



**Teknologiateollisuus**



**Aalto University**

25.4.2017

## **The Technology industries of Finland and Aalto University joint letter regarding the "Building the European Data Economy" communication and consultation**

We, the Technology Industries of Finland and Aalto University wish to commend the European Commission for actively pursuing the European Digital Single Market ("DSM"), with the explicit goals of providing better access to digital goods and services within Europe, better conditions for digital networks and services to flourish and maximizing the growth potential of the digital economy.

We find that the successful delivery of the European data economy hangs on a broad scope of issues that goes beyond those items covered in the communication and consultation. Therefore, in addition to individually providing our responses to the "Building the European Data Economy" consultation, we wish to jointly provide the following additional recommendations and observations, which either underline or somewhat expand on the theme of the digital economy.

### Our key recommendations

- Decisive EU regulatory action should be taken against forced data localization in member states, absent other effective measures.
- Additional regulation regarding ownership of data and liabilities is unnecessary. Freedom of contract should particularly be respected as the basis of B2B relations.
- Revising product liability to explicitly cover connected or automated products is not necessary, at least for the foreseeable future.
- The DSM must avoid creating overlapping privacy rules that may hinder innovation and stifle competition.
- While avoiding premature or unnecessary regulation, the EU should use other means at its disposal to speed up the development of European data economy, e.g. through the actions of the Digitizing European Industry initiative.
- The EU should focus on ensuring that Europeans have the required digital skills to take advantage of the digital economy, as both empowered citizens and innovative employees.
- The EU must stay mindful of the global market; all regulatory and policy initiatives should be measured carefully against their potential impact on the global competitiveness of Europe and European businesses. Advancing European competitiveness should be a key target in all policy action.

25.4.2017

**Data localization**

The European Commission has noted in its impact assessment for the European free flow of data initiative that "the free flow of data has become limited by technical and legal barriers at national level". We agree that forced data localization can form a great barrier not only for the free flow of data and the DSM in itself, but also for the adoption of versatile technologies that often transcend borders, such as cloud technology and varied IoT solutions. As the physical location of data is losing relevance as far as data storage is concerned, choosing between technologies should not be a matter dictated by law or technical barriers, but rather by the purchaser's preference.

Therefore, we recommend that decisive EU regulatory action be taken against forced data localization in member states, absent other effective measures.

**Data ownership**

Access and control over data is naturally tied into to most digital initiatives and we advocate drawing informed conclusions, whether the digital economy requires regulatory intervention involving such fundamental legal concepts as data ownership and/or liability.

During the preparation and delivery of the DSM initiatives we have not found or noticed any provided evidence pointing to a market failure requiring regulatory intervention. As such, no additional regulatory intervention would be needed, as individual elements to ownership rights such as access to, transfer and the right to use data are already covered by the existing legal framework and can also be regulated contractually in an efficient and purposeful manner.

We find that the digital economy is formed out of a constellation of different business models which do not necessarily conform to one regulatory solution, nor does data as a commodity hold value and marketable attributes as other property. Data is ubiquitous, abstract, multifaceted, replicable and only valuable in the right context where it is being actively used, and depending on the data, often only for a limited time. Data in itself does not carry similar features to e.g. tangible products where rights of ownership are mostly exercised. Therefore, the creation of any new right to data may actually complicate or even hinder the free flow of data, rather than facilitate it.

Upon the initial introduction of the DSM strategy in 2015, we maintained that additional regulation regarding ownership of data and liabilities is unnecessary and the current legal framework is sufficient, including its competition provisions, harmonized data protection regulation, unfair commercial practices legislation, contract and consumer protection law, intellectual property law, the database directive and the trade secrets directive. We hold to this finding upon writing this joint letter, particularly, as the data protection rules applicable as of May 2018 will extensively regulate data processing

25.4.2017

(access, transfer and use) relating to personal data, which in Europe is very broadly defined as any data that has the ability to identify an individual. Also, further privacy regulation covering e-privacy is currently being contemplated on top of EU general data protection regulation even before it has been tested in practice. Additionally, the upcoming directives on digital contracts on tangible goods and on digital content intend to provide structured solutions to digital commercial practices as they pertain to consumers.

With the onset of new provisions and revisions to the current framework, we emphasize that freedom of contract should particularly be respected as the basis of business-to-business relations and non-personal data should be clearly distinguishable from personal data in the regulatory framework.

### **Liability, Product liability**

Instead of looking at the product liability directive in the ongoing consultation by the Commission (ending April 26, 2017) as a "single solution" to possible emerging liability questions, we find it important to note that the existing rules in the product liability directive already do apply to IoT devices.

Much like many other business models, the Internet of Things relies on complicated 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 flexibility and certainty for parties in the supply chain. It is worth noting that in a contractual context product liability will apply to the breach of an express or implied contractual term.

Further to product liability, it is also important to note that there is an array of different liability regimes already in place that, much like product liability, cover liabilities from a technologically neutral point of view and provide coverage to the damaged party under tort law, sale of goods legislation or consumer law and additional sector specific mandatory insurance schemes are already in place parallel to product liability (e.g. for traffic insurance, medical treatments, farmer's insurance) to provide efficient remedies. Also strict liability can be attributed to a particularly dangerous activity in court practice.

Therefore, we do not find that revising the product liability directive to explicitly cover connected or automated products is necessary, at least for the foreseeable future. Under the current framework, in addition to contractual solutions, there is a wide variety of different regulations covering liability and they are interconnected to form a comprehensive system that is applied as parallel sources of remedies, which can be relied upon in the event of an accident. The system is intricate, effective, technology neutral, and rather comprehensive.

25.4.2017

One emerging issue however, that may pertain to product liability, is the provision of evidence in the event of a product liability incident. Given the increasing complexity of future products and their level of autonomy, the task of attributing a particular incident to a defect and finding the liable party may in the future become difficult. We find that the answer to this problem will not necessarily be resolved in legislation or necessarily under contractual solutions, but rather technical solutions and standards may be required. In certain automation devices where risks of property or personal damage is evident, data storage devices will likely be installed as a voluntary risk management measure in order to establish the chain of events attributable for the damage. Sector specific standards may be needed to address what is the minimum set of data needed to establish liability.

### **Regulation on Privacy and Electronic Communications**

With the introduction of the "Building a European data Economy" communication on January 10, 2017, the commission also introduced a proposal for a new Regulation on Privacy and Electronic Communications ("ePrivacy").

We find that the ePrivacy reform should complement the General Data Protection Regulation, not contradict or reproduce it. Overall we find that the proposed regulation will not lead to simplification of existing rules and it goes much further than the GDPR setting rules in newly covered areas with a likely detriment on innovation. As the Commission has set the goal on establishing a level playing field for telecommunications and over the top service providers (OTT's), we recommend that instead of establishing new provisions, the Commission rely on the General Data Protection Regulation which already sets forth a high standard of confidentiality, privacy, security and requirement of consents, and also sets forth very stringent sanctions with regard to nonconformity with the General Data Protection Regulation. We note with particular concern that Machine-to-machine (M2M) communication has been included in the ePrivacy proposal, which means that M2M communication content data and metadata would be covered by the regulation. This in our opinion will greatly impact new technologies relevant in our digital economy such as the Internet of Things (IoT) and casts a shadow on purely industrial data usage, with no personal data relevance. We therefore find, for sake of the digital economy, that M2M data processing should be excluded from the scope of the regulation. Further we make note that M2M communication where it pertains to personal data is already covered by the GDPR, which if regulated under ePrivacy will create a confusing overlap.

Should the legislative process for ePrivacy continue, we further recommend that the proposed "ancillary communications features" are excluded from the scope to bring the legislation in line with the Electronic Communications Code. Also the consent reliant

25.4.2017

approach in the regulation needs to be revisited to accommodate new services and technology. For instance, where user consents are required for e.g. new innovative multifaceted services and it is evident that asking for consents from all parties each time services are used would be impractical, processing based on *legitimate interest* should be allowed in order to balance privacy requirements with the need of advancing such services that consumers have grown to expect in the digital economy.

Our recommendation is that the DSM avoid creating privacy rules that may hinder innovation and stifle competition. Particularly with ePrivacy, the EU legislator must take sufficient time to evaluate and take industry feedback to consideration in preparation of such new privacy regulation that will greatly impact industry and the competitiveness of the digital economy. The timeline for preparation should be amended accordingly.

#### **Other means to speed up the development of a European data economy**

While we suggest refraining from unnecessary, or premature regulation, as applicable, we nevertheless support wholeheartedly the basic objective of the **"Building the European Data Economy"** initiative. Indeed, speeding up the development of a true European data economy should have a high priority in EU policies and the Union should use other, non-legislative, means at its disposal to achieve this objective.

The **Digitising European Industry** initiative offers a good example of other means that can be deployed. In particular, the data economy should be fully recognized as a key topic in the "Industrial platforms and large scale pilots" part of the initiative. While the need to develop industrial data platforms has been recognized in the DEI initiative, it appears that the actions along this line will be implemented through the Big Data Value PPP which only covers a subset of the issues that need to be studied and piloted. Therefore, there is a risk that the topic will fall in the cracks of the DEI initiative.

At the same time, data economy and especially development of platforms for data sharing across companies has been recognized in some national initiatives, prominently by the Industrial Data Space initiative of Germany which has outlined a concept architecture for a comprehensive data platform. We urge that the EU take up this topic also at European level to make sure that rapid progress in this work is achieved. One way to do that would be recognizing the Industrial Data Space Association as a cPPP, and assign it resources in the next version of the H2020 work programme and its planned continuation.

Finally, while we fully support the H2020 programme and the means provided in the DEI, one particular issue tied in to the programme evident from the Communication on the European Cloud Initiative has raised concerns. Namely, the proposal to open up "by

25.4.2017

default" all scientific data produced by future projects under Horizon 2020 as of 2017. We find that this approach, if not carefully considered from the perspective of commercial IPR, may put cooperative academic and business research at risk and also jeopardize the industrial leadership and competitiveness of Europe's industry. We firmly recommend that the open by default policy be revised with sufficient safeguards that allow protection of commercially valuable intellectual property.

### **Digital skills**

In order to realize the three pillars provided for the DSM, including maximizing the growth potential of the digital economy, it is extremely important that the European Union ensure that its citizens are able to reap the full benefit of the digital economy, its current employees are able to innovate and produce competitive digital products and services and its future generations are given digital tools to innovate and participate in the digital economy.

We firmly recommend that the EU focus efforts in ensuring that Europeans have the required digital skills, as both citizens and highly educated employees, to take advantage of and contribute to the digital economy.

### **The EU must stay mindful of the global market**

While a balanced and fully harmonized single market would be welcome for those invested in the EU, the competitive edge arising out of EU legislation is what counts. We urge the EU legislator to pay attention to the global market and observe closely the potential impacts of any legislative proposal that will affect businesses operating within the single market, but against global competition. This is particularly important in the digital economy, which does not necessarily conform to national borders.

For one, the new General Data Protection Legislation is opaque and a technically difficult instrument to apply to an individual data relevant business. It is important to allow companies to adapt to new legislation and provide new rules with clarity in order for companies to implement required technical and organizational changes to their operations in a smooth way. We find that it is not conducive to good data protection, competitiveness, lessening of administrative burden and better regulation to produce additional overlapping and contradictory e-privacy regulations to the General Data Protection Regulation while preparation is ongoing in anticipation of the General Data Protection Regulation.

Second, it is extremely important that EU based companies have legal clarity on the use of transformative technologies such as text and data mining, and to no less extent than what advanced non-EU jurisdictions, such as the U.S. and Japan provide. We find it crucial that a mandatory TDM exception, not limited to non-commercial research, is

25.4.2017

provided to bring the EU on the same level playing field as other jurisdictions. We call for a balanced and globally competitive regulatory framework for copyrights.

Third, we find that much of the innovation online and the internet as it stands today can be ascribed to the balance provided in the e-commerce stipulation for intermediary liability, whereby no liability is attributed to an intermediary where it merely provides a service and does not have knowledge of what is transmitted. In order to maintain competitiveness and a low threshold for new innovative platforms, it is important to maintain this balance in the digital economy.

Finally, another noteworthy example of "data economy" is the real-time economy (RTE), where all financial and administrative transactions will be represented in a standardized structural data format and all financial reporting and accounting will be automatically derived from the data flows. It promises to bring huge cost savings for Europe and is an opportunity for Europe to take a global lead and improve competitiveness. At the same time, it is the most efficient way to reduce shadow economy posing no additional costs in the process. Real-time economy significantly advances the Single Market and free movement of data in the EU and greatly simplifies operating SME business. This development also calls for resources in the European innovation framework programmes.

Respectfully,



Matti Mannonen,  
Director, Industrial Policy  
The Technology Industries of Finland



Martti Mäntylä  
Professor of Information Technology  
Aalto University

25.4.2017

### **About The Technology Industries of Finland**

The Technology Industries of Finland (FTI) is a national trade organization representing 1600 technology companies in Finland. The technology industry makes up 50% of Finnish exports and 80% of R&D investment in the private sector. The sector employs almost 280,000 people directly, and 700,000 people in total. This equates to about 30% of the entire Finnish labour force.

### **About Aalto University**

Aalto University is a multidisciplinary community where science and art meet technology and business. We are committed to identifying and solving grand societal challenges and building an innovative future.

Aalto University was founded in 2010 as Helsinki University of Technology, the Helsinki School of Economics and the University of Art and Design Helsinki were merged. The main campus is located in Otaniemi in Espoo, Finland. The other campuses are in Töölö and Arabia in Helsinki.

Aalto University has six schools with nearly 20 000 students and 4 000 employees, 386 of whom are Professors.