DIGITALEUROPE

DIGITALEUROPE's Reflection on the review of the Digital Single Market strategy

Brussels, 13 April 2017

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INTRODUCTION

DIGITALEUROPE's vision for the European Union (EU) is one that nurtures and supports the digital technology industry, and prospers from the jobs we provide, the innovation and economic benefits we deliver and the societal challenges we address.

DIGITALEUROPE commended the EU Institutions for making digital a top priority for Europe and welcomed the timely delivery of the Digital Single Market (DSM) strategy.

STOCK TAKING

We stress that the acid test for the DSM strategy is the impact it will have on economic growth and job creation in Europe. In order to achieve these goals, the implementation of the DSM strategy should be guided by the following general principles:

- Be pro-innovation and pro-competition
- Adopt simple and flexible rules for businesses and consumers that are fully harmonised at an EU level
- Recognise the global nature of digital and remain open to free trade
- Involve and consult regularly with all interested stakeholders.

We commend the Commission to take a stock taking exercise of all legislative and non-legislative proposals related to the DSM strategy.

We understand that the legislative process is not under control of the Commission, but we still think it is important that the Commission reflects also on the already proposed legislation because it can serve as a direction for the future work, including this review.

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1. Legislative proposals

Consumer rules

Consumers are already benefiting from a strong set of consumer laws such as the Consumer Rights Directive (CRD), Unfair Commercial Practices Directive, the Unfair Contract Terms Directive as well as the Data Protection Directive and soon to be the General Data Protection Regulation.

In the spirit of Better Regulation, we believe that it is essential to promote existing rules that strengthen consumer trust in cross-border commerce activities. New regulation should only complement where necessary.

In particular, we believe that the REFIT of EU Consumer and Marketing Law should have been undertaken first to evaluate consumer law requirements in a holistic manner before introducing any new legislation.

Furthermore, we would like to stress that the Digital Single Market cannot be successful without a true Single Market. At the moment, there are still too many variables, which make cross-border trade very difficult, irrespective of it being offline or online.

Traders need to adapt their offers to the jurisdictions they target, which may imply some variations to take into account: national standards of living, consumer habits and preferences, language requirements as well as the need to comply with diverging local technical and legal rules - consumer rights, VAT rates, copyright, or rules on the disposal of electronic waste. Those variables justify trading online in a targeted, differentiated way.

Full harmonisation of rules should also be pursued in order to ensure legal certainty for both consumers and businesses. Such a level of harmonisation will entrust consumers when shopping cross-border as well as incentivize companies to engage in cross-border trade.

Finally, it is of utmost importance that consumer legislation remains limited to B2C only. Given the specificities of B2B, we strongly believe that consumer legislations are not appropriate for regulating B2B relations.

Geoblocking

Scope of the Regulation – Copyright

Copyrighted-content should not be included in the scope of the Regulation, as proposed by amendments in the European Parliament. Such an inclusion would create a disproportionate burden on service providers as they would have to manage every piece of content individually to see whether it is legal in the consumer market. Not only must the service provider identify on a content per content basis if it owns the appropriate licenses but must also ensure that it is in compliance with local legal requirements regarding VAT (i.e. display the net price and applicable VAT depending on the customer's home country) protection of minors, banned content. It would also lead to a negative experience for consumers, who will be flooded with disclosures and will add frustration and confusion for they are unable to buy certain content. Moreover, we would like to stress that this is a de facto circumvention of copyright territoriality. It is unclear which rights holder the service provider will need to pay. Finally, such an inclusion would ultimately lead to a price harmonisation upwards, making content more expensive. This would not be beneficial for consumers and would also put service providers at a significant competitive disadvantage against piracy. Finally, it is of utmost importance that consumer legislation remains limited to B2C only. Given the specificities of B2B, we strongly believe that consumer legislations are not appropriate for regulating B2B relations.

Applicable law

We welcome the indirect references to the application of the trader's law and to the fact that sales to customers from other Member States should be considered as "home sales". However, the Regulation, as proposed by the European Commission, is insufficiently explicit for such sales to be considered as passive sales, and not directing activity beyond the Member State(s) where the trader already operates / delivers. This creates legal uncertainty that is detrimental both for traders and customers who would be unsure about which rules apply to the sale (incl. which contract rules the products or services should comply with, which VAT rate applies, which labelling rules apply, who should pay the cost to return a product if the good is faulty and has been picked up by the customer in the trader's country, etc.). Both traders and customers would benefit from more legal certainty. The link between this Regulation and the Rome I Regulation (and the related CJEU jurisprudence – which has considerably extended the situations where a contract is subject to the rule of law of the country of the customer - and not of the trader) must be clarified in order to ensure, as intended by the Commission proposal, that traders can "sell like at home".

Passive agreements

Article 6 creates a risk of conflict with EU competition law. Current EU competition rules allow for a limited exception to passive sales restrictions. The 2010 Guidelines on distribution agreements allow a manufacturer who wants to sign an exclusive agreement with a distributor to prevent passive sales under strict conditions for a maximum of two years. The rationale is that the distributor should be allowed to remain free from competition in a certain territory so that they can recoup the substantial investments they make to build up a new brand and the costs of launching a new product. For example, under the Guidelines, a new product's exclusive distributor for Germany may ensure that for a period of two years the same product's distributors for other Member States will not be allowed to engage in passive sales in Germany. By stating that contracts which include restrictions on passive sales "shall be automatically void", the proposed Regulation contradicts existing competition law. Therefore, the text should be amended to be aligned with existing competition rules.

Digital contracts package

Data as a counter-performance

DIGITALEUROPE is very concerned about the proposed introduction of digital content or services provided for counter-performance other than money in the form of personal data or any other data into the scope of the Directive. We do not believe that this would create a level-playing field but be at the disadvantage of innovative services and small companies and would not reflect the different expectations consumers have whether or not they pay for the content or service. DIGITALEUROPE recommends limiting the scope to digital content or services supplied in exchange for money. If data were to be included in the scope, it should be restricted to personal data actively provided only. References to other data should be deleted from the text.We would like to also to draw your attention to potential conflicts with the recently adopted General Data Protection Regulation. In this regard, we recommend to take stock the recently published Opinion from the European Data Protection Supervisor (Opinion 4/2017).

Retrieval of data

We believe that the termination rights offered by the Digital Content Directive, combined with the lack of clarity of the scope, give rise to disproportionate remedies for consumers. The right for consumers to retrieve all the data produced or generated through the use of the digital content to the extent that data has been retained by the supplier is extremely broad and does not reflect consumer expectations. While it makes sense that consumers of cloud storage services, for instance, should be allowed to retrieve the original content they have uploaded as well as any modification to the content made via the service provided that no third party intellectual property rights are infringed as a result, we question the value of retrieving data such as the complete history of a search engine or a progression in an online game. We are of the opinion that only data that has value to end-users should be returned to them. We are also concerned by how this obligation fits with privacy rules, i.e. when the data collected for commercial use has already been anonymised. Once anonymised and aggregated, it is technically impossible to go back and de-anonymise data.

Extension of the scope to offline rules

The Tangible Goods Directive, as proposed by the European Commission, would create two competing regimes for offline and distance sales. Depending on the final text of the Directive, one of the two regimes could be more attractive for companies or consumers than the other. We therefore welcome amendments which broaden the TGD's scope so that it would apply to both offline and distance sales. A wider scope would provide a simplified framework and a level playing field for both consumers and companies.

Lifespan of products

We are very concerned about the proposals made in the European Parliament to link legal and commercial guarantees to the lifespan of products. We would like to stress that the expected lifespan of goods depends on many variables. Determining a product's lifespan would be particularly challenging, if not impossible. Products are complex by virtue of their design, components and innovation. There is no industry definition, no standard, and no agreed measurement of expected lifespan. Furthermore, a product's lifespan highly depends on how the consumer uses the good and under what conditions (ambient temperature, dust, humidity etc).

Regarding commercial guarantees, we believe that competition and consumer choice are key. Most consumer electronics and electrical products may be purchased with commercial guarantees on both parts and labour. Also, manufactures sometimes offer longer commercial guarantees alongside the legal protection periods offered by the seller, in an attempt to gain commercial advantage. Making commercial guarantees mandatory and linking them to the expected lifespan of products through legislation would stifle both competition and consumer choice and would increase retail prices.

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Copyright

Directive on copyright in digital single market

Text and Data Mining (article 3)

As proposed in the draft Directive on "Copyright in the DSM", the new exception for Text and Data Mining will allow research organisations to carry out TDM of works they have lawful access to, for the purposes of scientific research. Research organisations are understood very narrowly as organisations practicing scientific research on a non-for profit basis or pursuant to public interest. The material being mined, whether copyright subject matter or not, needs to be secured lawfully in the first place, but to suggest that all TDM activities should require a specific license 'on top' will only create difficult conditions, not least for SMEs.

The TDM exception is granted for the purpose of scientific research only. It seems that "scientific research" always means on a "non-for profit basis" or for "public interest". Incorporating copyright protection for facts and ideas ensures that TDM is controlled by the copyright owner, thus preventing foreign and European businesses from driving competition through innovation.

Also, if during a cooperation between a research organisation and a commercial entity the commercial entity practices a "decisive influence" to enjoy the TDM results on a preferential basis, this cooperation is not considered a research organisation or public-private partnership benefiting from the TDM exception. There is already clear evidence that the use of TDM by researchers is lower in Europe in comparison to the US and Asia, specifically affecting the field of computer science. However, by allowing innovation to flourish and supporting operational efficiency improvement by using data more effectively can lead to €195 billion of potential annual value to Europe's public sector.

Companies of all sizes in Europe are constantly investing in data analytics and predictive analytics, and use TDM to process large volumes of content and discover new insights from data. To protect these investments, to enable companies in Europe to compete with companies in other regions of the world, which benefit from broad exceptions and fair use exemptions for TDM, and because most importantly, as lawful access to the work is a precondition, TDM does not affect the market for the original works, we propose the following:

We propose that this exception applies to all entities carrying out TDM of content they have lawful access to, for the purposes of both commercial and non-commercial research. We also propose to define if lawful access was acquired, the licensor is already compensated also for TDM. We also suggest the Directive to allow the inclusion of minor samples of the work in the TDM results to support and to confirm transparency, intelligibility and quality of the TDM outcome. We suggest that the last sentence in Recital 10 mentioning research and public private partnerships as well as Recital 11 are deleted.

Publishers Rights (articles 11 and 12 and Recital 36)

The Commission proposes to introduce a related right for publishers covering online uses of news publications (in Article 11.) as well as the possibility for Member States to provide that publishers (news, book and scientific publishers) may claim a share of the compensation due for uses under an exception (typically levies for reprography and private copying, in Article 12.).

We are not supportive of introduction of additional rights for publishers under article 11. Publishers are already sufficiently protected by existing copyright rules. Experiences in Spain and Germany have yielded negative results for journalists, publishers, start-ups and consumers alike, have been critised by academics and have yielded no positive benefits.

We believe that Article 11 should be redrafted to ensure that Member States which unilaterally introduced a digital neighbouring right for publishers, without notifying the European Commission nor assessing their compatibility with internal copyright law, fundamental rights, EU law and the single market, should be obliged to abrogate such neighbouring rights. The rule of law should of course be observed in withdrawing such rights, with transitional measures protecting acquired rights, and without prejudice to other national laws governing collective works. Article 11 should also provide that that the creation of such new territorial publisher rights under national law is detrimental to the single market and is not permitted.

We believe that it is necessary to clarify in Article 12 (and recital 36) that including publishers as a beneficiary of the fair compensation does not lead to overall increase of the fair compensation paid, compared to today's level. To make sure that no additional hardware levy burdens occur, we would need to ensure that the proposed Directive complies with its Impact Assessment so that (i) compensation is due to authors, so whatever publishers get should be a share of authors compensation and not an extra, specific one; and (ii) this provision should not allow for an increase of the overall level of collected levies.

Intermediaries (article 13, recital 38)

We are concerned with a proposal that mandates extended liability and content filtering for a wide range of online services used by European consumers on a daily basis. Article 13 and Recitals 37 to 39 will change the nature of the online services which consumers use to create, access and share creative content online. A huge sway of the Internet based services will be become less convenient, less open, and ultimately unavailable to European consumers in their current form.

Legally, Article 13 raises equally far reaching concerns, not least with respect to fundamental rights, firstly, the mandating of filtering technology to a broad range of services used everyday by European consumers amounts to a general monitoring obligation. As such it infringes the E-Commerce Directive (ECD) and in particular Article 15.

Article 15 of ECD says Member states shall not impose a general obligation on providers to monitor content they "transmit" or "store". Further, the CJEU the CJEU in SABAM v Netlog clearly started that filtering measures raised concerns with respect to fundamental rights. In that case, the court ruled that filtering measures would not strike a 'fair balance' between the EU Fundamental Rights i.e. the property right (Article 17(2) of the Charter) and the provider's freedom to conduct a business (Article 16 of the Charter) on one hand, the right of the users to the protection of their personal data (Article 8 of the Charter) and the rights of those users to their freedom of expression (Article 11 of the Charter) on the other hand.

Second, the proposal and recital 38 in particular significantly expands the scope of copyright protection. The resulting scope of copyright protection appears at odds with the internet. According to the proposal, an internet service provider could be considered as infringing copyright ("communicating to the public") simply because a consumer is using the service to share copyright protected material online, as may be the case with cloud infrastructure services and internet service providers. It is broadly understood in EU and Member States laws, courts and legal doctrines that the making available is done by the end-user in the first place. It is the end-user that actually uploads the material, unless the intermediary generated the content itself or somehow made the content its own. It does not stand to scrutiny that 'storing and providing public access' to works should amount to a communication to the public.

Third, the proposal also reduces the scope of the ECD in making intermediaries liable irrespective of whether they have knowledge that the content in question infringes copyright. Recital 38 in this respect is a misleading and partial summary of the case law of the Court of Justice.

We believe that the proposal of Article 13. should make clear that in case of conflict with other instruments such as the ECD or the Charter, these laws prevail over the copyright directive. Where a service concludes a licensing agreement, said service keeps the benefit of the safe harbour provided for under article 14 of the ECD and associated case law. Where a service uses content-recognition technology, said service keeps the benefit of the safe harbour provided for under articles 12-15 ECD.

Electronic Communications Code

We welcome the Commission's proposals to review and update the European Union's telecommunications regulatory framework. The proposed Electronic Communications Code (ECC), flanked by the 5G Action Plan and Gigabit Society Communication, aim to build a more competitive and investment-friendly telecoms landscape in Europe.

DIGITALEUROPE as the representative of the technology vendors in all layers of the internet value chain, believe that the core goals of the new telecoms framework should be fostering investments and infrastructure-based competition, notably through a coordinated EU vision on spectrum management and through a proportionate, innovation-friendly approach to electronic communication services regulation.

DIGITALEUROPE finds that effective infrastructure-based competition remains the most important driver of innovation and investment into Very High Capacity Networks (VHCNs). We support the proposals of the Commission to make access regulation more targeted and proportionate and, if implementation of access remedies is warranted, to focus first on the physical infrastructure, passive and then active network elements.

We also support the proposal to further encourage co-investments into VHCNs but believe it should be considered to allow more flexibility for the market to design the investments according the specifics of individual projects. Finally, DIGITALEUROPE supports the concept of broadband mapping and Digital Exclusion Areas where additional efforts will be needed to ensure every EU citizens will have access to VHCNs.

As far as the spectrum proposals are concerned, DIGITALEUROPE fully supports the Commission's draft and agrees that coordination is needed to free up the bands for deployment of 5G devices and services. The markets for Internet of Things, Machine-to-Machine technologies, Connected Cars, etc., all depends on certainty for investment and timely availability of spectrum bands.

The important elements of a secure and predictable spectrum landscape consist of, as proposed in the ECC, longer license durations combined a flexible secondary market in trading and leasing of licenses.

The most crucial element though is the timely and EU-wide availability of spectrum, to foster those economies of scale which are essential for the development and deployment of wireless devices in the Digital Single Market. To this end, a more balanced approach to general authorisations versus individual rights should be considered (as licensed spectrum availability is the guarantee for networks with required quality of service).

Finally, in respect of services regulation, DIGITALEUROPE appreciates the layered approach taken by the Commission. We stress nonetheless that the definitions need to be more carefully crafted to be better aligned with technology to ensure a truly targeted approach and to ensure a practicable implementation that works to the benefit of consumers and businesses. This notably concerns the definition of number-based and the exception for 'merely minor and ancillary' features where the current wording could capture a significantly wider group of services than intended.

More targeted definitions and provisions, supported by established competition law, would also better support innovation for both big and small players in this dynamic and borderless digital market. Overall, a harmonised EU approach, true to the principles of the Digital Single Market and aligned with existing horizontal legislation such as the NIS Directive, would be the most proportionate way of delivering on a flourishing telecoms market.

Audiovisual Media Services directive (AVMS-D)

DIGITALEUROPE welcomed the targeted approach followed by the European Commission for the revision of the AVMS-D and believes that the AVMS-D proposal can help ensure that the market continues to prosper and that the viewer is in the driving seat. Anyhow, the new legislation must be future-proof and allow for growth for further developments within a fast changing market. Therefore DIGITALEUROPE would like to highlight in particular the following issues which raised strong concerns:

Country-of-origin principle

The country of origin principle is the cornerstone of the AVMS-D and has played a vital role in the creation and the functioning of the single market. We strongly believe that any consideration given to water it down would move the EU backwards and lead to legal uncertainty. We believe that this is strongly undermined by the introduction of levies for the financing of content in the country of destination of the service. This goes against the purposes and vision of the Digital Single Market.

Quotas for European content

Digital technology and services support media pluralism and the creation of EU content, however, as a principle, DIGITALEUROPE is not in favour of the introduction of quotas to promote EU works. We believe that they are not an effective way of protecting local content providers and would have a detrimental impact on the sustainability of existing and new business models which provide European consumers with the ability to access a wide variety of European and international content. If quotas were to be included in the proposal, they should not exceed 20%.

Discoverability

We welcome, that the Commission did not see the necessity to include provisions regarding discoverability within the AVMS-D proposal. However, recital 38 of the proposal refers to the ability of Member States to "impose obligations to ensure discoverability and accessibility of content of general interest under general interest objectives such as media pluralism, freedom of speech and cultural diversity". Whereas discoverability of content is a legitimate aim of media regulation, the prioritisation of certain content one over the other inevitably leads to discrimination. Device manufacturers and digital service providers compete by offering access to as many applications and as much content as possible. As it is in everyone's interest to ensure that search tools are user-friendly and efficient, we strongly believe that the pre-eminence in content offers and search results ("must be found") do not need to be forced by legislation. We fear that the European Commission did underestimate the seriousness this recital can take, and fiercely recommend to delete this recital. Any regulation laying down principles how to search or organise content on connected devices does hinder the development of new, not-yet-thought-of, searching tools and design features and impedes competition in a volatile and fast changing market.

Liability of intermediaries

Finally, we would like to stress that it is essential to safeguard the delicate and necessary balance created by the eCommerce Directive, to guarantee free expression, the provision of basic services enabling the free flow of information and the provision of a legally certain framework supporting the Internet and a flourishing E-commerce economy. It is key to refer to the e-commerce directive throughout the text to avoid any legal uncertainty, but also to avoid any language and requirement going against the spirit of the e-commerce directive.

e-Privacy regulation

By publishing a proposal for an ePrivacy Regulation the Commission has unfortunately failed to implement the 'Better Regulation' principle. By largely ignoring feedback and contributions from industry the Commission has missed an opportunity to streamline data privacy rules in Europe and risks creating confusion, legal uncertainty and overly-restrictive rules rather than creating a level-playing field.

The ePR should avoid to become a 'catch-all' legislation and we encourage the final exclusion from the scope of those services with only ancillary communications features and M2M communications to bring the legislation in line with the Electronic Communications Code. The ePR must also provide additional flexibility for the use of communications data through a great reliance on legal basis' for processing other than end-user consent, such as legitimate interest.

Co-legislators must take the time to properly consult and evaluate the impact of the ePR instead of rushing negotiations to meet an unrealistic timeline. Companies will need sufficient time to comply once the text is officially adopted.

2. Ongoing actions

Data emerging issues (data flows, data ownership, re-use, access, liability and portability)

The European economy is undergoing a transformation to a data driven economy, which heavily relies on cross-border data flows. The success of this transformation directly depends on companies' ability to transfer data across borders in order to develop their business models, provide services to consumers and create cross-industry partnerships. However, existing direct and indirect restrictions to the free flow of data across Member States, including in the area of national public procurement, undermine the competitiveness and growth of companies in Europe.

The European Commission rightfully noted in its recent inception impact assessment for a European free flow of data initiative within the DSM that, "the free flow of data has become limited by technical and legal barriers at national level. This comes at a cost for businesses that have to set up data centres in each Member State, or pay higher costs for data storage and processing".

We agree with the Commission's view that these restrictions should be regarded as an exception rather than the rule, and we strongly oppose data localisation requirements at national, European or global level. Not only do localisation mandates rarely find any valid justification, they also prevent customers from accessing new services and state of the art technology. Importantly, data localisation measures actually weaken security protections as they make centralised data more vulnerable to attacks. Where data is stored should be a matter of customer choice, not government mandate.

We strongly recommend avoiding any forced data localisation requirements on a national, European or global scale. These requirements in most cases find no valid justification, as under a true DSM there is little justification to deem data safer or better accessible by default if stored in a specific Member State, as the physical location where the data is stored does not seem to have much relevance anymore.

Any forced data localisation requirements should be subject to EU scrutiny and should only be kept if proportionate and in line with EU legislation and single market principles. The EU must introduce a legal instrument that removes existing national data localisation requirements and prevents the creation of new ones.

Companies in Europe are already facing various data localisation restrictions, which may be likely to increase in the future in absence of EU action.

The exceptional introduction of data localisation requirements by Member States should be pre-determined by a narrow range of acceptable justifications and subject to prior notification to allow for verification of their compatibility with EU law, including in the area of national public procurement. Even in the exceptional cases of "justified" data localisation the objective should be, as much as possible, to allow for the free flow of data within Europe and not force storage within a specific country.

The European Commission has carried out various rounds of consultations on the question of data ownership, access and liability. All of these consultations have lead to the same conclusion: legislative intervention is not necessary. The existing framework and contractual arrangements provide a sufficient legal framework.

First, the responses to the public consultation on platforms, which also touched upon this question, indicated that "it is not necessary to regulate access to, transfer and the use of non-personal data at European level." The majority of business groups, like DIGITALEUROPE, were also "against specific measures, claiming that any new restrictions on data not covered by the (personal) data protection regime should be avoided in order to deliver maximum benefit to the economy and society." Respondents also highlighted the absence of proof of market failure and that "data protection laws deal adequately with issues of ownership, use and access regarding personal data." The answers also indicated that there is no need for a new or specific liability regime as the current framework is sufficiently technology neutral. "It was emphasized by many respondents that there is nothing intrinsically different about IoT that calls into question existing liability regimes." (See Synopsis Report on the Contributions to the Public Consultation - Regulatory Environment for data and cloud computing.).

Further to the public consultation, the Commission has organised various workshops where the same issue was discussed and the same feedback was provided. During these workshops, participants emphasized that there is "no need to create any new data exploitation right or similar", as the "creation of any new right to data may actually complicate or even hinder the free flow of data". Some Member States are also looking into this question, but the preliminary results "confirm the view stated above that no legislative intervention is desirable at this stage." (See Synthesis report - EC Round Table - an efficient and fair access to and usage and exchange of data.")

Access to, transfer and the use of data, is already covered by the existing legal framework, including, data protection, competition, unfair commercial practices, contract and consumer protection law, intellectual property laws, including, the database directive and the new trade secrets directive. To the extent that the processing (including access, transfer and use) relates to personal data, which is very broadly defined in Europe encompassing any data that has the ability to identify an individual. The rights of individuals are extensively regulated by the current and upcoming data protection rules. Rights of access and use between commercial parties processing both personal and non-personal data should be set by contractual relations between the various parties involved. Because we do not see market failure or particular need, we are sceptical about the need for model contracts or model licences. The flexibility of existing contractual practices, complemented by existing legislation is in our view sufficient.

In the B2B context, the data accessed and used is usually defined through contracts between the different companies or organisations involved. Given the disparate entities potentially involved in the offering and differences in the nature and purposes behind the generation of certain types of data, we – as the majority of the respondents to the various consultations with the Commission - are not convinced that a uniform regulatory solution is preferable to existing contract negotiations. Not all of the actors involved in a 'system' will have equal claim to all types of data. Where additional analysis or combinations of data have been used to draw out new insights this is clearly added-value brought to the data by the processor in question. Even the customer who opts for a specific solution may not need access to all the data being generated. Some data may be business confidential, whereas in other cases they may decide they have limited interest in the data in question and may be willing to trade it against other advantages in contract negotiations. Without evidence that such negotiations are proving unworkable, we do not see a need for regulatory intervention.

In the B2C context it is assumed that the data subject has the right under the current and future data protection rules to transparency and control with regard to the use of their personal data. However, there are clear benefits to sharing such information in an aggregated and anonymized format and the urge for an all-encompassing interpretation of the personal data definition should be balanced with these gains. For example, one must consider intelligent transport management which requires the collection of personal location data to map and predict traffic flow. Accuracy improves as more traffic data is connected.

Generally speaking, we do not believe that rules specific to IoT are needed when it comes to assigning liability. The existing rules in the Products Liability Directive can apply to IoT devices. In addition, like many other business models, the Internet of Things relies on complex supply and value chains which can involve a great number of service providers and users. In all those business models and equally for data driven services and connected products, liability is assigned in contract terms which provide the necessary legal certainty for parties in the supply chain.

To conclude, as demonstrated by the various consultations launched by the Commission, contractual relations and existing rules are sufficient. It is currently premature to conclude that new legislation is needed. The existing rules should be carefully assessed according to various use cases and soft regulation should be promoted.

Cybersecurity

As the Commission looks to build trust in the field of cybersecurity, particularly for IoT products, we believe that potential future proposals in the field of cybersecurity certification and labelling may be focusing on the wrong policy priorities. The Commission should not look to establish new labelling frameworks as they typically take decades to be developed and adopted. Time consuming and expensive certifications work for the governmental and critical infrastructure sectors, but cannot be applied to the dynamic world of consumer products with short innovation cycles and multiple contexts of use.

To stay ahead of malicious attackers, industry must be able to develop and deploy new tools to protect our digital economy against changing cyber risks. A new EU certification framework would not be able to cover a broad set of products/services as the nature of products and services as well as the magnitude of cybersecurity risk vary significantly. Component/product labelling could potentially lead to a false sense of security for end-users in the consumer market. Benchmarking cybersecurity practices, on the contrary, would allow both consumers and organisations to compare situations and form an idea of the cybersecurity state-of-the-art.

We strongly believe that security is not static. While a product may achieve a top rating at the point it is put on the market, six months down the line changes in the threat landscape may render it insecure. While users of ICT products in the critical infrastructure sector or other sensitive settings are likely to have means to keep up with developments across the lifecycle of a product, at the consumer end of the market, there is an imbalance of information and the devices do not even necessarily have update capabilities. Labelling, therefore, creates the very real risk of a false sense of security.

We instead continue to express an openness to the concept of a voluntary IoT Trust Charter – allowing the industry ecosystem to sign up to a set of principles that elucidate their approach to security and privacy.

Digitising Europe

Building a Connected Society

All digital solutions that are envisaged in traditional sectors are heavily dependent on available and reliable connectivity. To develop proper connectivity, there is the need for a highly performant infrastructure. This requires cross-border cooperation and investment-friendly policies in the European Union and beyond.

Connectivity is at the heart of today's digital society. It's the bridge between people, businesses and devices. But today's infrastructure must be upgrade to become truly ubiquitous, fully reliable, instantaneous and capable of dealing with vast amounts of data.

A state of the art, robust and fit-for-purpose communications networks are an absolute necessity for the EU and can only be achieved through cooperation between industry and regulators to unlock the required investments to ensure a truly connected society.

Consumer angle should be considered as well, because all connectivity is underlying that there will be value add by services and applications built upon available and reliable connectivity, either when we talk about business or citizens.

Digitising other industries

Connectivity and infrastructure are the basis for developing solutions both for factory floors and for consumers. For example, connected vehicles, e-Health, Smart Cities are developed assuming there is reliable, high-speed connectivity.

The Digital industry must create innovation for the connected world together – across sectors. Europe also has several other big R&D spenders such as automotive and healthcare. They all stand to benefit from the transformative force of digital technologies.

The key thing is to develop the "digital ecosystem" as neither operators, nor telecom vendors, nor IT companies, nor players in the traditional industry sectors will be able to cover the whole value chain. All stakeholders need to create and jointly nurture new digital ecosystems, in which also smaller, innovative players can prosper. National governments and the EU can play an important role in enabling such ecosystems.

Digital ecosystems transcend traditional industry boundaries. Success means being able to connect all kinds of things, collecting and transforming data into meaningful information.

Harnessing data economy opportunities

Business models are nowadays highly based on data. Data and big data will play a key role for companies engaging in the process of digital transformation. Big data analytics can help companies make key strategic adjustments and minimize costs through improved productivity. Big data analytics can also help companies to better tailor their offers to attract and retain end-consumers.

The EU institutions have all recognised the importance of digital transformation and the data economy for the future of Europe. Rather than developing opportunities arising from the digital economy, policy makers currently focus on potential threats (e.g. discussion on limitations for data flows, regulation of platforms, potential adoption of the concept of data as currency, data ownership, privacy, security, and so on).

It is essential that Europe enables free flows of data within the EU and with the world as the digital economy is global by nature and for data ownership, access and re-use rely on the contractual relations and existing rules.

Making European rules fit for the global digital ecosystem

ICT is global by default and enables global value chains for every sector of the economy. Europe's Digital Single Market must stay open and integrated within the global connected ecosystem and marketplace for businesses and ideas to succeed, lead and scale up.

While the inclusion of the Innovation principle should be at the core of any upcoming European initiative for building up the Digital Single Market, the international dimension is fundamental to keep up with the dynamic, ever-changing global technological market.

Technology neutrality and engagement in support of global standards and specifications are prerequisites for fast innovation, and for building a connected society and to fully explore the data economy.

Europe as the no. 1 exporter of trade services needs to lead by example and strive for global market access, international regulatory cooperation and preserve openness of the Internet. The European Union must be a key global influencer also in global organisations such as the G20, the G7, OECD, WTO, etc. to advance the principles of a truly international digital marketplace.

Digital Skills

As all sectors of the economy are becoming more and more digital, it is essential to re-train the whole European workforce: ICT practitioners, farmers, bank employees, factory workers and others alike.

More should be done to harness industry-led education when it comes to digital skills. **Member States** should allocate more time for teachers to be trained on IT and digital skills. The **IT industry** is willing to support training of trainers. Future teacher should have a minimum standards of digital skills as a transversal training. The **European Commission** could provide guidance on a unified quality framework for industry based training materials, in order to leverage the impact of vendor neutral learning tools.

Platforms

Platforms should be primarily seen as an opportunity, not a threat. Platforms are a development to be positive about. They are creative, innovative and drive growth and competitiveness. The reason they have succeeded is that they offer advantages for businesses and consumers alike. Businesses use platforms to reach more customers and expand into new markets. They benefit from new funding models and reduced costs. Consumers benefit from increased information and convenience, choice and quality of services, and savings in money and time. It is thus important that platforms are allowed to continue to be the drivers of innovation and to meet customer demand.

Platforms are already subject to significant regulation. Platforms must operate within the law and we believe that we should look to the existing regulatory framework to solve any concerns about the way platforms operate, whenever this is possible. Existing legislative and non-legislative instruments, including data protection law, competition law and consumer law, already apply to platforms and can be used to regulate them. In addition, we should make sure that we have explored the role of industry self-regulation fully as this may often be more appropriate and effective than government regulation in the fast pace of the digital world. In the first instance, we should focus on implementing existing laws effectively and consistently rather than adding to the burden of regulation on businesses.

Platforms must not be hampered by cumbersome regulation. Platforms are hugely varied and cover a wide range of business models. Policy questions are therefore rarely applicable exclusively to platforms, and when they are, they are limited to a subset of platforms. Adoption of new ex-ante regulation targeting online platforms as a segment of the digital economy is not desirable unless there is clear and compelling evidence of need, as there is a high risk that such new regulation would be ill-suited to the dynamic nature of the sector. If at all possible, we should avoid introducing legislation that might act as a barrier to the development of new digital business models and create obstacles to entry and growth in the European digital market. Such legislation might have an unintentionally damaging effect on the innovation, competitiveness and economic growth of the European digital industries. It would not be in the interests of European businesses nor of consumers and would put us at a disadvantage in relation to global competition.

We can best support the development of European platforms in Europe by providing the right conditions for growth. This can be achieved by working to complete the Digital Single Market, updating existing regulation to make it fit for a digital age, lightening the burden of regulation for small, innovative businesses and encouraging ease of access to finance through the Capital Markets Union package. Innovative new business-to-business platforms that support technology like the Internet of Things will benefit from a stable and clear regulatory environment. This line of action will encourage the growth and development of European platforms by providing a dynamic and competitive environment, which further regulation is not well placed to do. This will fulfil the ambition of the Commission's strategy to set free the entrepreneurial potential of European start-ups and foster economic growth and competitiveness in the EU.

EU Catalogue on ICT Standards

As the Commission is developing the concept for the EU Catalogue on ICT Standards, it is important that a proper balance is found between promoting the adoption of standards and facilitating the referencing of standards based products and solutions without moving into de facto regulation in areas that are outside of the regulated domain in Europe.

Any reference list on European Commission level presenting a selection of standards is likely to evolve into a single reference for public procurement. Therefore, if a selection of standards is done in the context of such a catalogue/reference list, this will unavoidably lead to a de facto support, if not mandating, of certain standards and thus to a limitation of choice. Moreover, the issue of how certain standards are selected, how decisions on "winners" and "losers" are taken, becomes critical and opens the door for questioning the validity of the respective reference lists.

The prime objective of the catalogue should be to promote the use of ICT standards based on comprehensive inventories of available standards in a certain domain. Such inventories – e.g. standardisation roadmaps, landscapes, etc. – are often available either as a result of landscape analyses done in standards developing organisations or, in some cases, even as a result of government initiated activities.

In areas where the European Commission requested the development of a standardisation landscape as it was, for instance, successfully done in CSC and the subsequent projects maintaining CSC, this standards landscape – and similar activities for other domains – should be taken into consideration as background information for public procurement when looking for guidance on standards in the respective domain.

Therefore, links should be established informing public procurement authorities about such standardisation landscapes and encouraging public authorities that, if they wish to make use of a technical specification on this list, they can initiate an identification procedure according to Regulation 1025/2012.

Additionally, in areas where similar standardisation landscapes have been developed in standards developing organisations in open and transparent processes, such landscapes can function in the same way.

The lists in the Catalogue should be as open as possible in order to avoid the risk of the Catalogue constituting a de-facto regulation in non-regulated domains.

3. What we think is missing

Private Copying Levies

We regret that there is no mentioning of private copying in the proposals for the EU copyright reform.

Every year European Court of Justice is getting at least one new case, and deciding in at least one case related to private copying systems in Europe.

Fragmentation of the implementation and disregard of Member States to implement judgements of the European Court of Justice is rampant and is clear call for the Commission to intervene and ensure that there is at least minimum harmonization in the European Digital single market.

We reiterate our strong belief that the current device-based levy system is outdated and no longer fit for the realities of the digital economy.

As an immediate step towards its much-needed reform, we believe that some of the internal market distortions caused by the current dysfunctional levy paradigm can be mitigated by implementing the interim "fixes", that should apply to all types of hardware based levies (so called media levies and reprographic levies):

1. Providing harmonized harm assessment processes (aimed at determining actual harm, as lost profit) and tariff setting processes (such as uniform time limits for defining and implementing tariffs with no retroactivity) that would become applicable in all Member States. No levies based solely on technical specifications of the device but on actual use and resulting harm. Guidance to be provided on "de minimis" rule.
2. Providing guidance to avoid double-payments and/or overcompensation in all relevant scenarios (namely, exports, accumulative forms of compensation, no harm situations, and licensed contents), requiring that in the context of the reprography exception, levies must be avoided and emphasis must be placed on operator fees.
3. Mandating transparency on all invoices in the distribution chain when levies are charged.
4. Exempting "ex ante" all purchases by legal entities and professional persons, and, providing a complementary simple and effective "ex post" reimbursement process for full and speedy recoupment in situations where the levy should have not been paid. This should in particular be applied to sales to public sector and publicly funded entities. No prior registration to be required to be eligible for exemption and/or refund.
5. Revenues collected should be dedicated to compensate right-holders for harm caused by private copying and not to the benefit of Governmental agencies and/or collecting societies. Social, cultural and educational funds should be exceptional and be set and managed following guidelines to be provided by the Commission.

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ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 61 corporate members and 37 national trade associations from across Europe. Our website provides further information on our recent news and activities: http://www.digitaleurope.org

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National Trade Associations

Austria: IOÖ
Belarus: INFOPARK
Belgium: AGORIA
Bulgaria: BAIT
Cyprus: CITEA
Denmark: DI Digital, IT-BRANCHEN
Estonia: ITL
Finland: TIF
France: AFNUM, Force Numérique, Tech in France
Germany: BITKOM, ZVEI
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Switzerland: SWICO
Turkey: Digital Turkey Platform, ECID
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