

**Meeting between Kristian Hedberg and Thomas Myrup Kristensen,
Managing Director EU Affairs and Head of Office for Facebook in Brussels
Brussels, 10 June 2016**

Name of Cabinet Member: Fabrice Comptour

Name of the Director who has cleared the briefing: Joaquim Nunes de Almeida

BASIS request ID: CAB 314

Room, time: CAB room, 10/06/2016, 14:30

Participants: , Unit 03

Name of main contact person: ,

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Directorate/Unit: E/3

BRIEFING NOTE

Scene setter/Context of the meeting:

- Overall, Facebook is in favour of a digital single market in Europe: uniform rules will mean the company will not have to deal with different laws in every country in the region.
- DSM initiatives of particular interest to Facebook (DG CNECT is in lead):
 - online platforms (e.g. liability regime, how platforms use the personal data, B2B relations, etc.);
 - revision of the telecoms regulatory framework (due in the second half of 2016): Facebook bought WhatsApp in early 2014; the DSM strategy announced the intention to place over-the-top communication services (OTT, like WhatsApp and Skype) under the same regulation as telecom providers.
 - privacy protection in the EU regarding Internet and Telecommunication Services: according to a 2015 report by the Belgian Privacy Commission, Facebook is tracking users, contravening EU privacy rules. In addition, OTT communication services like WhatsApp are excluded from the scope of the e-privacy Directive (on personal data protection in the Telecom sector), which applies only to traditional telecoms companies. Following the adoption of the General Data Protection Regulation (applicable as from 25 May 2018), the Commission will revise the existing e-Privacy Directive by end 2016 in order to

ensure a high level of protection for data subjects in the telecom sector

- The Commission (JUST) is negotiating with the USA to improve the protection of EU data subjects and expects a new framework agreement to be in force in 2016.

Objective of the meeting:

- The aim would be for Mr Myrup Kristensen to introduce himself, the Brussels office and Facebook's priorities, and to explore areas in which they can collaborate more closely with you and Commissioner Bieńkowska.
- The objective for you is to inform about recent developments as regards DSM and get the interlocutor's views.

MAIN KEY messages

For all items at the agenda

- We have started to deliver on the promises made in the DSM Strategy.
- Commissioner Bieńkowska is responsible for the recently adopted initiatives on geo-blocking and parcel delivery, and the European agenda for the collaborative economy.
- We are also working on the evaluation of on the enforcement of intellectual property rights – IPRED review (due in December 2016), the digital transformation of the European industry, and the B2B relations on platforms.
- Our overall aim is to support the digital revolution including the rise of online platforms while preserving core principles.

Questions to the interlocutor?

- *What are your views on the obstacles that hamper the growth of digital economy in Europe (compared to the US)?*

- *What are Facebook's concerns regarding the proposals included in the DSM strategy?*

KEY messages

DSM – state of play

1. Two concrete actions were already presented in December 2015: (1) a set of legislative proposals on Digital Contracts and (2) a communication on copyright with a legislative proposal on cross-border portability.
2. In April we presented our initiatives on Digitising European Industry, the Internet of Things, the Cloud, the free flow of data, standards and e-Government.
3. In May, the focus has been on e-commerce and content. We set out proposals on geo-blocking, parcel delivery and consumer issues. The content initiative includes the comprehensive assessment of online platforms, and an update of EU audio-visual rules.
4. Later in the year, the second part of copyright reform will be proposed. We will also present a review of the Satellite and Cable Directive, revision of the telecom framework and the Free Flow of Data initiative.

Platforms

1. Platforms are strong drivers of innovation, play an important role in the European economy and bring many benefits for consumers and small and medium sized businesses.
2. At the same time, there are some critical voices about the market role of these actors, the amount of data they control, their bargaining power vis-à-vis suppliers, transparency, and their compliance with safety and

consumer legislation at national level in the case of sharing economy applications.

3. As you can see from our Communication and preliminary findings, we are not announcing any legislative proposals at this stage. We are defining areas for further research that might inform possible future proposals, one of this being B2B relationships.
4. Any Future policy on online platforms will take the following principles into account:
 - a level playing field for comparable services to ensure fair competition
 - responsible behaviour of online platforms to protect core values
 - transparency and fairness for maintaining user trust and safeguarding innovation
 - open and non-discriminatory markets for a data-driven economy

Telecom review

1. The review of telecoms regulatory framework is part of the DSM aiming at creating the right conditions for digital networks and services to flourish. We have engaged proactively with all stakeholders including the Member States.
2. We have already identified several challenges for the forthcoming review: (i) a consistent single market approach to spectrum policy and management; (ii) ensuring a level playing field for market players and consistent application of rules; (iii) incentivising investment in high speed broadband networks, and (iv) a more effective regulatory institutional framework.
3. Services (OTT vs. traditional providers):

- Innovative online services ("over the top ('OTT') services") are increasingly relevant for the electronic communications sector and perform a competitive constraint for traditional electronic communications providers (e.g. VoIP and IP based-messaging make inroads into traditional revenue streams such as voice and SMS). At the same time these novel services also boost demand for the provision of data services.
- The public consultation highlights the need to ensure a fair competition between digital players, in particular when they provide competing or comparable services
- There are also public policy interest which may eventually require applying certain regulatory obligations to all communications services regardless of the mode of provision or whether they use public resources or not. Security of communications and confidentiality of communications are examples of such public interests.

Defensives / Q&A

Platforms

Does the Commission want to regulate platforms?

- The Communication on platforms does not propose a new general law on online platforms, nor does it suggest to change the liability regime set by the e-Commerce Directive.
- The aim is to make sure that platforms can be created, scale up and grow in the European Union. To reach this goal we need a functioning Digital Single Market where online platforms (both startups and established market operators) are not hampered by heavy regulation.
- Online platforms are already subject to EU legislation such as consumer and data protection rules, and competition law. New initiatives will only be taken to tackle any specific problems

identified and only if it is established that better enforcement of existing rules is not sufficient to address these.

- In our approach to online platforms, we will be guided by the following principles:
 - a level-playing field for comparable digital services
 - responsible behaviour of online platforms to protect core values,
 - transparency and fairness for maintaining user trust and safeguarding innovation,
 - open and non-discriminatory markets in a data-driven economy.

What about the liability regime in the e-Commerce Directive?

- The e-Commerce Directive foresees that internet intermediary service providers should not be liable for the content that they hold and transmit passively. At the same time when illegal content is identified, intermediaries should take effective action to remove it, whether it be information that is illegal (e.g. terrorism/child abuse) or information that infringes the property rights of others (e.g. copyright).
- The Communication on platforms does not propose any changes to the liability regime in the e-Commerce Directive. The Commission will not oblige online platforms to generally monitor content. As a complement, the Commission will, however, look into the possibility to tackle illegal content also by voluntary and self-regulatory action.
- However, the Commission's stakeholder consultation indicated the need to explore potential problems for platforms when putting in place voluntary measures to fight illegal content online and further review the need for a clarification of the notice-and-action procedures. The Commission will therefore undertake further analysis in the coming year to explore whether EU action is warranted in these areas.

How will you address concerns about how platforms use their data?

- Access to data spurs efficiency and innovation. However, many people are concerned about data collection and want to know what data is collected and how it is shared and used. The Commission believes platforms need to respond to these concerns and comply with existing data protection rules. The Commission also believes that improved enforcement of current rules as well as better compliance will increase trust.
- The Commission will also promote interoperability actions and encourage platforms to recognise electronic identifications (eID), in particular those identified under the Regulation on electronic identification and trust services for electronic transactions in the internal market (eIDAS), to improve consumer and data protection.

How will you address issues relating to potential unfair practices in business-to-business relations?

- The results of the public consultation on platforms highlighted a number of concerns from suppliers about allegedly "unfair" practices e.g. platforms imposing unfair terms and conditions, in particular for access to important data bases; platforms refusing access to markets or essential business data necessary for suppliers; platforms promoting their own service to the disadvantage of third-party supplier.
- Beyond the application of competition policy which addresses competition between market players, it is vital that more evidence is obtained on the prevalence of such "unfair" trading practices.
- This is all the more important in light of the fact that some Member States are already in the process of introducing or considering the introduction of platform-specific measures to address some of these unfair trading practices, risking fragmentation of the Digital Single Market.

- In order to assess the extent of any potential problems we will, therefore, further engage with public authorities and stakeholders to find out more about such practices in the online platform world and will decide if further action to address fairness in business-to-business relations is necessary in 2017.

Background information

(1) Assessment of the role of online platform

As part of the DSM Strategy, the European Commission conducted a comprehensive assessment of the role of online platforms. This assessment was based on a broad public consultation, and a series of workshops and studies. The results of the assessment are further set out in a Staff Working Document on Online Platforms that underpins the Platforms Communication which:

- formulates the Commission's policy approach to online platforms; and
- identifies areas where action or further assessment may be necessary.

The assessment of online platforms concludes that they play a key role in supporting innovation and growth in the Digital Single Market. Both, businesses and consumers in the EU stand to benefit from an environment that attracts, retains and grows new online platform innovators. Market fragmentation due to differing national or even local rules is identified as an obstacle to the sustainable development and scaling-up of online platforms (both for established market players as well as for new entrants).

In the Communication on online platforms (adopted on 25 May 2016) the Commission outlined a targeted, principles-based approach, to fix problems flagged by respondents to the Commission's public consultation during its year-long assessment of platforms. The Commission will support industry and stakeholder efforts for self- and co-regulation to ensure this approach remains flexible and up-to-date. The action areas include:

- **Comparable rules for comparable digital services:** Comparable digital services should follow the same or similar rules and, where possible, the Commission should reduce the scope and extent of existing regulation. The Commission will apply these principles in- ongoing reviews of **EU telecoms legislation**, and of the **e-Privacy Directive**, for example when considering whether rules on confidentiality should apply to providers of online communications services as well as traditional telecoms companies.
- **An obligation for online platforms to behave responsibly:** The existing intermediary liability regime, set out in the **e-Commerce Directive** should be maintained. Specific problems will be addressed through targeted instruments, such as **audiovisual or copyright rules**, or enhanced voluntary efforts by industry. For example, the Commission is working intensely with **major online platforms on a code of conduct on combatting hate speech online** and will present the results in the coming weeks.

- **Trust is a must:** Cross-border enforcement cooperation will ensure that platforms fulfil their obligations regarding consumer rights, for example to clearly indicate sponsored search results. The Commission will also encourage industry to step-up voluntary efforts to tackle practices such as fake or misleading online reviews. The Commission will encourage online platforms to recognise different kinds of **secure electronic identifications** (eID) which offer the same reassurance as their own eID systems.
- **Open markets for a data-driven economy:** The **free flow of data initiative** scheduled for the end of 2016 will facilitate switching and portability of data among different online platforms and cloud computing services.
- **A fair and innovation-friendly business environment:** The Commission will carry out a fact-finding exercise into issues raised in the public consultation by businesses and suppliers who directly interact with platforms. These include, for example, concerns over unfair terms and conditions, in particular for access to important databases, market access and general lack of transparency. On this basis, the Commission will determine, by spring 2017, whether additional EU action in this area is needed.

(2) Review of the Telecoms Regulatory Framework

The DSM strategy announced an ambitious overhaul of the telecoms regulatory framework. One of the issues is to ensure a level playing field for market players and consistent application of the rules. A public consultation took place in 2015 (September-December). The inter-service consultation could be launched by 15th July and the Commission could adopt a legislative proposal on 21 September.

Many over-the-top (OTT) [of Internet] Voice and Messaging services (e.g. WhatsApp, Skype) directly compete with Electronic Communication Services (ECS) providers (the traditional telecommunication operators). In 2014, 70% of instant messages were OTT and 30% SMS. By 2020, OTT messages could be 90% of the market.

However, OTT and ECS are not subject to the same regulatory framework, and therefore without benefitting from the same rights (e.g. interconnection), or abiding by the same obligations (e.g. portability, access to emergency calling).

ECS have complained about how services like WhatsApp and Skype use their networks without having to make any contribution to underlying infrastructure, so reducing the incentive for investment, but the new proposals are said to encourage it.

(3) Privacy protection in the EU regarding Internet and Telecommunication Services

The new General Data Protection Regulation (EU) 2016/679 was published in the EU Official Journal of 4 May 2016 and will be applicable as from 25 May 2018.

These new personal data protection rules will reduce enterprise costs by replacing 28 sets of national rules with a single set of EU rules and creating an administrative one-stop-shop, maintain the free movement of personal data and better protect the privacy of individuals.

The Commission expects to adopt in 2016 a legislative proposal to revise the existing Directive 2002/58/EC on personal data protection in the Telecom sector.

The Commission is negotiating with the USA to improve the protection of EU data subjects and expects a new framework agreement to be in force in 2016.

Personal Data Protection for data exported to third countries, in particular the USA

On 29.2.2016, the Commission adopted a Communication on "*Transatlantic Data Flows: Restoring Trust through Strong Safeguards*" and the EU and the U.S. reached a political agreement on the new framework, the EU-U.S. Privacy Shield. It contains important new safeguards and will guarantee a high level of protection of the fundamental rights of EU individuals. It will provide the necessary legal certainty for companies on both sides of the Atlantic that want to do business together. And it will inject a new momentum into the transatlantic partnership.

EU Procedural steps

The Commission will submit the Privacy Shield to the Committee where the national Data Protection Authorities are represented, the "Article 29 Working Party", for an opinion on the level of protection provided. If it is positive, the Commission will send a draft Commission decision considering the US protection is adequate ("Adequacy decision") to the Council of Ministers to follow the comitology procedure before it can be adopted. The European Data Protection Supervisor will also be consulted.