DIGITALEUROPE

**DIGITALEUROPE** Priorities for
# The Estonian Presidency
of the Council of the European Union

# Contents

# INTRODUCTION

Vision - A European Union that nurtures and supports digital technology industries, and that prospers from the jobs we provide, the innovation and economic benefits we deliver and the societal challenges we address.

Mission - To foster, on behalf of our members, a business, policy and regulatory environment in Europe that best realises our vision. We will achieve this by working as positive partners with the European Institutions and other European and global bodies and, through our national trade associations, the member states of Europe.

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

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;

- Recognise the global nature of digital and remain open to free trade;

- Involve and consult regularly with all interested stakeholders.
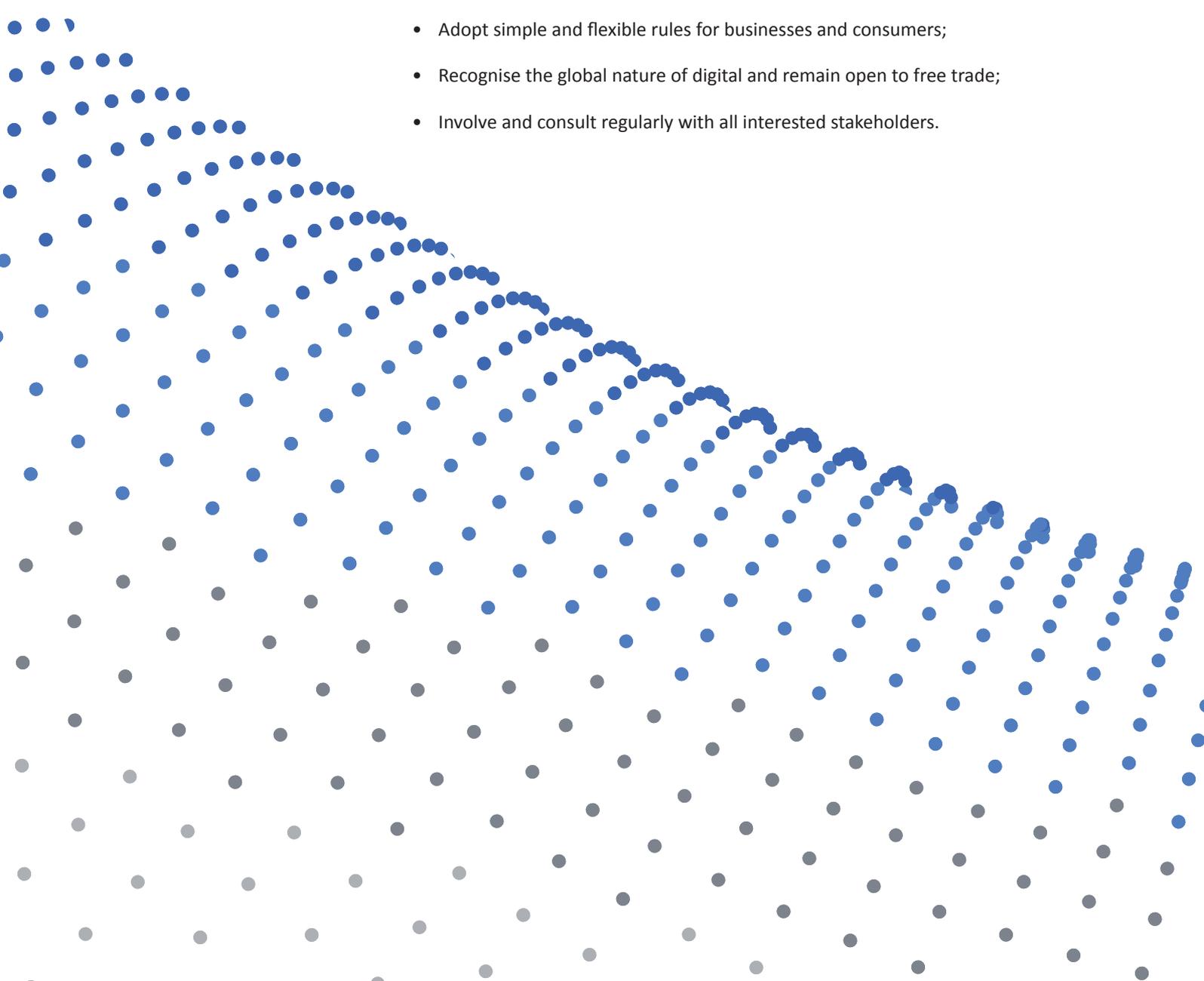
# OUR GUIDING PRINCIPLES

DIGITALEUROPE acts as a trusted partner in the implementation of the DSM so that the much expected benefits of the DSM in terms of growth and jobs can be enjoyed by European citizens and businesses as early as possible.

DIGITALEUROPE wants to work further with the European Commission, the European Parliament and Member States to see that the DSM principles are also applicable in the international context and all relevant international regulatory and policy dialogues.

**DIGITALEUROPE believes that the EU Institutions must continue to provide:**

- Guidance - for the digital economy, rather than create new legislation, especially for the data driven economy;

- Harmonisation - spectrum policies and encourage efficient management as one of the key drivers of the uptake of new technologies and innovation (5G, IoT);

- Entrepreneurship - create a plan for start-ups, focusing on the possibility of a tailored regulatory framework;

- Digital Skills - use the public sector as a lead and driver for the uptake of digital and the promotion of digital skills;

- Missed Opportunities - act on missed opportunities such as e-labelling to foster digital and the Internal Market;

- Global Approach - develop a clear vision on how to tackle digital trade and address digital protectionism in trade agreements as well as increase trust in cross-border trade for consumers and businesses;

- Existing Rules - ensure the proper implementation of existing rules. New rules should only complement where necessary;

- Tackling Disruption - refrain from regulating disruptive and innovative digital technologies and services.
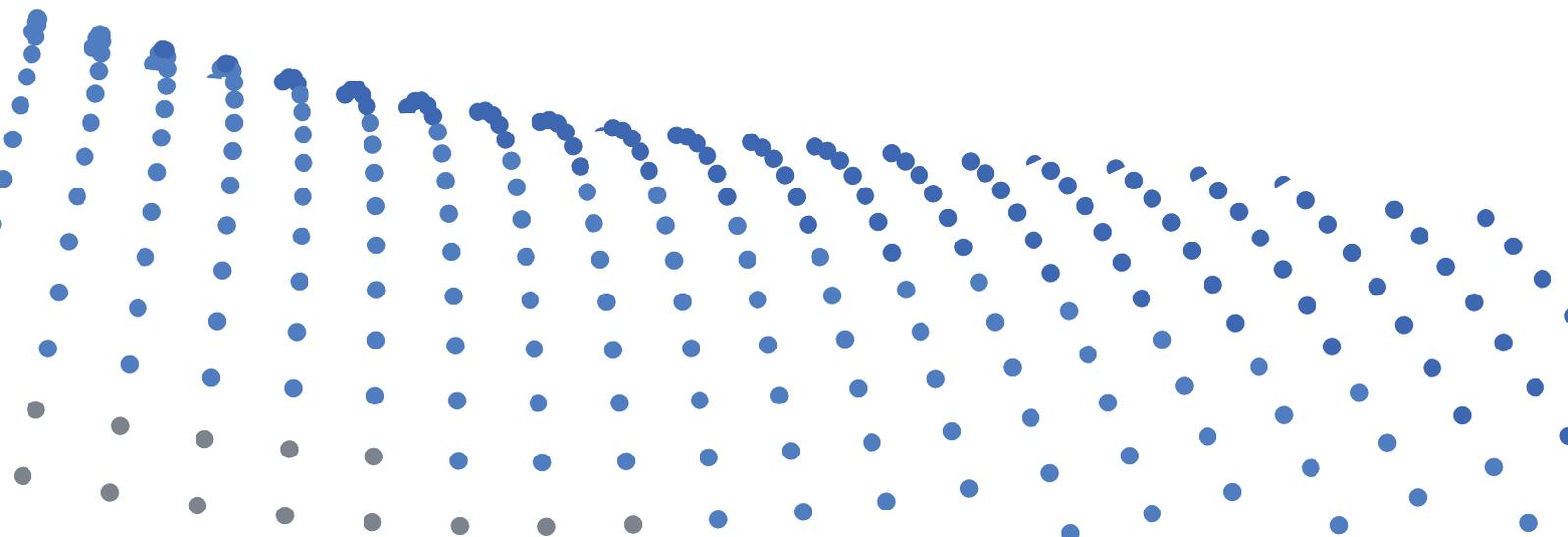
# DIGITAL
# TRANSFORMATION

## Why it is important?

Progress in digital technologies is changing the way we design, produce, commercialise and generate value from products and related services. Advances in technologies such as the Internet of Things (IoT), 5G, cloud computing, data analytics and robotics are transforming products, processes and business models in all sectors ultimately creating new industrial patterns as global value chains shift. The challenge ahead is for European industry to seize fully and swiftly these digital opportunities. This is essential to ensure Europe's mid and long term competitiveness with implications for the continents overall welfare.

## DATA OWNERSHIP, ACCESS AND RE-USE

**State of Play**

In May 2016, the European Commission launched a call for tender for a Legal Study on ownership and access to data. In March and October 2016, the European Commission held stakeholder consultation workshops to further discuss the topic. In January 2017, the European Commission published its communication on the topic of data ownership, access and re-use.

**Key Points**

DIGITALEUROPE believes that there is no single answer to data ownership, particularly when the business-to-consumer (B2C) context is different from the business-to-business (B2B) context. DIGITALEUROPE stresses that legislative intervention on the topic is not necessary as the existing framework of contractual arrangements provides a sufficient legal framework.

## Recommendations for the Presidency

- Support the view that access to, transfer of 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, and intellectual property laws. This includes the Database Directive and the new Trade Secrets Directive.

- Stress to the European Commission that legislative intervention is not necessary.

- Acknowledge that 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.

- Encourage the European Commission to better explain the market failure they have identified.

# FREE FLOW OF DATA

**State of Play**

As part of its DSM strategy, the European Commission announced that it would launch a free flow of data initiative before the end of 2016. In May 2016, the European Commission held a stakeholder consultation workshop to discuss the current legal barriers to the free flow of data in the EU. In January 2017, the European Commission published its communication.

**Key Points**

DIGITALEUROPE believes that the EU should take a leadership role at the global level to address protectionism and raise awareness globally on the negative impacts of data localisation requirements for the emerging digital economy. DIGITALEUROPE supports the European Commission in removing data localisation requirements and believes that localisation justified by national security reasons or public safety reasons should be applied with caution.

## Recommendations for the Presidency

- Work with Member States to prevent, address and remove general sector or market wide data localisation laws.

- Ensure that the free flow of data initiative remains true to its intention of abolishing unnecessary legal requirements for data localisation by Member States, which are the main obstacle for the free flow of data in the DSM.

- Support the concept that Member State public procurement policies should explicitly allow for data to be transferred within Europe, and wherever possible outside of Europe, taking into account all due safeguards as appropriate and in full respect of the commitments taken by the EU at WTO level.

- Encourage the introduction of strong monitoring and enforcement mechanisms to ensure individual procurement exercises adhere to free flow of data principles.

# INTERNET OF THINGS

**State of Play**

In April 2016, the European Commission published a Communication on Digitising European Industry, which included a Staff Working Document on Advancing the Internet of Things (IoT) in Europe. In October 2016, the European Parliament will have its first exchange of views setting out its initial opinion on the European Commission's Communication and accompanying Staff Working Document. A draft own-initiative report is expected shortly after.

**Key Points**

DIGITALEUROPE believes that IoT requires an innovation friendly approach to policy. As the pace of change is high and many business models are still emerging, we feel that it is important to take stock and make use of existing legislation before calling for and developing new regulatory measures.

DIGITALEUROPE is concerned that the potential future proposals of the European Commission in the field of cybersecurity certification and labelling may be focusing on the wrong policy priorities.

## Recommendations for the Presidency

- Stress to the European Commission that new legislation should only be considered when true market failure is detected and kept to a minimum and maximise innovation in IoT.

- Encourage the European Commission to fully introduce an 'Innovation Principle' to all future legislation so that whenever a policy or regulatory decision is under consideration, the impact on innovation is fully assessed.

- We emphasise that the European Commission should not look to establishing new frameworks. 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 life spans or multiple contexts of use.

# CONSUMER
## POLICY

### Why it is important?

The opportunities that digital technologies offer to consumers are countless. With today's technologies and multi-channel distribution opportunities, consumers can already benefit from a broader choice for services and products (incl. cross-border), better deals, tailored recommendations, as well as an increasing influence on service and product development. Social media, online review tools, and comparison websites are helping consumers to take more informed decisions and make better choices.
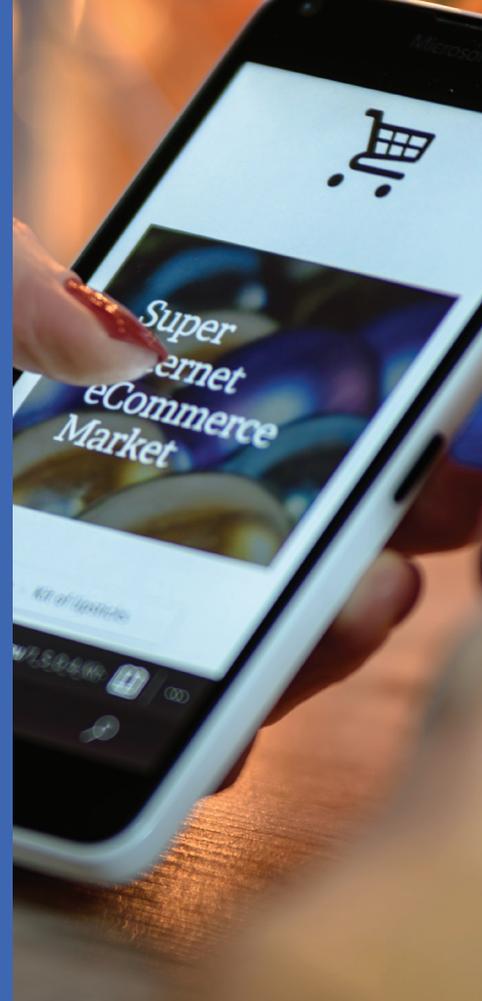
## GEOBLOCKING

**State of Play**

As part of its DSM strategy, in May 2016, the European Commission published a proposal for a Regulation on geoblocking and other geographical restrictions. The Council adopted its general approach on the proposed Regulation in November 2016. the European Parliament adopted its report in Committee in April 2017. Trilogue negotiations have now started and are expected to conclude under the Estonian Presidency.

**Key Points**

DIGITALEUROPE believes the Regulation fails to deal with the root problems facing the Single Market. Geoblocking is a symptom of a fragmented EU market, not the cause. Businesses must comply with various local rules for their products and services to be legally supplied in each market, but also adapt them to ensure they can function safely and properly. Furthermore, businesses must adapt their offers and marketing activities to local expectations as a matter of commercial success.

## Recommendations for the Presidency

- Address the root causes of the fragmentation of the EU Market. Lowering existing barriers is key for the Single Market and therefore the DSM to succeed.

- Ensure that the proposal remains limited to B2C contracts and that copyrighted-content is not included in the scope of the Regulation.

- Bring more legal clarity with regards to the issue of applicable law. The link between this Regulation and the Rome I Regulation must be clarified in order to ensure, as intended by the Commission proposal, that traders can sell "like at home".

- Align the Regulation with existing competition rules. 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. By stating that contracts which include restrictions on passive sales "shall be automatically void", the proposed Regulation would contradict existing competition law.

- Preserve Freedom of contract. This proposal should not deviate into a de facto obligation to sell everything, everywhere.

## DIGITAL CONTENT

**State of Play**

In December 2015, the European Commission published a legislative package aimed at boosting consumer trust when buying online cross-border, while at the same time encouraging companies to engage in cross-border activity. This included a Directive on certain aspects concerning contracts for the supply of digital content. Both the European Parliament and the Council are currently discussing the proposal of the European Commission. . The Maltese Presidency aims at reaching a general approach during the JHA Council in June. The IMCO and JURI Committees, lead on this file, are expected to adopt their report on 28 September. Trilogue negotiations would then start under the Estonian Presidency.

**Key Points**

DIGITALEUROPE supports the objective of the European Commission to boost eCommerce in Europe. We recognise that harmonisation of EU law for online purchases of digital content must provide further confidence for consumers and consistency across the DSM. 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 (GDPR). 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.

## Recommendations for the Presidency

- Encourage Member States to support the principle of full harmonisation, which is necessary to   to bring increased trust for consumers and legal certainty for businesses.

- Ensure that the proposal remains limited to B2C contracts.

- Avoid overlaps and potential conflicts with existing legislation such as the CDR and the GDPR.

- Refrain from including all types of content in the definition of digital content without identifying the problems that the legislation would solve nor recognising the specificities of each type at the risk of hampering innovation and creating more consumer confusion.

- Limit the scope of the Directive to digital content or services provided in exchange for money. If digital content and services provided against data are to be included, the scope should be limited to personal data and references to 'any  other data' should be deleted.

- Ensure that only data that has value to end-users are required to be returned to them. While it makes sense that consumers of cloud storage services, 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.

# TANGIBLE GOODS

**State of Play**

In December 2015, the European Commission published a Directive on certain aspects concerning contracts for the online and other distance sales of goods. The European Parliament is currently reviewing the file. The IMCO Committee is expected to adopt its report on 11-12 October 2017.  Discussions are expected to start within the Council under the Estonian Presidency.

**Key Points**

DIGITALEUROPE supports the objective of the European Commission to boost eCommerce in Europe. While we welcome the full harmonisation approach proposed by the Directive, improvement of the proposal is needed to increase trust for businesses to provide sales services, including cross-border. Furthermore, similarly to our position on the Digital Content Directive, we believe that that promotion of existing rules is crucial and that new legislation should only be drawn up where necessary.

## Recommendations for the Presidency

- Ensure that the full harmonisation approach is maintained throughout the legislative process.

- Extend the scope of the Directive to all sales contracts in order to prevent a competing regime for online sales as opposed to offline sales.

- Ensure that the new rules do not create unrealistic and/or unbearable obligations on businesses.

- Promote sustainable consumption by encouraging the repair of products. The seller should, first, have the right to repair or to replace, and only if this fails, the consumer could be entitled to a refund or a reduction of price. Allowing the consumer to choose the remedy would lead to a significant increase of the number of electronic devices refunded or replaced rather than repaired – often unnecessarily.

- Stress the need for conformity to continue to be understood as a product being fit for the purposes for which goods of the same description would ordinarily be used.

- Refrain from introducing provisions on the expected lifespan of products in this Directive. The expected lifespan of goods depends on many variables. Determining it would be particularly challenging, if not impossible. There is no industry definition, no standard, and no agreed measurement of expected lifespan. It also highly depends on how the consumer uses the good and under what conditions.  In addition, 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.

- Finally, an obligation to inform about the availability of spare parts would lead to a significant amount of spare parts not being used and becoming waste.

# COPYRIGHT
## TRANSFORMATION

### Why it is important?

As the Internet has become a key distribution channel for consumers to enjoy creative content, making copies of content digitally has become easy and quick. European citizens have come to expect access to digital content on multiple devices, anytime and anywhere in the Single Market. When this does not happen, citizens find it hard to understand why. EU copyright rules need to keep pace with the growth of digital technologies so that all market players and citizens can seize the opportunities provided by today's digital environment.
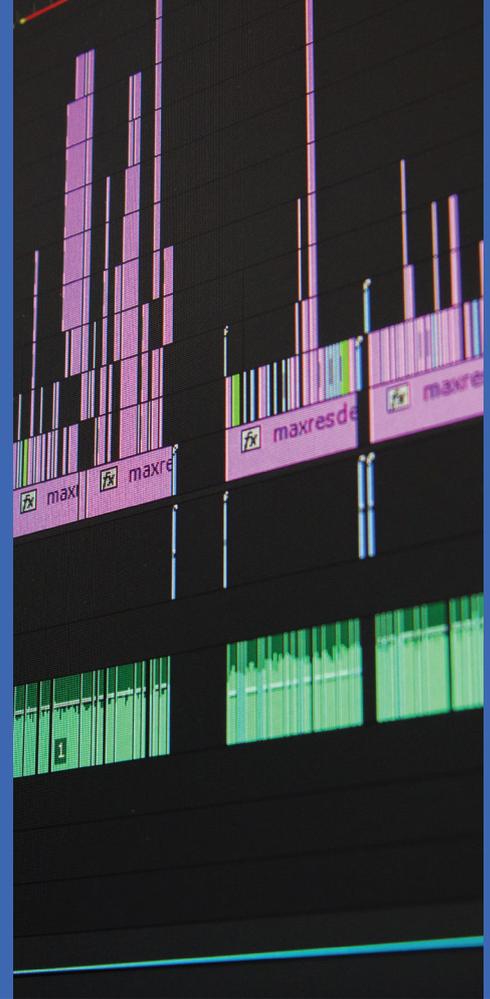
## TEXT AND DATA MINING, PUBLISHERS RIGHTS & LIABILITIES

**State of Play**

In December 2015, the European Commission published a Communication Towards a modern, more European copyright framework, setting out the European Commission's vision for copyright. In September 2016, the European Commission followed up on its Communication with the publication of a Directive on copyright in the Digital Single Market covering text and data mining (TDM), publishers rights and intermediary liability.

**Key Points**

As proposed in the draft Directive on "Copyright in the DSM", the new exception for TDM 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.

DIGITALEUROPE believes that when it comes to publishers rights, there is no legal gap that prevents publishers to license and be paid for the use of their content, including content distributed online. If the objective is to make publishers eligible for the distribution of copyright levies, DIGITALEUROPE believes this may be achieved without granting any ancillary rights, but by requiring publishers that such funding is reinvested in (publishing) activities that somehow may be deemed to benefit authors.

DIGITALEUROPE is 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.

## Recommendations for the Presidency

- 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.

- Re-asses whether it is necessary to introduce an EU-wide novel ancillary right in favour of newspapers, magazines, scientific journals and/or books due to its weak legal standing. Investigate the number of legal barriers facing the introduction of an ancillary right for publishers, including international legal obligations assumed by the EU and Member States in the field of copyright and the constitutional rules of the EU, in particular rules dealing with the free circulation of goods (Art 34 and 36 TFEU) and the Charter of Fundamental Rights of the EU.

- We believe that the proposal of Article 13. should make clear that in case of conflict with other instruments such as the E-Commerce Directive (ECD) or the Charter of the Fundamental Rights, 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 of the ECD.

## LEVIES

**State of Play**

In December 2015, the European Commission published a Communication Towards a modern, more European copyright framework, setting out the European Commission's vision for copyright. It includes language on copyright levies where the European Commission suggests that further analysis and possible action is needed on the issue. Focus will be made on double payments, the professional use exemption and the definition of harm. The Court of Justice of the EU (CJEU) has also adopted decisions that represent an additional call for action (e.g. C-470/14 from Spain and C110/15 from Italy).

**Key Points**

DIGITALEUROPE believes that it is of the utmost importance for the Council to follow through on its commitments to ensure that there is not only greater harmonisation, but also for national systems to actually respect existing case law.

## Recommendations for the Presidency

- DIGITALEUROPE encourages the Council to include in draft proposal of the Directive on copyright in Digital Single Market a provision that would mandate the Commission to assess the current systems and propose appropriate measures for their improvements in line with CJEU decisions.

- Work with the Council to create more transparency in the levy's system throughout the distribution chain as well as towards the end consumer.

- Ensure that all purchases by legal entities and professional persons are exempt from levies 'ex ante', and work to provide a simple and effective 'ex post' reimbursement process.

- Encourage the Council to create a harmonised approach to the process of assessing harm and setting of tariffs based on actual use and resulting harm.

- Work with the Council to implement measures to avoid double-payments and/or overcompensation in all relevant scenarios as well as requiring that in the context of the reprography exception, levies must be avoided and the emphasis must be placed on operator fees.

# AUDIOVISUAL
## MEDIA POLICY

### Why it is important?

Both technology-driven innovation and user demand drive the development of new, personalised, and exciting audiovisual services in Europe. European users are placed at the centre of the (audiovisual) media experience - with full control over content including where, when and how they want to access it. In addition, connected devices and services extend media pluralism and significantly augment, rather than limit, the richness of access to content. Thus, connected devices greatly contribute to the goal of media pluralism, cultural diversity and the free flow of information in the EU. The dynamic changes in content delivery and use of media must be reflected in future rules and allow for growth for further developments within a fast changing market.
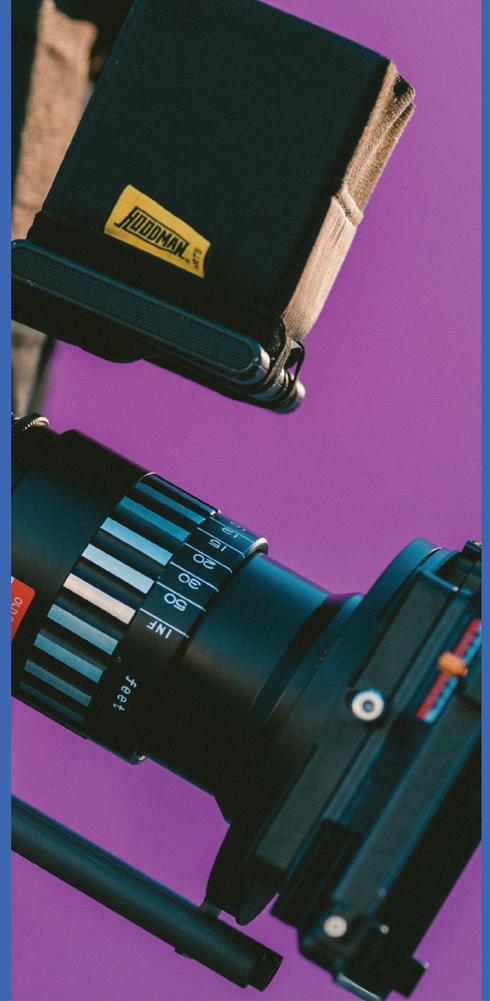
## AUDIOVISUAL MEDIA SERVICES

### State of Play

In May 2016, the European Commission presented its proposal to review the Audiovisual Media Services Directive (AVMS-D). Both the European Parliament and the Council have recently adopted their respective position on the proposed revision Trilogue negotiations will be conducted during the Estonian Presidency.

### Key Points

DIGITALEUROPE believes that the reviewed Directive must reflect the dynamic changes in content delivery and use of media and allow for growth of further developments within a fast changing market. Both technological innovation and user demand drive the development of new, personalised, and exciting audiovisual services in Europe. Our vision is that European users are placed at the centre of the (audiovisual) media experience - with full control over the content, where, when and how they want to access it.

## Recommendations for the Presidency

- Follow the targeted approach proposed by the European Commission.

- Keep the scope of the AVMS-D technology neutral and device agnostic, since today´s audiovisual media can be assessed by any connected device (TV, tablet, game console etc...).

- Maintain the distinction between linear and non-linear services in the new text, as per the currently applicable framework.

- Ensure that the country-of-origin principle will remain the cornerstone of the Directive. Any consideration given to water it down would move the EU backwards and lead to legal uncertainty.

- Refrain from introducing requirements on prominence. Any legislation laying down principles how to search or organise content hinders the development of new, not-yet-thought-of, searching tools and design features and impedes competition in a volatile and fast changing market.

- 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.

# PRIVACY
## AND SECURITY

### Why it is important?

The flow of information is a defining feature of today's information economy. The ability to transfer customer data, employee data, financial records, and other information across Europe and the globe has opened up many business opportunities for companies thought unimaginable in the past. However, these opportunities come with challenges as the potential for misuse of sensitive personal information is high. Companies need to ensure a flexible and capable data security policy to ensure data is secure and safe from unauthorised parties. When improperly instituted, privacy and security risks can have a direct impact on a company's future.

## DATA PROTECTION

### State of Play

Following four years of negotiations, the General Data Protection Regulation (GDPR) was adopted in April 2016 and will become applicable in all Member States in May 2018. Member States will spend the next years transposing the Regulation into national law. As a follow up, the European Commission has begun the process of reviewing the ePrivacy Directive (ePD) with a public consultation, which concluded in July 2016. The European Commission is expected to publish its legislative proposal in January 2017.

### Key Points:

DIGITALEUROPE believes that the transposition by of the GDPR must not lose sight of the overall objective of the legislation by (1) getting bogged down in prescriptive technical mandates for companies to meet compliance and (2) should focus on sustainable engagement between national regulators (data protection authorities) and concerned stakeholders (industry and civil society).

DIGITALEUROPE is of the belief that the objectives of the ePD are better served by the GDPR. The ePD is a complex combination of sector and non-sector specific rules with conflicting provisions leading to an un-harmonised implementation across Member States. This has led to confusion and a negative impact for both industry and citizens.

## Recommendations for the Presidency:

- Engage and coordinate with Member States to ensure that the GDPR is implemented in a harmonised manner using the opening clauses in cases when only truly necessary.

- Encourage national data protection authorities to create a structured consultation process with all stakeholders beyond the system which exists today.

- Encourage the European Commission to remove the ePD as there is no compelling reason justifying keeping a separate legal instrument since its privacy provisions are covered by the GDPR, which explicitly aims at regulating the processing of personal data in the digital economy.

- If kept, avoid placing over-the-top (OTT) services in the scope of the legislation, particularly IoT devices, as this could undermine their privacy protections. A new ePrivacy legislation could undermine their ability to guarantee the security and confidentially of the communication through the use of encryption due to Member State circumvention of confidentiality requirements.

- If kept, ensure that any new legislation seeks to achieve harmonisation through a Regulation rather than Directive.

## INTERNATIONAL DATA FLOWS

**State of Play**

In July 2016, the European Commission published the 'EU-US Privacy Shield' Adequacy Decision. An expected challenge to the Adequacy Decision seems inevitable with the new transfer mechanisms likely bound for an assessment by the CJEU. Closely connected is the on-going Irish Court case, where activist Max Schrems is seeking to challenge the validity of standard contractual clauses, a mechanism used by many companies to transfer data outside of the EU to third countries.

**Key Points:**

DIGITALEUROPE believes that Member States have an important role to play in working with the European Commission to supports and secure existing international data agreements while also encouraging the European Commission to begin the evaluation process for agreements with other third countries.

## Recommendations for the Presidency:

- Encourage Member States to support the European Commission and Privacy Shield in front of the CJEU (if challenged).

- Promote the Privacy Shield to organisations to increase uptake by European entities.

- Urge the European Commission to begin assessing the adequacy evaluation process for the EU's main trading partners (Asia & Latin America) to ease the free flow of data.

## CYBERSECURITY

**State of Play**

Similar to the GDPR, the Network and Information Security (NIS) Directive was adopted in July 2016 and will become applicable in all Member States in August 2016. Member States will spend the next years implementing the Directive into national law. Closely related, in July 2015, the European Commission published a Communication on strengthening Europe's cyber resilience. The Communication announces the launch of a public-private partnership on cybersecurity and additional market-oriented policy measures aimed at boosting industrial capabilities in Europe.

**Key Points:**

When implementing the NIS Directive, we believe that Member States should not lose sight of the two main objectives of the Directive: (1) ensuring a high level cybersecurity of the country's critical infrastructures and (2) establishing an effective cooperation mechanism among Member States to further this objective. Resources should be first and foremost dedicated to achieving these two important objectives.

## Recommendations for the Presidency:

- Encourage Member States to pay close attention to the intended scope of the services in question and not to subject sectors other than those identified as digital service providers (DSPs) and operators of essential services

(OESs) to security requirements in national legislation.

- Ensure that DSPs should be able to rely on the applicable law in the country of their main establishment, even in cases where competent authorities from more than one country are involved.

- Encourage Member States to focus on outcomes and maintain the distinction between OESs and DSPs by not subjecting the latter to requirements not foreseen by the Directive, such as auditing and binding instructions.

- Work with Member States to make sure that security measures for DSPs are different than OESs and encourage the recognition of existing industry-led international standards, avoid technology mandates and respect the right of DSPs enshrined in the Directive to define security measures most appropriate for their systems.

- Pursue the objective of incident reporting being as harmonised as possible focusing on incidents impacting the continuity of the service, while respecting the flexibility in timing of notification to create a trusted environment that encourages information sharing without exposing the notifying party to increased liability.

## LAW ENFORCEMENT ACCESS TO DATA

**State of Play**

In June 2016, the Justice and Home Affairs (JHA) Council Conclusions gave the European Commission a mandate to begin discussions with stakeholders to find solutions to perceived inefficiencies for law enforcement access requests for electronic evidence. This will include evaluating how to improve cooperation within the framework of existing rules, while also providing input into the need for any future legislative solutions. The European Commission will conclude this exercise by June 2017, when they will be required to present to Member States their findings and proposals for potential solutions.

**Key Points:**

DIGITALEUROPE welcomes the balanced approach of Member States in improving criminal justice in cyberspace. We believe that Member States should focus on enhancing engagement between Member States and the private sector, improving intergovernmental information sharing cooperation (streamlining mutual legal assistance and mutual recognition instruments) as well as safeguards to guarantee effective, proportionate and necessary investigative measures in the online world.

## Recommendations for the Presidency:

- Encourage Member States to continue to identify ways to solve legal conflicts arising from the patchwork of national criminal and privacy laws.

- Caution against any Council moves to determine jurisdiction for a Member State to address requests directly to the local office of a company, legally established in another Member State, simply because it has a presence in that Member State.

- Avoid any proposals that would require companies to deliberately undermine the integrity and security of their products, infrastructure and services, such as the creation of 'backdoors' or government mandates on how to develop encryption technologies.

- Endorse innovation in security technologies to ensure that individuals and enterprises can reap the greatest benefits of the digital economy which is central to job creation and economic prosperity in the EU.

- Raise awareness around the benefits of encryption from a privacy and security policy perspective as the first step in opening up a balanced discussion at EU and national levels.

- Promote the use of EU funds to increase research and investment into stronger private sector driven encryption solutions along with emerging/evolving technologies.

# DIGITAL
## TRADE

### Why it is important?

ICT is global by default and enables global value chains for every sector of the economy. Europe's future DSM has to stay open and integrated within the global connected ecosystem and marketplace for European business and ideas to lead and scale up. Technological neutrality and engagement in support of international and open standards are prerequisites for fast innovation. In the global context Europe needs to lead by example and strive for market access and preserve openness. This provides an opportunity for the EU to display trade leadership again for everyone's interest.

## FREE TRADE AGREEMENTS

### State of Play

The European Commission is currently involved in numerous Free Trade Agreements (FTAs) negotiations covering various geographical scopes. In October 2012, the EU (along with other partners) announced the beginning of negotions on a plurilateral Trade in Services Agreement (TiSA). By June 2016, 18 negotiation rounds have taken place and there is no formally set deadline for ending the negotiations.

In March 2016, the European Commission stated that it would begin discussions with Japan for an EU-Japan FTA. By September 2016, 17 negotiation rounds have taken place.

In June 2013, the European Commission announced that it would begin discussions with the United States on the Transatlantic Trade and Investment Partnership (TTIP) agreement. Discussions on TTIP continue with a finalisation by the end of 2016 appearing unlikely.

In October 2015, the European Commission also published its 'Trade 4 All' strategy which priorities trade in services while seeking to use FTAs and TiSA to set rules for eCommerce and cross-border data flows and tackle new forms of digital protectionism.

### Key Points

DIGITALEUROPE believes that all FTAs (at multi-, pluri- or bi-lateral level) should remove tariffs and non-tariff barriers and include commitments that promote the growth of ICT goods and services, telecoms, cloud computing, and eCommerce. They should ensure that the digital ecosystem and the data that flows through it remain open to innovation and commerce globally.

## Recommendations for the Presidency

- Encourage fellow Member States to continue to support the ongoing EU Trade agenda, including the negotiations for the TiSA, the TTIP, the EU-China BIT and the EU-Japan FTA.

- Urge Member States to support the inclusion in all FTAs of a vertical ICT Regulatory chapter and of digital trade provisions aiming to scale up the ambitions of the DSM at global level. This includes ensuring the free flow of data, and combating challenges related to forced localisation (eg: obligation to disclose source code), geoblocking and copyright.

- Seek innovative trade rules at WTO level on enabling digital trade for businesses , including start-ups and SMEs.

- Use bilateral dialogues and global fora (such as G7, G20, OECD, WTO, etc.) to reiterate commitments to open markets and free trade.

- Ensure a good implementation/enforcement of the provisions of trade agreements.

## EXPORT CONTROL

### State of Play

In September 2016, the European Commission published its draft Export Control Policy Review, which looks at upgrading existing rules with regard to global challenges in the areas of terrorism, cybersecurity and human rights. The review extends the definition of 'dual use' items to cyber surveillance technologies and includes now a 'catch-all' clause if there's any doubt the product/technology could be misused in violation of human rights and acts of terrorism. The discussions with the Council and the European Parliament will start during the Fall 2016.

### Key Points

The EU has an extensive dual-use industry that brings together thousand of SMEs and large companies. Dual-use items are often also leading-edge technologies and can be found across a wide range of key sectors of the EU economy.

DIGITALEUROPE understands concerns related to misuse of digital surveillance and intrusion systems, and is fully committed to ensure the protection of Human Rights and Human Security. However, DIGITALEUROPE believes that the EU should rather look at designing its future export control regulations on international practices (e.g. Wassenaar arrangement) and on bringing global controls up to the already high EU level via more international cooperation.

## Recommendations for the Presidency

- Clarify the definition and scope of the draft regulation  notably for the 'catch-all' clause and the 'due-diligence' approach.  These criteria and concepts remain open-ended and could create legal uncertainty for companies operating in Europe.

- Support the introduction of a new EU General Export Authorisation and the simplification of controls on the transfer within the EU of certain very sensitive products and technologies, notably those containing encryption.

- Remove the extra-territoriality application of the provision related to broking services.

- Involve industry in the drafting of the guidelines and ensure those will be available prior to the entry into force of the regulation.

- Cooperate at international level – via the Wassenaar discussions but also via bilateral meetings – with other trading countries to ensure a true level playing field.

# INFRASTRUCTURE,
## 5G AND SPECTRUM

## Why it is important?

Citizens and businesses rely more and more on fast internet for accessing, consuming and sharing content and information. With this growing need for high-capacity broadband connections, the correct regulatory framework is needed as well in order to create economies of scale, to facilitate investment and stimulate timely deployment of new fixed and wireless networks. It is also important to have such a forward-looking framework to realise the benefits to society by having an accessible and reliable internet infrastructure. Fast new 5G connections, internet access in rural areas and networks for IoT and machine-to-machine (M2M) applications depend on an efficient and coordinated regulatory approach, for spectrum management and the roll-out of next-generation broadband.

## ELECTRONIC COMMUNICATIONS CODE

### State of Play

The Electronic Communications Code includes, in addition to the provisions on Spectrum management, an upgraded approach to Access regulation with view on the deployment of very high-capacity networks and a review of electronic communications services (ECS), changing its definition and expanding its scope. The Code is also linked with other legislative proposals, such as the new ePrivacy Regulation, the Digital Content Directive and the European Accessibility Act.

### Key Points

On Access, DIGITALEUROPE welcomes the ambitions of the European Commission's proposals. The EU must work to build a stronger and more competitive telecommunications infrastructure market, with a balanced regulatory enforcement regime. Network investment and infrastructure competition go hand-in-hand, and rely on an effective problem-solving oriented approach by the National Regulatory Authorities.

For Services, DIGITALEUROPE believes that where sector specific legislation is no longer needed, it should be abandoned. The goal should instead be to rely on horizontal legislation. This is particularly important as the the Code extends the scope to OTT services. The new rules must remain proportionate, technically feasible and supportive of innovation. A Digital Single Market approach is crucial in order to ensure effective implementation.

## Recommendations for the Presidency

- Realise the ambitions of the Code, by focusing on a proportionate enforcement regime that works on an 'ex-post' basis, based on a forward-looking market analysis, with an evidence-based and counter-factual approach.

- Build an investment-friendly framework to sustain infrastructure competition with a targeted approach to access remedies.

- Ensure that the Code is aligned with the NIS-Directive and ePrivacy Regulation for a unified approach to the security obligations.

- Carefully assess and re-scope where needed the expanded obligations on electronic communication services to take into account the technological foundation of the concerned systems and respect proportionality.

## SPECTRUM AND 5G

**State of Play**

As part of the review of the telecoms regulatory framework, the European Commission proposed measures as part of the Electronic Communications Code to harmonise spectrum management. This includes common principles for spectrum auction procedures, longer license durations and a peer-review process by the Body of European Regulators for Electronic Communications (BEREC).

The Code was also flanked by the Communication for a 5G Action Plan following close discussions with industry to understand the needs of stakeholders are obtain an assessment of which spectrum bands are feasible for timely deployment of fast and high-capacity 5G networks. This Action Plan, and the 5G strategy in general, can count on widespread political support in Parliament and with Member States.

**Key Points**

DIGITALEUROPE advocates that spectrum bands should be assigned in Europe via consistent and transparent procedures. This way the needed frequencies will be available across the EU in a timely and coordinated manner, supporting efficient usage of limited spectrum resources.

A coordinated and predictable spectrum assignment and management policy is needed to build the 5G infrastructure of tomorrow, delivering services across the Digital Single Market and encouraging economies of scale in product development.

For 5G in particular, DIGITALEUROPE believes that the 5G Action Plan, together with proposals in the Code and recommendations by the Radio Spectrum Policy Group (RSPG), have the ability to create a common EU calendar for a coordinated 5G commercial launch in 2020.

It will therefore help Member States and industry stakeholders to identify and allocate spectrum bands for 5G, organise pan-European 5G trials as of 2018, promote common global 5G standards and encourage the adoption of national 5G deployment roadmaps across all Member States.

## Recommendations for the Presidency

- In line with the European Commission proposals in the Electronic Communications Code, realise efficient and coordinated spectrum management in Europe through common principles for auction procedures, license durations and authorization conditions.

- Take a holistic approach to Spectrum policy, to ensure that all services that rely on wireless connectivity in the Gigabit Society and 5G landscape (such as transport, education, utilities and healthcare) can count on frequency availability across the EU.

# Accessibility

## Why it is important?

The EU's population is getting older. An ageing population means more people with hearing, vision and mobility-related impairments. Hearing a movie soundtrack, reading an on-screen menu, dialling a phone number or just changing TV channels can be a real challenge for many. It is not just an age-related issue as there are around 30 million visually-impaired people of all ages in the EU, of whom 1.6 million are completely blind. Similarly, there are over 70 million people with moderate-to-severe hearing loss, and an estimated 25-35 million people with physical disabilities of all forms. The pressure from consumers to cater for a wider spectrum of user needs and abilities is thus increasing.

## EUROPEAN ACCESSIBILITY ACT

### State of Play

In December 2015, the European Commission published its proposal for a European Accessibility Act (EAA), more than three years after the conclusion of the impact assessment and stakeholder consultation. The Directive is currently under discussion in the Council and the European Parliament.

### Key Points

The ICT industry has always been a frontrunner in the development of accessible products and services. DIGITALEUROPE believes that the EAA could be the chance to create a truly future-proof legislation that combines best practices in accessibility regulation and makes a real change in the lives of consumers. To meet this goal, the current proposal will need to be improved in several aspects - including the obligations of the economic operator, the accessibility requirements and the enforcement mechanisms.

## Recommendations for the Presidency

- Pursue only partial alignment of the EAA with the New Legislative Framework (NLF). Accessibility cannot be subject to a generic pass/fail assessment because user requirements vary and usability is subjective. The full alignment with the NLF and included CE-Marking runs counter to this logic and will render the Directive ineffective and unenforceable.

- Encourage Member States to adopt a process-based approach that finds the right balance between flexibility and legal certainty and encourages ambitious innovation.

- Ensure that the accessibility requirements in Annex I are replaced by truly functional performance criteria based on existing global and European standards that allow on-going innovation. The currently proposed requirements are formulated at a highly prescriptive and technical level.

- Reduce administrative burden, including reporting and documentation requirements, to a necessary minimum.

- Support effective enforcement which acknowledges that withdrawal or recall of a product/service not fulfilling all accessibility requirements at all times is disproportionate.

- Ensure that public procurement stays within the scope. Experience in other regions has shown that public sector engagement has a more powerful impact on the advancement of accessibility than any market regulation.

- Promote the allocation of research and development funding, as well as information campaigns for consumers and all actors across the value chain both at European and national level.

# Sustainability
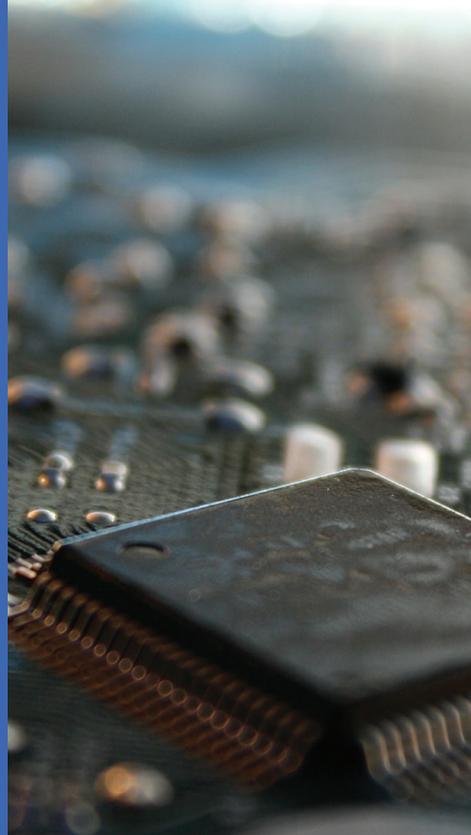
## Why it is important?

Today's linear approach of growth is not sustainable. In a world with ever-growing population it is no longer possible to rely on the "take, make, and and throw away 's approach". A circular economy is the answer to this challenge. The digital industry strongly supports moves to implement circular economy practices and thinking and has already taken a number of steps to advance this transition.

## CIRCULAR ECONOMY

**State of Play**

In December 2015, the European Commission published its Circular Economy Package, which includes revised legislative proposals on waste to stimulate Europe's transition to a circular economy. The revised legislative proposals on waste set clear targets for the reduction of waste and establish an ambitious and credible long-term path for waste management and recycling. The Council and European Parliament are currently discussing the waste package under the ordinary legislative procedure.

**Key Points**

DIGITALEUROPE believes that legislation should focus on End of Life (EoL) requirements. Large volumes of waste are being reused, but this reuse happens before items become waste. Reuse needs to be distinguished from preparation for reuse. Only the latter, which deals with repairing/refurbishing of items discarded as waste should be regulated under waste legislation.

DIGITALEUROPE stresses that all waste flows should be measured to provide accurate data on all waste that is properly collected and treated. Furthermore, responsibilities and obligations of all actors in the value chain need to be considered, as industry is only a part of it.

DIGITALEUROPE also believes that the Energy Related Products (ErP) Directive is the principal means to determine any design requirements for products, and therefore the correct tool for determining design requirements. Dispersing similar requirements over several regulations is not good practice in law making.

## Recommendations for the Presidency

- Ensure that waste legislation only focuses on EoL requirements.

- Encourage Member States to take up all the Waste Electrical and Electronic Equipment (WEEE) flows approach, in order to be able to provide accurate data on all waste that is properly collected.

- Support a pragmatic approach to product policy by avoiding that similar requirements are dispersed over several regulations.