



## U.S. CHAMBER OF COMMERCE

### U.S. CHAMBER OF COMMERCE RESPONSE TO DSM ONLINE PLATFORMS, CLOUD & DATA, LIABILITY OF INTERMEDIARIES, AND COLLABORATIVE ECONOMY CONSULTATION

The U.S. Chamber of Commerce is the largest business organization in the United States, representing the interests of more than three million businesses of every size, sector, and state, as well as state and local chambers and industry associations. In addition, we represent many European firms with investments and operations in the United States and have been a steadfast supporter of the economic underpinnings of the Atlantic alliance and their benefits for workers, consumers, and companies in both the United States and the EU.

#### **Broad Importance of Good Regulatory Practice & EU Better Regulation Agenda**

Before offering substantive comments, the Chamber would note that this questionnaire, like many of the other consultations launched to support the Digital Single Market (DSM) initiative, features a number of leading questions that seem to be designed to generate responses that can be translated into mandates for action, rather than a fact-finding exercise to better capture a full picture of what is happening in the market.

The Chamber recognizes that these questionnaires represent only the initial stages of the European Commission's process to develop its plans to support a Digital Single Market, but it is important that the process surrounding the DSM adheres to good regulatory practices and lives up to the standards of the REFIT program and the changes outlined and endorsed in the Timmermans report on Better Regulation. As the Commission's Better Regulation "toolbox" correctly observes, questionnaires are of limited value when a limited range of answers forces respondents to provide similar answers all focused in the same direction.<sup>1</sup>

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<sup>1</sup> [http://ec.europa.eu/smart-regulation/guidelines/docs/br\\_toolbox\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf) pp.332-333

## **Online Platforms**

As noted, the DSM has the potential to open up even more opportunities for growth and innovation by removing regulatory barriers across the EU.

Online platforms (like traditional off-line platforms) are a growth engine for European small businesses, enabling them to build global and national businesses at scale, with consumers ultimately benefiting from the local innovation platforms support. The ICT sector, including online platforms, accounts for 30% of GDP growth in the EU.<sup>2</sup> The app economy employs 1 million people in the EU (projected to grow to 2.7 million people by 2018) and is worth nearly €20 billion in revenue.<sup>3</sup>

Platforms benefit both sides of the Atlantic, and we caution against erecting new barriers on either side that disconnect our economies from digital trade, one of the quickest growing economic segments in the world. Government responses should be slow to creating new rules out of concern for market-closing effects or locking in the status quo in a current system. The digital economy is rapidly evolving and there is plenty of evidence that the pace of change is being driven in response to consumer and market demands, both of which can act very effectively as self-regulating forces.

Unfortunately, parts of the DSM contemplate new regulatory rules regarding the relationships between online platforms, businesses, and consumers, some of which do not enhance consumer welfare, which should be a key focus of any such measure. The end result appears to be a consultation weighted in favor of the need for new regulations, before fully taking into account existing laws and governance that already regulates the activity of “platforms.”

As a threshold issue, the definition offered misses the mark and we caution against attempting to regulate something that is inherently difficult to define. Platform is not a useful legal or regulatory category as many markets, businesses and services are “platforms”, both online and off, and this essentially includes any function on the

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<sup>2</sup> [http://ec.europa.eu/priorities/digital-single-market/docs/dsm-swd\\_en.pdf](http://ec.europa.eu/priorities/digital-single-market/docs/dsm-swd_en.pdf)

<sup>3</sup> [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=4485](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=4485)

continuum between manufacturer/creator and end user. Nowhere does the consultation explain why online “platforms” should be treated in a distinct manner from other businesses.

Moreover, general statements, such as “online platforms should be more transparent,” make it difficult to develop targeted solutions without a clear definition for platform or detailing what problems “more transparency” would address. Without needed specificity there is a danger of creating a rule for one version of a “platform” that is unworkable and negatively impacts another type of “platform” or rules that stifle innovation and lock in status quo.

The consultation contemplates potential new regulatory rules regarding the relationship between online platforms and other businesses and consumers, when there are already a wide range of laws and practices that address these relationships. First, it is important for the Commission to ensure better enforcement and implementation of those laws.

Second, sector specific regulations should only be contemplated where there is a clear market failure and it can be demonstrated that horizontal rules such as competition, consumer protection, and data protection are not effective in addressing the issue. Before proposing any additional regulations, it is critical that the EU identify the specific problem they wish to address, along with any legal or regulatory deficiencies and an explanation of why current rules fail to address the concerns. Any proposals for new rules should be supported by sound legal analysis and economic evidence and narrowly tailored to achieve a well-defined public policy objective.

### **Online Intermediaries**

We encourage the EU to remain consistent with the OECD principle on intermediary liability. The DSM plans needs to respect the equilibrium achieved by the existing e-Commerce Directive. Intermediary liability limitations should continue to be implemented in a way that respects and promotes economic growth, innovation, creativity, seamless flow of information and incentivizes cooperation among all stakeholders to address and deter illegal activity.

## **Data and Cloud in Digital Ecosystems**

There are no situations where government imposed data localization standards are justifiable, provided companies can demonstrate compliance with data protection laws and regulations.

Forced data localization results in lowered privacy and security. Storing data online allows for processors and controllers to focus their security and privacy expertise and capabilities towards one system. Companies that operate on a global scale and are required to build multiple storage and processing facilities to meet data localization requirements face enormous expenses and disperse and water down technical, monetary, and personnel resources.

Storing data locally is also economically bad for end users; it raises costs without any added benefits and builds a wall around business, particularly small and medium sized companies and startups. If local data storage and servers are required, EU residents may lose access to best available technology and the services they rely on daily. Moreover, many companies may choose to stop providing services to smaller EU markets. Finally, forced localization can disrupt the resiliency of the basic functions of the Internet, which is designed as a global distributive system to deter threats and increase speeds. In fact the only arguments for forced localization are largely misguided political statements.

The consultation does appear supportive of enabling data flows within the EU, but also can be read to frame the issue in a manner that would result in the EU being cut off from the rest of the world. The DSM should provide a framework for preserving data flows both within the EU and recognizing the importance of global data flows.

In light of the recent passage of the General Data Protection Regulation, more also needs to be done to ensure new privacy rules work towards enabling a DSM as opposed to solidifying a 28 different member approach to enforcement and compliance.

There seems to be no acknowledgement about the sufficiency by which current laws can address concerns related to IoT or “automatically generated data.” Adding new

rules for non-personal data is regulatory over reach and only serves to hinder innovation and economic growth. Any new restrictions on data usage that falls outside of the scope of data protection regulatory regimes should be avoided. Consumers would not benefit from such measures. For instance, obligations to inform users about highly technical details only confuses people rather than helps them.

We are concerned by language that indicates there may be a push “for the opening up of data held by private entities” as a problem has not been identified.

Creating trust schemes for Cloud at national level risk diversifying and fragmenting the internal market. There’s also a risk that such schemes require or recommend data localization where there is no legal requirement, which has an adverse effect on the DSM.

In addition to creating a stronger intra-European market, the DSM plan can serve to better connect European consumers and businesses to the global marketplace. In this regard efforts should be made to break down government constructed barriers to create a stronger transatlantic digital single market with the U.S. The EU and U.S. are each other’s largest trading partners for digitally deliverable services; with the EU’s surplus of \$168 billion exceeding the U.S.’ surplus of \$151 billion<sup>4</sup>; and improving the transatlantic market would significantly benefit both economies. The strategic benefits of linking the U.S. and EU digital markets—given both sides’ core beliefs in the free exchange of information and the protection of the freedom of speech—would be a powerful signal to other global actors who do not share these ideals.

The Chamber appreciates your consideration of our comments. We would be happy to engage further on any points raised.

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<sup>4</sup> <http://useu.usmission.gov/sp-092015.html>