

## **Response of the Information Technology Industry Council**

to the

### **Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy**

#### **I. Introduction**

The Information Technology Industry Council (ITI), the global voice of the technology sector, appreciates the opportunity to respond to the European Commission’s consultation on the “regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy” (the “consultation”).

ITI is the premier voice, advocate, and thought leader for the global information and communications technology (ICT) industry. Our member companies include the world’s leading innovation companies, with headquarters worldwide and value chains distributed around the globe. (While most of our 64 members are based in the United States, we count among our number five companies headquartered in the EU, as well as eight from Japan and one each from China, India, Korea, and Taiwan.) We advocate on behalf of our members for policy and regulatory environments that enable innovation and maximize all of the benefits that ICT companies provide, including economic growth, job creation, and the tools to solve the world’s most pressing social, economic, and environmental challenges.

We work closely with our partners in government, international organizations, the business community, and civil society to achieve these objectives. Indeed, one of the core elements of our mission, in every economy in the world, is to position our companies to be genuine partners of governments. We do this because we firmly believe that the interests of our industry are fundamentally aligned with those of the economies and societies in which we operate, and that, when it comes to technology policy issues, there is much we can learn from each other. This spirit of cooperation and partnership underlies the candid and hopefully constructive comments we offer in respect of this consultation.

While ITI has also responded through the EU Survey system to many of the questions set out in the consultation questionnaire, we provide this separate submission in order to more fully explain our perspectives on these issues, as well as to identify some additional considerations.

#### **II. An Overview on Technology Policy and the Transatlantic Relationship**

The European Union and United States have the deepest and most integrated economic relationship in the world. For decades, European and American companies have traded goods and services and invested in each other’s economy, creating jobs, boosting exports, and raising

living standards on both sides of the Atlantic. Our shared commitment to openness, transparency, and non-discrimination has allowed us to provide joint leadership on economic policy issues around the world.

The ICT sector is a central part of this relationship. Virtually all of our companies – whether in manufacturing, services, agriculture, or energy – rely instinctively on technology products and services, as well as cross-border flows of data, to do business. Data flows between the EU and the United States are the largest in the world, and the EU and United States are the world’s largest exporters of digital services, having digital trade surpluses of \$168 billion and \$150 billion, respectively.<sup>1</sup> Moreover, 62 percent of the digital services that the United States imports from Europe are used in the production of U.S. exports; the corresponding figure for imports into Europe is 53 percent.<sup>2</sup> In addition, both sides provide digital services in great volumes through their investments, with U.S. affiliates in Europe supplying \$312 billion and their EU counterparts in the United States providing \$215 billion worth of such services.<sup>3</sup>

A Digital Single Market (DSM) has the potential to be the next great chapter in this story and would be a remarkable and hugely beneficial achievement to companies, employees, small business owners, and consumers on both sides of the Atlantic. By reducing regulatory fragmentation and creating a truly single market for digital commerce in Europe, a DSM would stimulate innovation, trade, investment, and economic growth, both within Europe and between Europe and the United States, as well as the rest of the world.

In pursuing this historic initiative, we recognize that the EU must carefully consider how to ensure that it also protects important public interests. Neither we nor the companies we represent question the right and responsibility of governments to regulate in the public interest, whether to protect people’s personal information, shield young people from inappropriate content, or prevent anti-competitive market behavior. Our companies succeed because of the trust and confidence of our customers, and so we have a strong interest in working with our European colleagues to advance these interests in a manner that is consistent with our shared commitment to open and non-discriminatory trade and investment environments. We have been encouraged by the evolving efforts of key European leaders – such as Commission Vice-President Andrus Ansip and Digital Commissioner Günther Oettinger – to recognize the importance of maintaining openness to cross-border data flows and a non-discriminatory approach to digital commerce and innovation, while pursuing thoughtful and targeted approaches to protecting the public interest.

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<sup>1</sup> See Joshua P. Meltzer, “The Importance of the Internet and Transatlantic Data Flows for U.S. and EU Trade and Investment” (hereinafter “Meltzer”), October 2014, p. 1.

<sup>2</sup> See Meltzer, p. 2.

<sup>3</sup> See Meltzer, p. 2.

Our views on the issues identified in the consultation – as to any government’s proposed consideration of regulatory measures affecting the ICT sector – flow from our assessment of how such measures could affect the ability of ICT firms to innovate, support growth, create jobs, increase consumer choice, and otherwise improve living standards and solve big problems around the world. We operate on the basis of several principles in conducting this assessment. First, recognizing that our companies’ businesses are international, we support policy solutions that are global in nature and that eschew national responses to challenges that are inherently borderless. Second, we favor approaches to advancing public interests that interfere as little as possible with (and ideally that facilitate) the ability of companies to invest and innovate. Third, where governments consider enacting regulatory measures, we believe that it is important to have concrete evidence of harm to an important public interest that is not otherwise addressed by existing law, and to show that the proposed measures are narrowly tailored to addressing that harm.

As we discuss in greater detail below, despite the overall value we see in the DSM initiative, it is our view that the potential regulatory actions suggested by this consultation would be inconsistent with one or more of these core principles. For example, the consideration of regulatory approaches to “online platforms” focuses inappropriately on the conduct of a specified (yet difficult or impossible to define) type of actor, rather than a type of harm. Moreover, the consultation assumes that there may be “problems” with the way “online platforms” operate, but it presents no significant evidence of market or regulatory failure that cannot be effectively addressed by existing laws, whether in the area of antitrust/competition, privacy/data protection, e-commerce, consumer protection, transparency, or the like.

### III. Online Platforms

Recognizing that the parameters of the term are open to discussion, “online platforms” have in general been the source and inspiration of significant innovation, economic growth, value creation, consumer choice, and other types of social and commercial expression in Europe and around the world. As the European Commission notes:

*Platforms play a central role in the digital ecosystem. With more than one trillion webpages on the Internet and more appearing every day, platforms are an important means by which consumers find online information and online information finds consumers . . . Platforms provide a basis for SMEs in all sectors of the economy, from manufacturing to services, to innovate and to exploit the advantages of e-commerce. This is hugely beneficial to a great number of companies (in particular SMEs) and to the economy as a whole. Moreover, platforms have proven to be innovators in the digital economy and can be expected to be important drivers towards the further development of the sharing economy.<sup>4</sup>*

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<sup>4</sup> European Commission, “[Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe – Analysis and Evidence](#)” (hereinafter “DSM Communication Analysis and Evidence”), 6 May 2015, p. 53.

It is precisely because of the massive economic and other benefits of platforms that it is important to convey our concerns over the Commission’s approach to them in the consultation. As noted above and explained below, ITI believes that the consideration of regulatory approaches to “online platforms” is seriously misguided, for several reasons. First, it is inappropriate and counterproductive to evaluate the need for regulation by reference to a type of economic actor, as opposed to a type of conduct (*e.g.*, fraud, abuse of a dominant position, etc.). Second, even if it were appropriate to single out a group of actors for evaluation, the definition of “online platforms” as set out by the Commission is so vague and malleable as to be of limited usefulness in doing so. Third, even if it were possible to generalize about the conduct of a clearly identified group of “online platforms,” the Commission provides no significant evidence that such entities engage in harmful conduct that is not already addressed by existing regulatory frameworks. Finally, the consultation itself is structured in a manner that suggests an inclination to regulate rather than to first gather views and evidence from all stakeholders.

**A. It is inappropriate to explore regulation by reference to a specific category of economic actor rather than a specific type of conduct.**

The core purpose of regulation is to reduce, if not eliminate, actions or behaviors that society deems harmful or otherwise undesirable. Effective approaches to the regulation of economic activity, therefore, generally focus on whether specific types of commercial conduct create a risk of harm to consumer or other public interests that warrants the government stepping in to minimize through regulation. Whether the harm is workplace accidents, the outbreak of epidemics, the deception of consumers, or the abuse of monopoly power, economic regulation – when it is done right – addresses what people or organizations do, rather than who they are. Focusing on conduct (or misconduct) is critically important to ensuring that government action actually addresses the risks and harms that certain economic activity can cause, without producing “unwelcome side-effects.”

One of the most significant concerns we have about the consultation is that it focuses on types of actors rather than types of conduct. In particular, the consultation assumes that there is a coherent, identifiable category of “online platforms” about which it is possible to generalize and assess the need for regulation. Putting aside that the category is so potentially broad as to be of limited utility and that the Commission does not seem to have put forward significant evidence of misconduct by such actors (both of which we address below), the consultation’s premise disserves the Commission’s interests in promoting innovation in Europe. At best, it distracts the Commission from examining the question that it would be appropriate to ask, which is whether the EU needs additional regulatory tools or should instead be taking other, more positive steps to unleash innovation. At worst, it does not fully account for the interests of a large number of global ICT firms that have already contributed greatly to growth and innovation in Europe, and whose future successes are inextricably connected to those of the EU generally.

**B. The definition of “online platforms” is so vague and malleable that it has limited usefulness.**

Even if it were appropriate to design regulatory frameworks by reference to types of actors rather than types of conduct or harm, the consultation’s approach to defining the set of actors subject to review is so broad and vague as to be of limited utility. Specifically, the consultation invites reaction to the following definition of “online platform”:

**“Online platform”** refers to an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers. Typical examples include general internet search engines (e.g. Google, Bing), specialised search tools (e.g. Google Shopping, Kelkoo, Twenga, Google Local, TripAdvisor, Yelp,), location-based business directories or some maps (e.g. Google or Bing Maps), news aggregators (e.g. Google News), online market places (e.g. Amazon, eBay, Allegro, Booking.com), audio-visual and music platforms (e.g. Deezer, Spotify, Netflix, Canal play, Apple TV), video sharing platforms (e.g. YouTube, Dailymotion), payment systems (e.g. PayPal, Apple Pay), social networks (e.g. Facebook, LinkedIn, Twitter, Tuenti), app stores (e.g. Apple App Store, Google Play) or collaborative economy platforms (e.g. AirBnB, Uber, Taskrabbit, Bla-bla car). Internet access providers fall outside the scope of this definition.

The breadth of the first sentence alone raises significant questions about the usefulness of the concept of “online platforms.” Countless types of economic actors operate in “multi[ ]-sided markets” and “use[ ] the Internet” to allow “groups of users” to “generate value.” The list includes not just search engines and the other categories of actors identified in this definition, but also a range of other actors, including newspaper and other media companies, automotive companies, shopping centers, real estate companies, credit card companies and other electronic payments firms,<sup>5</sup> among others.

*I challenge you to tell me what characteristics the following online models uniquely share: communications and social media platforms; operating systems and app stores; audiovisual and music platforms; e-commerce platforms; content platforms (itself a diverse group); search engines; payment systems; sharing platforms ... and the list could go on.<sup>6</sup>*

In many ways, the Internet itself is a multi-sided market that allows multiple parties to interact in a way that creates value for all of them.

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<sup>5</sup> See James Waterworth, “A Neutral Economy?” Disruptive Competition Project, 12 February 2015.

<sup>6</sup> Alex Chisholm, “Platform Regulation - Antitrust Law Versus Sector-Specific Legislation: Evolving our Tools and Practices to Meet the Challenges of the Digital Economy,” (27 October 2015), p. 3.

Similarly troubling is the suggestion that doing business “online” is somehow distinct from doing business “offline” in a manner that increases the need for regulation. There is no evidence for this assumption. The mere fact that a platform has an “online” character says nothing about whether it is more likely to produce the kinds of harms that society wishes to regulate. Indeed, a significant amount of the business taking place on the Internet today is being conducted by companies that have moved their longstanding physical operations online. Such businesses include newspapers, travel agencies, and supermarkets, among many others. To be sure, the concept of a platform – where intermediaries bring together buyers and sellers to exchange goods and services – is as old as commerce. The Commission has not demonstrated that there is anything qualitatively different about the fact that people increasingly use their computers to avail themselves of platforms that creates an increased need for regulation.

*There is no need to discard the competition playbook simply because platforms in the digital economy operate ‘online’. After all, offline platform markets, like newspapers, show that network effects in two-sided platform markets do not necessarily result in dominant positions and are not necessarily cause for concern in themselves. Indeed, the presence of network effects has sometimes been found to protect consumers from price increases, for example in the newspaper industry where the need to attract a large circulation for advertisers has been found to constrain the potential for increases in cover prices.<sup>7</sup>*

The Commission seems to assume that there is something special about doing business online that potentially increases the need for regulation. That is notwithstanding the fact that, in both the virtual and physical worlds, privacy laws exist to address mishandling of personal data, competition laws exist to address abuses of market power, consumer protection laws exist to address fraud and misleading representations, and so on.<sup>8</sup>

**C. There is no evidence of harm not already addressed by existing laws and regulations.**

If there are market failures or other risks of harm associated with the online world, we and our member companies are committed to working with the EU, United States, and other economies to craft targeted, thoughtful responses to them. Yet for regulation to be effective and not unduly impede growth and innovation, there has to be concrete evidence of a harm that is not already addressed by existing regulatory frameworks. In other words, “intervening without evidence that specific industry features or practices cause harm is putting the cart before the horse.”<sup>9</sup> We do not see any such evidence in this case.

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<sup>7</sup> Chisholm, p. 5.

<sup>8</sup> See Joe Kennedy, “Don’t Regulate Internet Platforms, Embrace Them,” *EurActiv.com*, 13 November 2015.

<sup>9</sup> Chisholm, p. 4.

Instead, to the extent that the consultation actually raises concrete concerns about the market behavior of “online platforms,” there are laws and regulations that squarely address them. And both the Commission and Member States have not been shy about using these measures, including in the technology space. Authorities have pursued data protection cases, competition investigations, and tax proceedings against various ITI members, for example. Indeed, as several commentators have observed, “while Internet companies are just as capable of anticompetitive behavior and bad business practices as any other company, the traditional powers available to injured parties and government regulators can handle virtually all actual (as opposed to possible) harms.”<sup>10</sup>

In addition to evaluating whether existing regulatory frameworks already address considerations such as anti-competitive market behavior or insufficient protection of personal data, the Commission should assess the significant extent to which market forces also create strong pressure for “good behavior.”<sup>11</sup> For global ICT firms, the trust and confidence of customers is indispensable and irreplaceable. Firms that breach this trust or confidence – whether by failing to protect personal data or other sensitive information, or by representing their services in a misleading way, or by raising their prices inexplicably, or by otherwise failing to provide goods and services in a competitive way – know that they will be subject to the harsh reality that customers will look for other providers. Among others, the European Parliament has recognized the “self-correcting powers of the market.”<sup>12</sup>

Indeed, the speed and turbulence of developments in the technology space are such that it is a near certainty that, in ten years, there will be many new players in the global ICT industry, just as there have been since the last ten. That is a good thing, as it reflects that the ICT sector constantly provides competitive opportunities to people and firms that meet customer demand more effectively than their predecessors. It also reflects, however, that taking a snapshot of the competitive landscape at any given point in time – as the Commission does in attempting to define “online platforms” – is a challenging and likely not very useful exercise.

To be sure, ITI takes seriously the concerns identified by the Commission and, where they are supported by evidence, would be eager to work with the Commission and other EU institutions to address them. We and our member companies are committed to the success of the EU digital market and, while we may have different views regarding the need for platform regulation, we will always interact in a spirit of partnership to seek to resolve whatever concerns the EU has.

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<sup>10</sup> See Joseph Kennedy, “[Why Internet Platforms Don’t Need Special Regulation](#), Information Technology & Innovation Foundation (hereinafter “Kennedy ITIF Paper”), 19 October 2015, p. 2.

<sup>11</sup> Kennedy ITIF Paper, p. 1.

<sup>12</sup> See Nicolai Van Gorp and Olga Batura, “[Challenges for Competition Policy in a Digitalised Economy](#),” European Parliament, July 2015, p. 10.



**D. The consultation appears to suggest that the Commission is inclined to regulate platforms.**

Beyond the specific concerns identified above, ITI is concerned by the signal that the Commission sends to the global ICT industry, and to global markets more generally, through the structure of the consultation itself. Instead of undertaking an empirical exercise to evaluate the potential existence and extent of a problem, the Commission in some cases appears to assume from the beginning that a problem exists, sometimes on the basis of assumptions rather than hard evidence of harm that platforms have caused to consumers or others:

*Although their impact depends on the types of platform concerned and their market power, some platforms can control access to online markets and can exercise significant influence over how various players in the market are remunerated. This has led to a number of concerns over the growing market power of some platforms. These include a lack of transparency as to how they use the information they acquire, their strong bargaining power compared to that of their clients, which may be reflected in their terms and conditions (particularly for SMEs), promotion of their own services to the disadvantage of competitors, and non-transparent pricing policies, or restrictions on pricing and sale conditions.<sup>13</sup>*

*While their emergence has been generally seen as beneficial, the way that online platforms operate raises issues that require further exploration. These include how online platforms collect and make use of users' data and the transparency with which they do it, the impact of some platforms' relative bargaining power when negotiating the terms and conditions with other market players (particularly SMEs or content providers), as well as in some cases the dual role of some platforms, acting both as marketplace operators and suppliers competing with some of their customers in downstream markets. The growing role of platforms also poses challenges as regards consumer protection. There is a need to further explore whether platforms provide sufficient information and safeguards to consumers where they act on their own behalf, or on behalf of their suppliers.<sup>14</sup>*

These are significant assertions, and it is incumbent upon the Commission to provide concrete evidence to support them. ITI and its member companies would be eager to work with the Commission and other EU institutions to ensure appropriate protection of personal privacy, consumer rights, market fairness, and other public interests.

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<sup>13</sup> European Commission, [“Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe”](#) (hereinafter “DSM Communication”), 6 May 2015, p. 11.

<sup>14</sup> European Commission, “Background for the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy,” September 2015, p. 1.



#### IV. Tackling illegal content online and the liability of online intermediaries

As noted above, ICT companies that may be considered “online platforms” have played a foundational role in causing the Internet, and the entire technology ecosystem, to serve as such a powerful engine for growth, innovation, and value creation around the world. A critical factor in enabling the success of the Internet is that most governments, including those in Europe and the United States, have generally taken an intelligent approach to the issue of “intermediary liability.” In particular, to date governments have appropriately provided “intermediaries” with sufficient assurances that they will not be responsible for the posting of content that is illegal or otherwise objectionable, provided that – upon actual knowledge – they take prompt and reasonable steps to remove or disable access to such content after receiving notice.

In the EU, as the Commission has recognized, the E-Commerce Directive has been the main backbone of legal stability in this regard.

*The principle, enshrined in the e-Commerce Directive, that Internet intermediary service providers should not be liable for the content that they transmit, store or host, as long as they act in a strictly passive manner has underpinned the development of the Internet in Europe.<sup>15</sup>*

Appropriately balanced approaches to intermediary liability such as that in the E-Commerce Directive promote growth and innovation, allow small- and medium-sized enterprises (SMEs) to reach otherwise unreachable markets, and enhance free expression and access to information, while ensuring that illegal content is removed expeditiously.

ITI is concerned that the consultation’s suggested approach to intermediary liability would upset this carefully calibrated balance of equities and impose inappropriate obligations on industry. For example, the Commission’s idea for a new “duty of care” requirement would place on companies an affirmative obligation to monitor their websites for illicit content. Such obligations would not only be hugely burdensome and costly for companies; they could also create inappropriate intrusions into private user data. The Commission would compound these burdens by requiring companies also to monitor their services to ensure that removed content stays removed (“take down + stay down”). In addition, the suggestion that regulators should differentiate their approaches among different categories of content (*e.g.*, gambling, trademark infringement, terrorism, and xenophobia) would introduce unworkable complexity into the system. Companies would not only incur huge administrative and financial costs in fulfilling their obligations; more importantly, they would also have to exercise independent, subjective judgment about the scope and contours of those obligations. That is not a recipe for growth and innovation.

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<sup>15</sup> DSM Communication, p. 11.

ITI and its member companies are committed to working with governments to remove illegal online content and activity. We believe that the current regime in Europe, underpinned by the E-Commerce Directive, appropriately balances responsibilities between companies and regulators and among content creators, brand owners, intermediaries, and other stakeholders. We also welcome the use of voluntary initiatives for addressing these issues that can evolve as business models evolve. We therefore urge the Commission to reconsider the imposition of new approaches to intermediary liability and to ensure a discussion with the global ICT sector regarding how best to work together to achieve our shared objectives on these issues.

## V. Data and cloud in digital ecosystems

Cross-border flows of data have become the lifeblood of business and now underpin our everyday lives as employees, consumers, and citizens. Whether it is banks managing customer accounts, manufacturers organizing production, retailers fulfilling orders, or technology firms delivering software, the movement of data underpins virtually every aspect of the modern global economy. Data flows are indispensable to the ability of companies to produce goods and services, create jobs, conduct research and development, and integrate SMEs into their value chains.

The EU appropriately recognizes the importance of cross-border data flows, including the role of cloud computing, in facilitating commerce, job creation, and other benefits in Europe.

*Restrictions, such as those related to data location (i.e. Member States requirements to keep data inside their territory) force service providers to build expensive local infrastructures (data centres) in each region or country.<sup>16</sup>*

For this reason, ITI and its member companies are troubled by the consultation's suggestion that there may be a need for regulatory "management" of data flows, whether through data localization requirements or other measures. In our view, the existing EU regulatory framework ensures appropriate levels of data access and use, while advancing important public policy interests. For example, the E-Commerce Directive and general contract law principles provide sufficient safeguards for data use as between service providers and users. In addition, the Consumer Rights Directive and related measures contain important protections for consumers. Furthermore, the Data Protection Directive ensures the proper treatment of EU citizen data.

ITI and its member companies have significant experience addressing the policy considerations associated with cross-border data flows. We also share with the EU and other governments a commitment not only to economic growth and innovation, but also to high levels of data protection and data security. As noted above, our companies' businesses absolutely depend on it. For this reason, we would welcome the opportunity to discuss more intensively the issues

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<sup>16</sup> DSM Communication, p. 14.



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raised in this part of the consultation. We believe that the experience and expertise of our member companies in bringing data flows into the service of public interests such as privacy and security could help the EU refine its regulatory approach to such issues, just as we have done in the U.S. context and with other economies.

## **VI. Conclusion**

ITI fully supports the right and responsibility of governments to regulate to prevent anti-competitive market conduct, protect privacy and security, and advance public health and safety, among other public interests. We appreciate the opportunity to provide our thoughts in regard to the consultation, and we will be eager partners in helping the Commission arrive at results that both protect public interests and advance growth and innovation.