers impeding trade in information communication technology goods. The EU has not defined its position on cross-border data flows.

The impact of the DSM on the EU's position in the ongoing plurilateral Trade in Services Agreement (TiSA) negotiations is not clear as the EU has not made a proposal on cross-border data flows or data privacy. The United States had opposed the EU's position to exempt new services from TiSA obligations, as these would likely include new digitally enabled and delivered services.

In addition to the WTO and TISA, bilateral engagement through the potential Transatlantic Trade and Investment Partnership (T-TIP) and on individual DSM proposals present opportunities for the United States and EU to build international standards for the digital economy that could become the global norm. Negotiations for both TiSA and T-TIP are on pause until the Trump Administration and EU decide how they wish to proceed.

For more information, see https://ec.europa.eu/digital-single-market/en/digital-single-market and CRS Report R44565, *Digital Trade and U.S. Trade Policy*, coordinated by Rachel F. Fefer.

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