

**P3 GROWTH**

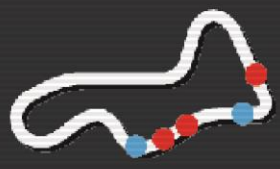
**P2 COMPETITIVENESS**

**P1 INNOVATION**

**EU DSM**

**WHERE ARE WE  
IN ACHIEVING AN  
EU DSM?**

**140**  
KM/H  
LAP 3/3



## INTRODUCTION

EDiMA is a long-standing supporter of a Digital Single Market (DSM) for Europe that benefits citizens, economies and businesses alike. As the representative of online platforms and other innovative businesses, EDiMA has actively contributed to the work of the European Commission by providing input on how to modernise this regulatory framework to make it fit for the 21st century.

While the Commission can be commended for its punctuality in the delivery of several legislative initiatives under the mantle of the DSM Strategy, EDiMA believes that the quality of these proposals are called into question when closely examined. In fact, many of the legislative proposals stemming from the European Commission's DSM Strategy presented in May 2015 seem to pander to existing beliefs and political pressures instead of working towards the realisation of a strong Digital Single Market for Europe.

In light of the mid-term review, EDiMA has taken stock of the proposals put forward thus far and has come to the conclusion that the DSM Strategy as envisaged by the Commission will - rather than harnessing the potential of 21st century innovations - actually undermine European growth by:

- I. Undermining the limited liability regime under the ECD - a fundamental element in the creation of any future European DSM;
- II. Halting the distribution of content – thereby slowing the dissemination of Europe's cultural wealth and any ensuing economic growth;
- III. Obstructing the creation of a European data economy.

One of EDiMA's main concerns is the risk of undermining the Electronic Commerce Directive (ECD), which is the cornerstone of a successful European DSM. The ECD limited liability regime is being eroded by coercing online platforms to become active players instead of mere facilitators or hosts of transactions online - thus disqualifying them from the limited liability regime. Several legislative initiatives proposed thus far under the DSM Strategy - including the proposed revision of the Audio Visual Media Services Directive (AVMS), the Directive proposal for Copyright for the DSM, and the Directive on Contract rules for the supply of Digital Content (DCD) threaten the effective framework created by the ECD.

Europe has undeniable potential to create a strong Digital Single Market that is a key player in the global landscape founded on a unified data economy. However, greater vision and clarity in future regulatory initiative and stronger enforcement of existing rules are essential to unlock this potential. The mid-term review of the DSM strategy offers a chance to pause and re-think the direction that has been set. This paper attempts to give a realistic view of how the DSM Strategy has unfolded so far and what the potential outcomes may be.

## **EDiMA recommendations:**

The members of EDiMA propose these actions to bring about a real DSM:

- Instead of more legislation, the European Commission should step up its efforts on enforcement:
  - Enforce existing legislation;
  - Ensure that NO initiatives that counter existing regulation are allowed to come into force at Member State level.
- A stock-taking exercise to ensure there is cohesion between the many DSM initiatives.
- Maintain the integrity of the eCommerce Directive and its balanced and future-proof liability regime
- Create a pro-innovation, pro-opportunity framework for the DSM in any upcoming proposals instead of producing overly prescriptive and therefore eventually ineffective legislation.
- Get quicker results by:
  - Placing more emphasis on effective self- and co-regulatory measures and mechanisms.
  - Working with stakeholders to promote best practices
  - Use more agile tools such as regulatory sandboxes

With regard to currently live files, EDiMA fears that a counter-productive path has been chosen. We recommend the following immediate steps:

- Copyright: align the Commission's proposal on copyright with the spirit of the ECD requirements, notably deleting all general monitoring requirements;
- DCD: clarify the interplay between the provisions of the proposed Directive and the GDPR and strongly reconsider the misplaced notion of data as a counter performance;
- AVMS: reconcile certain provisions of the proposal with the ECD;
- Free Flow of Data: revitalise the initiative with concrete legislative proposals.

## **I. Electronic Commerce Directive Limited Liability Regime: The cornerstone of a DSM**

Since its adoption in 2000, the Electronic Commerce Directive (ECD) has provided a sensible and balanced legislative framework to allow the EU to enjoy considerable growth. Notably it protects online intermediaries from liability for the misuse of their services by others as long as intermediaries have no active role to play in the infringing activity or have no actual knowledge such as an infringement. At the same time the ECD requires online intermediaries to act expeditiously after receiving knowledge of infringing content on their platform.

The principle that intermediaries should not be held [primarily] responsible for the actions of others reflects a well-established tenet of law. It has stood the test of time and remains valid in today's internet as it did at the time it was first adopted. As a result it has become the legal cornerstone of the digital economy. It recognises that imposing blanket and unlimited liability for user and third party infringements on intermediaries which result in general monitoring obligations, jeopardises the sector's capacity to innovate and scale in an increasingly globalised online economy. Furthermore, CJEU case law on the concept of "active role" must be followed taking into account the provisions on limited liability under the ECD.

**EDiMA is concerned that any attempt to break this delicate balancing act would have hugely negative implications, as it would drastically reduce the ability of citizens and businesses to gain the benefits of online platform services. It would put at risk the Internet as we know it by hindering the emergence of new start-ups, stifle competition in the European online sector, undermine the legal certainty on rights and obligations of respective players, and ultimately represent a threat to democratic values in the online world.**

It is therefore important to consider the role and activities of online intermediaries in the online sector as a key factor in the European economy. After all, it is due to the EU's limited liability framework for online intermediaries that the digital economy has been able to grow and provide immense economic and social benefits to European business and society<sup>1</sup>.

A workable and balanced environment for online intermediaries can only exist if a measured liability regime is in place that addresses the specificities of a fast-changing online environment. The importance of the ECD has been recognised by the European Commission as well in its pledge not to reopen the Directive. However, despite these assertions it is clear that the ECD is being undermined by various initiatives under the DSM Strategy.

- **The dangers of undermining the limited liability framework**

Taking third party marketplace as an example, the application of ex-ante rules is unfeasible, as well as unrealistic and counterproductive. Even if online platforms would have to manually review every single new listing coming on the site, it would still be impossible to determine the legality of products related to those listings. Online marketplaces for instance never have physical possession of the goods sold via its platform and hence they rely on the information provided by the user in the listing description. Indeed, in certain fields of law, the question of illegality cannot be determined easily. Even if a sophisticated algorithm is used to search and flag potential infringements, the final decision and assessment on the legality and compliance can be hardly done by such an algorithm.

This entire system would be furthermore problematic from a due process perspective: it would place online intermediaries in the role of the police, the prosecutor, and the judge. Mechanisms used to

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<sup>1</sup> According to a study undertaken by Plum Consulting in March 2015, information and communication technology (ICT) and the Internet have contributed over half of recent productivity in Europe.

report alleged intellectual property infringement on various platforms are regularly misused in an attempt to remove perfectly legitimate products from the marketplace. It is essential that checks are in place to hold parties accountable for intentional misuse of reporting processes, and to establish a basic requirement on the front end that a party must perform a good faith review before reporting content as allegedly infringing. Intermediaries, even in their capacity as corporate citizens, cannot, and should not, be expected to act as judges. Furthermore, the absence of a ‘Good Samaritan’ principle in EU law means that online intermediaries expose themselves to liability by adopting proactive measures.

National and local-level rules are already being developed across the EU which either explicitly or indirectly require platforms to help with enforcement efforts via monitoring of their users. Short-term accommodation platforms are, for example, being encouraged in some EU jurisdictions to actively police content on their sites, by for instance limiting the number of days per year that properties can be listed on their site, in line with local regulations. Such measures are in breach of the ECD and threaten online intermediaries’ liability exemption by making platforms take an active role. At the European level, it is essential that national initiatives that are undertaken by Member States are sufficiently investigated, infringements procedures lodged and action taken to curb the very negative impact these divergent initiatives will have on the DSM project in its entirety.

- **Digital Single Market (DSM) proposals are creating unworkable regulations and legal uncertainty**

Many of the legislative proposal stemming from the Commission’s DSM Strategy presented in May 2015 fundamentally undermine the ECD and its limited liability framework for online intermediaries. One of the ways in which the ECD limited liability regime is consistently being undermined is by extending the scope of analogue regulation to online platforms this is often unworkable and furthermore disqualifies the platforms from the limited liability regime. This will have a negative impact on the European digital sector and the economy as a whole. Below are some problematic initiatives put forward by the European Commission under the DSM Strategy:

#### *Copyright for the DSM*

The copyright proposal is particularly problematic as it turns all content hosting services (a very broad definition which encompasses service providers far beyond those which distribute content as part of their core business) into editors of that content and ultimately deprives them of the role of mere intermediaries in the process. This increases the liability of online platforms and creates legal uncertainty as it is not clear what concrete steps the platform has to undertake in order to rely on the liability exemption. This creates barriers to entry, especially for small digital entrepreneurs and small platforms, who are often understaffed and lack the financial resources to afford costly monitoring technology.

#### *(Suppliers of) digital content*

The European Commission’s proposal on Contract Rules for the supply of Digital Content (DCD) is also problematic from an online intermediary liability perspective due to the newly introduced “final supplier” concept. According to the proposal, a “final supplier” can be held accountable for lack of supply. Because of the lack of clarity around the definition of supplier, technologies platforms who act as mere intermediaries between digital content creators and consumers could be held liable for the failure to supply, even in cases where the lack of supply is not in their control.

#### *Intermediaries as protectors and police in AVMS*

Another example of the DSM Strategy’s push against the intermediary liability framework is the Audio-Visual Media Services Directive (AVMSD) obligation to police and monitor their platforms by requiring



‘video-sharing platforms to protect all citizens from content containing incitement to violence or hatred’. It also instructs video-sharing platforms to “protect minors against content which may impair their physical, mental or moral development”.

## II. Distribution of content

More than ever the online distribution of content is driving cultural, social and economic growth in Europe. Digital services allow consumers to discover and access creative content anytime, anywhere, increasing choice, access and opportunities<sup>2</sup>. Digital technologies also reduce production and distribution costs for content<sup>3</sup>, as well as allowing producers of content to reach global audiences almost instantly. Increased consumer demand for digital content is also driving employment in Europe - jobs in the European creative sector have continued to grow overall despite the economic crisis (2008 - 2012)<sup>4</sup>. In this climate opportunities are rife for new innovative EU business and funding models. As such, never before has there been such a need to foster the distribution of content.

With the backdrop of these clear successes in mind, it is quite shocking to see the legislative initiatives under the DSM Strategy introducing measures that could seriously halt the distribution of content in Europe.

- **DSM Strategy undermines distribution of content**

An increasing number of stakeholder are concerned that the effects of many proposals adopted under the DSM Strategy will not only fail to boost the dissemination of content and services, but will actually roll back and hamper the future distribution of content in Europe.

### *New legislative proposals that undermine existing legal structures*

New, extensive layers of obligations for online service providers are proposed in both the Copyright Directive and the AVMS Directive, which if enacted raise serious concerns for the future of the distribution of content in Europe.

As demonstrated in the previous section, the copyright proposal undermines the intermediary liability regime under the ECD. The general monitoring obligations will ultimately make online intermediaries liable for the actions of their users, thereby mandating an overly-cautious approach to the filtering and removal of digital content - including user-generated content - uploaded or shared on online platforms. Furthermore the proposed approach to bridging the acclaimed ‘value gap’ does nothing other than reinforce current distribution channels and making it very cumbersome for new distribution channels and to develop. Similarly the neighbouring rights for publishers does nothing other than ensuring a new revenue stream for publishers instead of encouraging publishers to join the digital transition that all industries are undergoing. The use of outdated analogue-era methods to tackle supposed issues online is anything but future proof and will only lead to the EU lagging behind.

The AVMS Directive also attempts to introduce a general monitoring obligation on a specific subset of online service providers: the video-sharing platforms. It would oblige video-sharing platforms to “take appropriate measures” to protect citizens from programmes and user-generated videos containing incitement to violence or hatred, protect minors from programmes or user-generated videos which may impair their physical, mental or moral development. The added value of the AVMSD is further distorted by the fact that the proposal is a minimum harmonisation Directive, meaning that 28

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<sup>2</sup> 62% of consumers go online to find unique content that they do not find elsewhere, and two thirds or more of consumers value the diversity of information and opinion they find online (BCG, 2013).

<sup>3</sup> For example, in the music sector, around 66% of revenues from a digital download now go to the artist and label, compared to around 32% for a CD sale (Booz & Co, 2012).

<sup>4</sup> <[http://www.ey.com/Publication/vwLUAssets/Measuring\\_cultural\\_and\\_creative\\_markets\\_in\\_the\\_EU/\\$FILE/Creating-Growth.pdf](http://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU/$FILE/Creating-Growth.pdf)>

different regimes for the protection of minors and safeguards against incitement to violence could be enacted. **This flies in the face of the overall EU objective of creating a Digital Single Market that fosters innovation and stimulates growth, and will most certainly lead to a reduction in the distribution of content across Europe.**

*New legislative proposals are creating burdens that will inhibit any data innovation*

The DCD risks creating new and substantial burdens and additional legal uncertainty for European traders, rather than removing barriers and stimulating economic growth and innovation to the benefit of European consumer. The extension of the scope of the Directive to digital content and services which have been provided for a “counter-performance other than money”, i.e. free digital content, is particularly problematic. Construing data as a mode of payment is in itself a flawed premise as no particular value can be attributed to data nor can it be considered a currency – a position which has recently been substantiated by the EDPS<sup>5</sup>. **The consequences of this proposal will undeniably inhibit innovation, as the applicable business models are predicated on scaling quickly to large (global) user bases, and benefit from the opportunity to easily create digital content and make reproductions given technological means.**

*New legislative proposals are pre-emptively legislating for market failures that don't exist*

In an attempt to bolster struggling ‘traditional’ business models, the Commission has made certain proposals under both the AVMSD and the Copyright Directive that are not fit-for-purpose in the digital age, thereby having a negative impact on the distribution of content across Europe.

By introducing quotas intended to increase the quantity of European content available on VOD platforms, the proposal fails to take into account the fact that VOD catalogues are built to provide customers what they want to watch. In the EU, culture, tastes and languages differ, therefore for companies to be successful it is important to offer a selection of exclusive movies and series across all genres, languages and countries of origin. The imposition of quotas will act as a barrier to new players who are least able to sustain their business models in the face of additional obligations and disproportionately affect those who want to develop services on a cross border or pan-EU basis.

The new levies proposal targets providers that offer video content cross-border further undermines the purpose of stimulating cross-border offerings of video content as part of the DSM. The additional financial and reporting burden will create market barriers and restrict the ability of providers to offer their services across borders. This will especially affect Member States which host smaller audiences and will lead to less choice for consumers, not more. For those players able to adapt and pay what is effectively a tax to access audiences in certain member states, higher prices reflecting the increase in operational costs would have to be passed onto consumers.

Rules on prominence are another outdated approach to an innovative industry introduced by the AVMSD. Customers control their viewing experience through a range of personalized tools. Search, categorization and recommendation functions based on customer preferences are already features of VOD services and smart TVs. Enabling national regulators to decide on the prominence of certain works amounts to an ability for those regulators to destroy the tailored services provided to consumers today and to severely hamper the user experience.

Article 11 of the Copyright Directive then introduces a new neighbouring right for press publishers which erodes the purpose of the DSM. The proposal ignores numerous and repeated pieces of evidence that confirm that there is no market failure that needs to be addressed between online

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<sup>5</sup> EDPS Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content  
<[https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2017/17-03-14\\_Opinion\\_Digital\\_Content\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2017/17-03-14_Opinion_Digital_Content_EN.pdf)>

services and press publishers, because of the current reality that is in fact a win-win situation between these services. This was highlighted by the Regional Court of Berlin<sup>6</sup>, the Spanish Competition authority (CNMC)<sup>7</sup>, academics, copyright experts and many other observers<sup>8</sup>. News aggregators and online services grow the market for news and send valuable new readers to new sites, driving media pluralism and giving consumers new pathways through which they can engage with news. Yet the European Commission's assessment of the impact of a new EU-wide neighbouring right has completely overlooked many of the side effects for internet users and the longer-term implications for the development of a well-functioning digital single market and the ability to link.

### III. Opportunities of the Data Economy

Data is the common thread uniting digital businesses and enabling growth. The digital world allows companies to reach millions of consumers and to understand better than ever before how and why people are using their service. According to a recent Deloitte study, 35% of businesses use data from customers for service improvements, 37% use data to provide personalised services to consumers, 23% use it to enable the product to function, and 22% use it to improve security. Allowing further innovation and experimentation, while guaranteeing common rules to protect consumers, is crucial to unlocking Europe's digital promise.

Given Europe operates at only 12% of its digital potential, the Digital Single Market Strategy offered a unique opportunity to create this truly borderless digital market and give a boost to the European economy. EDiMA welcomes the European Commission's recognition of the importance of Free Data flows, however, the most recent Commission digital policy proposals would not only have little effect, they introduce overlapping and contradictory rules for the use of data at times that would hold back the digital sector. Furthermore, the Commission's inability to act when existing single market rules are violated has created further concerns.

- **Europe is only a small part of the global ecosystem**

As the amounts of data generated by machines or processes based on emerging technologies increase over time, the demand for services that rely heavily on data is growing rapidly in the EU and worldwide.

Europe has traditionally underperformed on its digital potential when compared to the United States, which is a major producer of global content and creator of major platforms. For instance, measured by market capitalisation, there are no European firms in the 20 largest digital companies. The proliferation of digital "unicorns" (start-ups with billion-dollar valuation) has not occurred in Europe at the same pace and extent as it has in the United States and China. Leading European digital hubs, including Berlin, London, Paris, and Stockholm, tend to have fewer unicorns per vested company and relative to the leading US digital hubs. US-based firms account for nearly 50% of worldwide sales and two-thirds of post-tax profits, while European firms generate only 17% of global revenue and 14% of worldwide profits<sup>9</sup>.

This raises the question of why the European digital sector has been lagging when compared to other regions. As pointed out by the European Commission in its DSM Strategy, the fragmentation of the European single market is a major obstacle, as one of the main contributors to the Internet's success is the free flow of information and data. According to the European Commission's analysis used in the

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<sup>6</sup> <<http://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2016/pressemitteilung.481361.php>>

<sup>7</sup> See Comisión Nacional de los Mercados y de la Competencial, PRO/CNMC/0002/14, 16 May 2014.

<sup>8</sup> See Opinion of the CEIPI on the European Commission's copyright reform proposal, with a focus on the introduction of neighbouring rights for press publishers in EU law, 28 November 2016; see also Prof. Raquel Xalabarder Report 'The remunerated statutory limitation for news aggregation and search engines proposed by the Spanish Government; its compliance with international and EU law'.

<sup>9</sup> McKinsey Global Institute Report: "Digital Europe: Realizing the continent's potential".



Communication Building a European Data Economy Communication document in 2014, cross-border data flows generated \$2.8 trillion in economic value exceeding the value of global trade in goods<sup>10</sup>. Preventing EU Member States from imposing unjustified data localisation requirements would lead to a €52 million per year increase in economic activity in Europe or 0.37% of EU GDP<sup>11</sup>. We expect these figures to increase with the further digitisation of Europe's economy.

Already confronted with 28 regulatory frameworks at national level, tech companies and aspiring entrepreneurs are confronted with unjustified data localisation requirements in some Member States that undermine the competitiveness of a true Digital Single Market which could provide an estimate €415 billion to the EU's GDP<sup>12</sup>. European entrepreneurs are faced with a patchwork of national rules for the handling of their company data, which constitute a significant barrier for small firms trying to do business in other EU Member States. The vast majority of today's national data localisation requirements relate to company data, tax data, book-keeping data, financial data and health data. Many data localisation requirements are also imposed in the area of public procurement at national and local level. Localisation rules rarely find any valid public policy justification. They prevent consumers and businesses from accessing new services and technology and drive up costs and stifle innovation.

**EDiMA supports the views of the European Parliament expressed in its recommendation in June 2016<sup>13</sup> and the letter signed by 14 EU Member States, which openly called for a curb on forced data localisation<sup>14</sup>. Furthermore, while EDiMA welcomes any attempt to favour the free flow of data, it regrets that the European Commission watered down its initiative for free flow of data across European border into a communication<sup>15</sup>, with what we consider vague suggestions for next steps.**

- **DSM strategy should be re-focused to foster the data economy in the EU**

The adoption of the DSM Strategy was the perfect opportunity to tap the full potential of a borderless free flow of data market in Europe. However, recent legislative proposals adopted by the European Commission fall short of expectations. Some are even likely to further fragment the Digital Single Market.

#### *ePrivacy Regulation (ePR)*

The proposed ePR is a good example of a proposed initiative under the DSM Strategy that overlaps with existing legal instruments that already achieve the same objective. In particular, the General Data Protection Regulation (GDPR) already imposes extensive restrictions on the use of personal data and is applicable to all sectors – thereby extending the obligations originally outlined in the ePrivacy Directive to all sectors. While there may have been a need in the past to further specify the online application of the old data privacy laws, the new GDPR now offers a clearer and higher level of

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<sup>10</sup> Commission Staff Working Document on the free flow of data and emerging issues of the European data economy accompanying the document Communication Building a European Data Economy.

<sup>11</sup> Forthcoming study by the think tank ECIPE.

<sup>12</sup> Mapping the Cost of Non-Europe 2014-2019 – European Parliamentary Research Service (April 2015).

<sup>13</sup> The [European Parliament Recommendations](#) (June 2016) “recognise that data flows are a crucial driver of the services economy, an essential element of the global value chain of traditional manufacturing companies and critical for the development of the Digital Single Market; to seek, therefore, a comprehensive prohibition of forced data localisation requirements ... to the extent possible within and outside Europe.” 6 Joint letter from Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Luxembourg, Poland, Slovenia, Sweden and United Kingdom in preparation of the Transport, Telecommunications and Energy and Competitiveness Council meetings (26 May 2016).

<sup>14</sup> Joint letter from Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Luxembourg, Poland, Slovenia, Sweden and United Kingdom in preparation of the Transport, Telecommunications and Energy and Competitiveness Council meetings (26 May 2016).

<sup>15</sup> European Commission Communication “Building a European Data Economy” (January 2017).

protection regarding the processing of all types of data.

For instance, 'legitimate interest' is a ground that justifies data processing as long as those interests are not in conflict with the interests and fundamental rights and freedoms of the user. While under the GDPR 'legitimate interest' is a flexible and non-prescriptive basis for processing, it is currently absent in the proposed regulation. **As the different standards in the proposed ePrivacy Regulation become unworkable and create legal uncertainty, EDiMA reiterates the need for any sector specific rules on privacy to be carefully considered in order to ensure it does not create conflicting requirements that affect the free flow of data within Europe and compromise citizens' personal data.**

Another problematic Digital Single Market proposal is the proposed Copyright Directive presented by the European Commission, more specifically the text and data mining exception provision. While EDiMA welcomes such an exception in the text, its scope is disappointingly narrow as it is only applicable to non-commercial research institutions. Europe needs an exception that allows text and data mining of lawfully accessible materials by anyone and for any purpose. Only then start-ups and all innovative businesses, meaning more jobs and growth, can benefit. **EDiMA therefore urges the EU institutions to modernise copyright rules and make them fit for the digital age so creators and tech entrepreneurs can make the most of the digital world.**

Europe has undeniable potential to create a world-beating digital single market, founded on a unified data economy. Greater clarity in future regulation and stronger enforcement of existing rules are needed to unlock this potential. The mid-term review of the DSM strategy offers a chance to pause and re-think the direction that has been set.

#### **IV. Conclusions**

EDiMA continues to support the EU's aspiration to create a strong Digital Single Market. However, in order to achieve this success it is essential that potential overlaps in legislation - both existing and proposed - is avoided to ensure legal certainty, and that national initiatives do not counter the overall objectives of a Digital Single Market.