Meeting with [redacted]

[redacted]

Information Technology Industry Council (ITI)

Brussels, 18 May 2022, 12:15-12:45

Member in charge: [redacted]

Table of Contents

1. Steering brief
2. Topics for discussion
    - Digital Services Act
    - Data Act
    - Digital Markets Act
3. CV

Steering brief

Scene setter

You are meeting Jason Oxman, CEO of the Information Technology Industry Council (ITI). He has specifically asked to discuss the DMA, DSA and Data Act.

ITI, based in Washington D.C., is a global advocacy organisation for the tech industry. They represent 80 of the world's most innovative companies operating in software, hardware, services and related industries. Platform regulation and data governance are key priorities for them and their members.

ITI's members are mainly from the US (e.g. Amazon, Apple, Google, Facebook, Microsoft, HP, Qualcomm), but also from Europe (e.g. Ericsson, SAP, Schneider Electric) and Asia (e.g. Lenovo, Samsung, Softbank, Toshiba). Some members are not tech companies but rely on technology to do business (e.g. Siemens, VISA, MasterCard, Toyota).

You met [redacted] and other ITI representatives in February 2021 to discuss the Digital Services Act (DSA), the Digital Market Act (DMA) as well as the (then upcoming) proposal for the Artificial Intelligence Act. Also in February 2021, Mr Oxman met the Breton Cabinet to discuss the Data Governance Act, the DSA, the DMA and the AI Act. He also met VP Jourová to discuss data protection, artificial intelligence, regulation of platforms and e-evidence, as well as EVP Dombrovskis to discuss digital trade, digital taxation and the EU-US Trade and Technology Council.

On 13 May 2022, ITI published comments on the Data Act on its website. ITI supports the goals to facilitate data access and use, promote data sharing, and improve switching between cloud services, while preserving incentives to invest in data innovation and upholding individuals' rights. ITI writes that "these objectives would be best achieved through ensuring alignment with existing EU data rules, and encouraging data sharing based on contracts that protect investment in data innovation and provide safeguards against unfair competition and disclosure of IP and trade secrets. Our industry is also supportive of efforts to improve cloud switching and data portability in a way that is realistic, meaningful and economically viable. Finally, we strongly urge lawmakers to avoid adding any further data flows requirements, which – given the Data Act's focus on non-personal data – would be a disproportionate and unjustifiable restriction to international transfers. ITI looks forward to working with policymakers to ensure that the final Data Act can address these key issues with a balanced and innovation-oriented approach."

ITI has presented recommendations for policymakers to improve the Commission's Data Act proposal by:

- clarifying key concepts, including the definitions for "data" and "product", and building stronger IP and trade secrets safeguards;
- limiting government access to data to exceptional cases and subject to effective safeguards;
- ensuring that switching provisions are practical and feasible; and
- avoiding any unjustified restriction to the flow of non-personal data across borders.

On the DSA, on 25 April 2022 ITI published a reaction to the deal reached: "ITI fully supports the original objectives of the DSA to increase legal certainty, clarify roles, define responsibilities for actors in the online context, and to foster a level-playing field for businesses with proportionate rules on the removal of illegal content online. In order to preserve these goals, important principles like provisions on limited liability and the prohibition of a general monitoring obligation must be upheld. As policymakers continue to discuss the technical details of the final agreement, we continue to reiterate the importance of avoiding overly prescriptive requirements and to not overshadow the original objectives of the DSA with the addition of last-minute provisions."

ITI has previously argued that risk mitigation measures should be reasonable and proportionate and that the fines are too high and disproportionate to the type of violations.

Objectives of the meeting

- What we want:
  - Explain how the DSA, Data Act and DMA will benefit the technology sector.
- What the interlocutor wants:
  - Push for its agenda on the DSA, the Data Act proposal and the DMA.

Key messages

On the Digital Service Act

- With the DSA, we are helping to make the online environment safer and more accountable. Platforms should be transparent about their content moderation decisions, prevent dangerous disinformation from going viral and avoid unsafe products being offered on market places.
- The agreement that has been reached on the DSA ensures that platforms are held accountable for the risks their services can pose to society and citizens. That is also why there is the possibility for significant fines.
- We are getting ready to take on our new responsibilities to supervise and enforce the DSA. The supervisory fee will finance the minimum viable resources to cover the costs for the enforcement and supervision task of the Commission.

On the proposed Data Act

- We want to maximise the value of data for the economy and society and promote a data economy in which the value of data is allocated in a fair way.
- We are addressing issues related to rights of access and use of data, but without altering data protection legislation and without limiting the incentives for investment in data generation. Usage rights over data need to be clear to individuals and businesses. They should remain in control of the data they produce, and this also applies to portability.
- We agree that government access to data should be limited to exceptional cases and subject to effective safeguards. Where non-personal data is concerned, there can be arguments that government access is necessary, such as in the context of a pandemic.
- New data access rights cannot be granted to the benefit of the largest players defined as gatekeepers in the Digital Markets Act. Those players do not need an access right to get to the data, market mechanisms work for them. The Data Act about is also about fostering a climate of innovation for SMEs, putting them at the negotiating table and enabling them to develop digital solutions on the basis of valuable data.
- We want to get the Data Act adopted swiftly, so that we have the necessary legal clarity and additional data resources for the creation of a real internal market for data.

On the Digital Markets Act

- With the DMA, the EU has worked hard to find the right balance. We have reached agreement on a piece of legislation that is very fair. The DMA will enter into force next spring and we are getting ready.
- The DMA is the logical extension and evolution of our increased attention towards platform issues, such as fairness in online rankings, fair business behaviour and market openness.

Contact – briefing coordination: [redacted]

Digital Services Act

On 22 April 2022, the European Parliament and the Council reached a political agreement on the digital services act (DSA). Work is still ongoing at technical level to fine-tune the text and ensure that the political agreement is reflected in both the operative part as well as in the recitals.

The endorsement of the agreement at Coreper is expected on 25 May (tbc). After lawyer-linguists clearance, the text could be ready for formal adoption by co-legislators in the second half of 2022.

Main messages

- The European Parliament and Council found a deal on the Digital Services Act.
- Currently, it is primarily up to platforms to decide how they enforce their terms and conditions of use. There are no minimum requirements on these terms and conditions, there are no horizontal rules on transparency of their content moderation practices, and there is no effective democratic oversight.
- The Digital Services Act will bring an end to this. The Digital Services Act will make the internet a more responsible, more transparent and more accountable space.
- The Digital Services Act goes beyond illegal content. It will require digital services, online platforms in particular, to fight online disinformation. With full respect for genuine freedom of expression. A harmonised notice and action mechanism will make flagging harmful content easier. The rules will step up the fight against manipulative content.
- In short, it is the first piece of legislation that will create some order in the online informational space.

Defensives

When is it envisaged that the DSA will enter into application?

- The entry into force and application was one of the issues widely discussed with the co-legislators. We all agree that the regulation needs to start producing effects as soon as possible. At the same time we want to give public institutions in the Member States and the online intermediaries falling under the scope of the DSA sufficient time to adapt their systems and structures to comply with the new rules.
- The political agreement provides that the regulation starts to apply fifteen months after the entry into force or on 1 January 2024, whichever is later. The application of certain obligations is delayed for small- and micro-sized enterprises, and there is a potentially earlier application for very large online platforms and very large online search engines depending on their date of designation.

What will be the implications for the DSA of the acquisition of Twitter announced by Elon Musk?

- The DSA will remain applicable regardless of any change in the ownership of the online intermediaries it applies to. Once it enters into application, Twitter - as any other online intermediary - will be required to comply with the relevant rules applicable to its services.
- Online platforms cannot continue to be legislators, executors and judges of the moderation of content online. Not when the stakes are so high and the impact on our societies and fundamental rights is so significant.
- The DSA constitutes a shift in the supervision structure, from purely private to public supervision. This is regardless of the private owners behind the online intermediaries.

How much will the companies of US origin pay to the system and why should they finance their supervision and enforcement in Europe?

- The co-legislators agreed that the fee that very large online platforms (VLOPs) [and very large online search engines] would have to pay amounts equivalent to 0.05% of net income.
- The co-legislators also agreed that the annual supervisory fee to be charged on providers of VLOPs [and very large online search engines] should be proportionate to the size of the service as reflected by the number of its recipients in the EU.
- The amount they will eventually pay is likely to be lower, as the fee will be based on a repartition of the estimated costs across all designated providers, based on their size in terms of number of users.
- The 0.05% is a hard ceiling in case this allocated amount would exceed this figure.
- In other words, these service providers will not be required to pay more than what is necessary to cover the highly qualified human resources necessary for their adequate supervision, as well as the infrastructure for the smooth operation of the new institutional set up.
- This is based on a similar approach that is common in other regulated sectors. It is a part of the complex response that was adopted following the calls of very large service providers for more stringent regulation that is taken in the DSA, whereby the company that requires the oversight should contribute to the system.

On the enforcement system

- As agreed by the co-legislators, we accept the new institutional architecture for supervision of VLOPs that provides for a centralised primary role of the Commission.
- It is of key importance to ensure that we meet the strong expectations about enforcement of these rules vis-à-vis key services for European citizens and businesses.
- These are not easy tasks, as the Commission will need to supervise some of the biggest and most complex companies and systems in the world, touching upon the everyday life of hundreds of millions of citizens and businesses and balancing delicate fundamental rights, something comparable to the complexity and systemic nature of financial supervision.
- The Commission stands ready to take on its new responsibility to effectively supervise and enforce the DSA.
- In this context, to support the Commission in its future tasks, the co-legislators also agreed on the introduction of a supervisory fee in the final text of the DSA.
- This supervisory fee will be able to finance the minimum viable resources to cover the costs for the enforcement and supervision task of the Commission.

Contact – briefing contribution: [redacted]

Data Act

The Data Act contributes to a fair allocation of value in the data economy to the benefit of all players. It enhances ethical use of data, e.g. by increasing transparency, awareness and control over Internet of Things (IoT) data. The proposal includes safeguards against dark patterns and sets limits for gatekeepers' use of IoT data. It also encourages innovation in the aftermarkets of connected devices (e.g. smart home products, smart machines in the industrial context, cars, smart farming) to the benefit of consumers and society. Data access will be key for the development of new digital services, including AI, such as predictive maintenance. The proposal allows for a more competitive cloud market and protect cloud users from unlawful governmental data request from third countries.

Stakeholder interactions show mixed reactions of industry. Producers of connected products oppose mandatory data access; other players see business opportunities.

Main messages

- The first legislative initiative announced in the Data Strategy was the **Data Governance Act**, on which political agreement was reached in November 2021. It aims to create the conditions for trustful data sharing and to support the development of common European data spaces in different areas, by ensuring that more data is available to fill them, and by strengthening trust in data-sharing mechanisms.
- The **Data Act** is the second major legislative initiative under the Data Strategy. The proposal was adopted by the Commission on 23 February 2022.
- We are addressing issues related to rights of access and use of data, but without altering data protection legislation and without limiting the incentives for investment in data generation.
- Our objective is to promote a data economy in which the value of data is allocated in a fair way and usage rights over data are clear to individuals and businesses, who should remain in control of the data they produce.
- We want to maximise the value of data for the economy and society, while respecting the legitimate interests of companies that invest in tools and technologies for generating data.
- The Data Act leads to better control on data generated with the use of connected devices, as much for consumers as for companies. New access and portability right improve competition in aftermarkets of such products, such as repair and maintenance.
- Users of connected objects, both consumers and businesses, should have better access and possibilities to use the data that is generated from their own use of connected objects. In turn, a better allocation of data value should lead to additional value creation, so that more European public and private actors can benefit from data analytics, AI, etc.
- On business-to-government, we want to ensure that in exceptional situations, such as the current epidemiological emergency, the public sector can have better access to data held by companies.
- On data processing, the data act will facilitate switching between data processing providers.
- Fast adoption of the data act will be instrumental in providing the necessary legal clarity and additional data resources for the creation of a real internal market for data.

Implementing Act on High-Value Datasets (HVDs)

- A third initiative under the Data Strategy is the **Implementing Act on High-Value Datasets** under the Open Data Directive, which is expected to be adopted in the coming months.
- High-value datasets will be an ideal source for the development of artificial intelligence systems. They were designed for the benefit of SMEs and start-ups, who often remain shut out from the market as they do not have sufficient human and financial resources to acquire and enhance the quality of public sector data.
- The increased supply of data will boost entrepreneurship and result in the creation of new companies. In addition, HVDs can become an important enabler for start-ups to validate their business cases and attract investors.

Defensives

Data Act - What is meant by a 'fair' allocation of value?

- Fairness means finding the right balance between granting more access to data while preserving incentives for manufacturers to invest in data-generating activities.
- We want to increase the use of data for the benefit of all.

Will the Data Act proposal change the general data protection regulation (GDPR)?

- No. The proposal is fully GDPR compliant. We are not proposing any measures that change or interfere with personal data protection legislation.
- We will strengthen the portability right enshrined in Article 20 GDPR. It will be possible to transmit both personal and non-personal data generated by the use of connected objects to a third party chosen by the user.

How should we understand the interplay between GDPR and Data Act? Is it reasonable to assume that the GDPR applies 'after' the Data Act?

- The GDPR continues to apply when the processing of personal data is concerned.
- However, the Data Act will help to overcome previous legal uncertainty, e.g. with regard to the effective application of Article 20 GDPR, by clarifying the scope of data portability in the context of data from IoT objects.

Isn't technological sovereignty protectionism by another name?

- Technological sovereignty is a positive agenda. It is about having choice, alternatives, competition and making sure that others play by our rules when they do business in Europe.
- It also means working closer with allies that share our values and ideals, with democratic countries like the United States, Canada and Japan. The current semiconductor shortage or the discussions on vaccine supply chains during the peak of the COVID-19 pandemic have shown the importance of having reliable and trusted supply chains.

Background

Data Act

The Data Act focuses on the following topics:

- Better access to IoT data: manufacturer of IoT objects must allow access to co-generated data whilst maintaining the incentive to innovate. Users of IoT objects can access and port data and third parties can use the data to offer services (SMEs get special conditions).
- Horizontal rules for IoT data also frame data access and use in specific sectors.

- Contractual unfairness in B2B data sharing agreements: SMEs will have stronger negotiating power where certain conditions are unilaterally imposed on them.
- Business-to-government: companies must make data available to public sector bodies in case of emergency or exceptional need.
- Easier switching between cloud services.
- Facilitate interoperability: the Commission may adopt technical specifications if necessary to reduce transaction costs related to the use of data even across sectors.
- Protection of European cloud data in the international context.

State of play

In Council, the Telecom Council Telecom Working Party (TELE CWP) is discussing the Data Act. The latest meeting of the Tele CWP took place on 10 May. On 11 May, Coreper I prepared the draft progress report in view of the TTE/Telecom Council on 3 June.

At the Parliament, the IMCO, JURI and LIBE committees challenged the full competence of the ITRE Committee on the file. The matter keeps on being negotiated internally. Mr Alin Mituța (RE/RO) and Ms Elena Kountoura (Left/EL) were appointed shadow rapporteurs for their respective groups in ITRE.

[redacted]

Contact – briefing contribution: [redacted]

Digital Markets Act

The European Parliament and the Council reached agreement on the Digital Markets Act (DMA) on 24 March 2022. Coreper I endorsed the political agreement on 6 May 2022. The IMCO vote is scheduled for 18 May and the plenary vote is scheduled for the plenary on 4-7 July. The Council could adopt the legal act either at the end of July or at the end of September.

On the scope of the DMA, co-legislators agreed to extend the list of core platform services to web browsers and virtual assistants. They also agreed to increase the thresholds for the designation of gatekeepers to EUR 7.5 billion turnover/ EUR 75 billion market capitalisation.

On obligations and prohibitions, a deal has been reached to:

- ban narrow most-favoured-nation (MFN) clauses;
- provide for choice screens and enable users to change default settings;
- introduce a new obligation on interoperability for messenger services, with a staggered implementation period;
- extend the obligation on fair, reasonable and non-discriminatory (FRAND) access conditions, to cover online search engines and online social networking services, whereby the gatekeeper will publish general terms of access and provide for the use of alternative dispute resolution mechanisms.

The final agreement enables the Commission temporarily to restrict the ability of the gatekeeper from making acquisitions in areas relevant to the DMA, in cases of systematic non-compliance. It will also be possible to impose structural remedies without the need to exhaust behavioural remedies first.

A High Level Group will be established to assist the Commission. The final agreement lays down a general framework of cooperation between the Commission and national authorities, as well as national competition authorities.

If a gatekeeper violates the rules laid down in the legislation, it risks a fine of up to 10% of its total worldwide turnover. For a repeat offence, a fine of up to 20% of its worldwide turnover may be imposed. The regulation will apply within 6 months after entry into force (as proposed in the Commission proposal).

CV of [redacted]

Information Technology Industry Council (ITI)

[redacted]

[redacted] of the Information Technology Industry Council (ITI), the global trade association for the tech sector, representing 80 of the world's most innovative companies.

Before joining ITI, [redacted] served as [redacted]

Previously, [redacted] was [redacted], which he joined in 2006, leading multiple departments. [redacted] to develop and implement technology policy for broadband and related communications services.

He received his [redacted]