



Briefing on the Digital Single Market

In view of the draft report 'Towards a Digital Market Act', and in line with [our analysis](#) of the Digital Single Market (DSM) Communication¹, these are our core priorities:

1. Role of intermediaries

Intermediaries are facing a lot of pressure to delete allegedly illegal content, but also legal content that could be uncomfortable for certain audiences. It is important that each type of content is dealt with differently, as a holistic approach is not feasible. For more information, please read our preliminary input to the public consultation on internet platforms: <https://edri.org/key-points-for-a-successful-consultation-on-internet-platforms/>.

Copyright as an example

Our focus in copyright is in the restriction on civil liberties rather than in access to content. For instance, copyright creates restrictions on the right to education in French schools because copyrighted works cannot be used without explicit permission of the author (which does not occur in Estonia, for example). This does not help neither authors nor students.

Problems with the actual copyright enforcement lies with privatised law enforcement. This leads to legal content being taken down almost automatically, leading to censorship (<https://www.eff.org/deeplinks/2010/03/youtubes-content-id-c-ensorship-problem>), to cases like Premier League's use of copyright to pull down a youtube video of a professor advocating for stronger copyright (<https://www.techdirt.com/articles/20140903/06114628400/premier-league-uses-copyright-to-pull-down-youtube-video-professor-advocating-stronger-copyright-premier-league.shtml>) or ContentID (<https://support.google.com/youtube/answer/2797370?hl=fr>), which removes everything, even if the legislator has foreseen an exception to copyright for that particular use.

On the other hand, big companies like Google/Youtube apply US law (the DMCA) for situations which are legal in the European Union. See, for instance [this report](#), which argues that the DMCA doesn't work.

EU case law

- Case C-360/10 Netlog Sabam: https://edri.org/sabam_netlog_win/
- Case C-314-12 UPC Telekabel Wien v Constantin Film Verleih GmbH: <https://edri.org/web-blocking-austria-law-with-the-law-taken-out/>

¹ <https://edri.org/overview-of-dsm-communication/>.

In *Telekabel*, the European Court of Justice ruled that a non-specific injunction could be imposed on an internet service provider, “*provided that they do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available.*” (cf. para. 63).

However, the safeguards for ensuring fundamental rights are very unclear:

“*Nonetheless, when the addressee of an injunction such as that at issue in the main proceedings chooses the measures to be adopted in order to comply with that injunction, he must ensure compliance with the fundamental right of internet users to freedom of information.*” (cf. para. 55).

This means that either the Court has created a new obligation on intermediaries to ensure respect for fundamental rights OR that previous case law (especially C-275/06, *Promusicae*) means that correct transposition of Directive 2001/29/EC requires that safeguards be transposed into national law with regard to the injunction powers it requires.

For background information, please read:

- European Digital Rights, “[The slide from self-regulation to corporate censorship](#)”
- European Digital Rights, “[Human rights and privatised law enforcement](#)”
- “[The rule of law on the Internet and in the wider digital world](#)”. Issue Paper published by the Council of Europe Commissioner for Human Rights
- [Human Rights Violations Online](#), Council of Europe, Paper DGI (2014)31, prepared by EDRI.

2. Data protection and privacy safeguards in new economy opportunities

There are problems with the paragraphs under section 4.1 “Building a data economy” of the draft report, which relate to the concept of data ownership. Those paragraphs focus on the potential economic opportunities of big data, but they are not balanced, as there are no mention to fundamental rights safeguards.

- One of the most evident risks is profiling. Profiling is a form of “reproductive data”. Information A + B that you provide to a social network can be used to create information X+Z that you would not even aware it exists and that nevertheless the social network can use on its social network and putting you on a certain category built on those (maybe false) assumptions.

A recent study by Cambridge and Stanford Universities discovered that, by analysing clicks on Facebook “like” buttons, it was possible to guess an individual’s answers on a personality test better than a work colleague (based on just 10 clicks), better than a parent or sibling (based on 150 clicks) and better than a spouse (based on 300 clicks). Researchers indicated that Facebook has records of 100 billion “likes”: <https://edri.org/googling-your-brain-latest-data-protection-proposals-from-council/>



- Privacy can in fact be good for businesses and increase competitiveness: As Paul Nemitz, Director for Fundamental rights and Union citizenship in the Directorate-General for Justice of the European Commission, explained to the Wall Street Journal, "the path toward trust through high levels of protection is good for the economy, good for growth and employment." Cf. <http://blogs.wsj.com/digits/2014/12/08/e-u-sees-u-s-firms-building-more-data-centers-in-europe>

Amendments reflecting such consumer and citizens' risks are needed.

3. Open standards (e-government).

The draft report misses references to open standards with regard e-government services or applications. We also have concerns regarding the "once only principle". For more information, see https://edri.org/files/DSM_Analysis_EDRi_20150617.pdf (pp. 9 and 10).

4. Net neutrality

Paragraph 22 of the draft report contains an essential linguistic problem, since it asks for "uniform enforcement of the Connected Continent package including **the end of** roaming charges **and** the net neutrality principle...", which could be read as asking for the end of the principle of net neutrality. It should be changed to "(...)the end of roaming charges and *rigorously defend* the principle of net neutrality"(...).