

PromethEUs DIGITAL CONFERENCE

A NEW FRAMEWORK FOR EUROPE'S DIGITAL RULES

Leading the path towards AI and digital services revolution

13 October 2020, 16:30 – 19:00 | Zoom

As part of its Digital Strategy, the European Commission is preparing to put on the table in the coming months two of the main legislative packages of the current institutional cycle - the AI legislation and the Digital Services Act. The first would be following-up the White Paper to define a regulatory and investment-oriented approach to promote the uptake of AI and address the risks associated with its uses. The second should modernise the current legal framework for digital services to strengthen the Digital Single Market and foster the innovation and competitiveness of the European online environment.

As the debate on these topics has been intensifying in recent months in the European institutions and national capitals, PromethEUs will provide a forum for high-level representatives from EU and national institutions, research and business organisations, trade and consumer associations and other relevant stakeholders, in order to take stock of the Commission Digital Strategy in view of the presentation of the legislative proposals.

1. The N(EU) Way to Artificial Intelligence - Fostering Excellence, Building Trust

The first Von der Leyen Commission digital proposals were published on 19 February 2020, including two Communications (*Shaping Europe's digital future & A European Strategy for data*), a white paper (*Artificial Intelligence: a European Approach to excellence and trust*) and two reports (*B2G Expert Group Report: Towards a European Strategy on business-to-government data-sharing for the public interest* and the Commission Report on *Safety and liability implications of AI, the Internet of Things and Robotics*). The White Paper's purpose is to initiate a consultation of Member States, civil society, industry and academics on concrete proposals for setting a European regulatory framework for trustworthy AI. This will help prepare the ground for legislative proposals (also regarding safety, liability, fundamental rights and data) as a follow-up to the White Paper in Q1 2021 according to the adjusted Commission Work Programme 2020 presented in May 2020.

The current Commission updated and upgraded the DSM strategy, with its priorities and proposals. In the Communication "Shaping Europe's digital future", the Commission establishes three key

objectives to ensure digital transformation complies with European values: 1) a technology that works for people; 2) a fair and competitive economy; and 3) an open, democratic and sustainable society.

As data is the essential enabler for AI, the European Data Strategy aims at Europe emerging as a leader in the data economy, providing for a single data market and a larger role for European companies. The Commission starts from acknowledging that the EU has the potential to be successful in the data-agile economy, thanks to its technology, its know-how and its highly-skilled workforce. However, several issues are holding the EU back from realising its potential in the data economy, mainly due to the fragmentation among Member States (compared to the small number of US and China-based Big Tech firms). Among the most important issues, the strategy lists: 1) availability of data; 2) imbalances in market power; 3) data interoperability and quality; 4) data governance; 5) data infrastructures and technologies; 6) empowering individuals to exercise their rights; 7) skills and data literacy; 8) cybersecurity.

Included in the actions envisaged by the data strategy, the Commission aims to support business-to-business data sharing, investing in a High Impact Project on European data spaces and federated cloud infrastructures. This will be achieved by establishing EU-wide common, interoperable data spaces (in manufacturing, the environment, mobility, health, finance, energy, agriculture, public administration and skills) and the setting up of a cloud service marketplace, empowering individuals regarding their data and investing in skills and general data literacy.

The AI White Paper aims at setting a framework for trustworthy Artificial Intelligence, based on excellence and trust¹.

In the so called “ecosystem of excellence”, among several planned actions, the Commission will propose to Member States a revision of the 2018 Coordination Plan, facilitating the creation of excellence and testing centres that can combine European, national and private investments. This involves working with Member States to ensure that at least one digital innovation hub per MS has a high degree of specialization in AI, setting up a new public-private partnership in AI, data and robotics in the context of the Horizon Europe Programme.

For the other ecosystem (“ecosystem of trust”), the Commission assesses the main risks associated with AI in order to ensure a European regulatory framework for a trustworthy AI. The risk-based approach allows for a proportionate regulatory intervention, heavier for high-risk AI applications than for other lower-risk applications. According to the White Paper, an AI application should be considered high-risk when : 1) it is employed in a sector where, given the characteristics of the activities typically undertaken, significant risks can be expected to occur (for instance, healthcare, transport, energy and parts of the public sector); and 2) the AI application in the sensitive sector is used in such a manner

¹ WHITE PAPER On Artificial Intelligence - A European approach to excellence and trust: https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf

that significant risks are likely to arise (based on the kind of impact on presumably affected parties). Moreover, the use of AI applications for employment processes, biometric identification and other intrusive surveillance purposes would always be considered as high-risk.

Mandatory requirements for high-risk applications would cover the following areas: 1) training data; 2) data and record-keeping; 3) information to be provided 4) robustness and accuracy; 5) human oversight; 6) specific requirements for certain specific applications, such as biometric identification. These requirements would be at least in part verified under prior conformity assessments, in line with already existing mechanisms for a large number of products being placed on the EU's internal market. Of course, ex-post controls could be still enforced by competent national authorities. For non-high-risk applications, the Commission envisages a voluntary labelling scheme, allowing the economic operators to signal the trustworthiness of their products or services.

The European Commission ran a public consultation on the AI White Paper between February and June 2020. Over 1,250 replies were received via the procedures foreseen in the consultation, including survey submissions and stand-alone position papers². Participants represented all interested stakeholders from the public and private sectors, including governments, local authorities, commercial and non-commercial organisations, experts, academics and citizens. Contributions arrived from all over the world, including the EU's 27 Member States and countries such as India, China, Japan, Syria, Iraq, Brazil, Mexico, Canada, the US and the UK.

In the European Parliament, the Legal Affairs (JURI) Committee approved on 1 October three reports on Artificial Intelligence: *Civil liability regime for artificial intelligence* (rapporteur Axel Voss, EPP, Germany), 2020/2014(INL), *Framework of ethical aspects of artificial intelligence, robotics and related technologies* (rapporteur Ibán García del Blanco, S&D, Spain) 2020/2012(INL) and *Intellectual property rights for the development of artificial intelligence technologies* (rapporteur Stéphane Séjourné, Renew, France), 2020/2015(INI)³. Other reports on AI are also expected to be approved, including a report from the Committee on Civil Liberties, Justice and Home Affairs (LIBE) on *Artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters* (2020/2016 (INI)) and a report from the Committee on Culture and Education (CULT) on *Artificial intelligence in education, culture and the audio-visual sector* (2020/2017(INI)).

After this series of “legislative initiatives” and own-initiative reports on AI in several standing committees, **the European Parliament set up a special committee on Artificial Intelligence in the Digital Age (AIDA)** on 18 June 2020, mandating this committee to take a horizontal, long-term approach on the matter. The new Special Committee on Artificial Intelligence in a Digital Age (AIDA) is

² White Paper on Artificial Intelligence: Public consultation towards a European approach for excellence and trust: <https://ec.europa.eu/digital-single-market/en/news/white-paper-artificial-intelligence-public-consultation-towards-european-approach-excellence>

³ Making Artificial Intelligence ethical, safe and innovative: <https://www.europarl.europa.eu/news/en/press-room/20200925IPR87932/making-artificial-intelligence-ethical-safe-and-innovative>

made up of 33 members, and will have an initial duration of 12 months from the date of the constitutive meeting. Its mandate is to analyse the future impact of AI in the digital age on the EU economy, especially on skills, employment, fintech, education, health, transport, tourism, agriculture, the environment, defence, industry, energy and e-government. The constitutive meeting of the AIDA Committee took place on 23 September 2020.

In its conclusions adopted on 2 October 2020, the European Council – supporting the Council Conclusions on Shaping Europe's Digital Future (9 June 2020) - highlighted that the EU needs to be a global leader in the development of secure, trustworthy and ethical AI, inviting the Commission to: «propose ways to increase European and national public and private investments in Artificial Intelligence research, innovation and deployment; ensure better coordination, and more networks and synergies between European research centres based on excellence» and «provide a clear, objective definition of high-risk Artificial Intelligence systems»⁴.

1.1 PromethEUs' remarks on the AI White Paper

In PromethEUs' view, while the EU should strive to improve its current standing in research and innovation, increasing public and private investments and also better coordinating existing initiatives, most companies, especially SMEs, would be either only or mainly AI users, buying technologies developed by other companies. Therefore, for a competitive economy, the EU regulatory framework should lead the vast majority of companies to adopt AI easily and at a cost to be competitive.

According to PromethEUs, EU objectives to increase R&D and productive excellence should not jeopardize the possibility for EU citizens and companies to have access to the best available AI technologies at a competitive price. A balanced approach should be used fully taking into account the interests of all the concerned parties, including the vast majority of citizens and companies that would be adopters rather than R&D and/or commercial producers in the AI ecosystem. Both training and advice to SMEs should be key activities for AI specialized digital innovation hubs (DIHs). For this reason, foreseeing only one DIH per Member State may involve a sizeable geographical barrier for SMEs, especially in larger countries. A more distributed network of DIHs providing expertise to SMEs in different regions should be pursued, possibly involving trade associations and larger AI technology players.

On the ecosystem of trust, PromethEUs first highlighted that a EU-wide regulatory approach is preferable in order to avoid major risks of internal market fragmentation. Therefore, Member States should refrain from unilateral moves and look for agreements and alliances at a EU level. Although some new legislation is certainly required and a EU-wide regulatory framework is surely preferable to

⁴ Special meeting of the European Council (1 and 2 October 2020) – Conclusions: <https://www.consilium.europa.eu/media/45910/021020-euco-final-conclusions.pdf>

a national one, current legislation should apply whenever possible in order to avoid excessive market fragmentation and uncertainty, and increase compliance costs for companies, especially SMEs.

Whenever possible, a clearer interpretation of current legislation to be applied to all products, including those embedding AI, should be chosen instead of new legislation reserved to AI products. Although many mentioned concerns deserve a high level of scrutiny and sometimes need to be addressed by ad hoc regulation, it would be fairer to compare AI applications with a human-based benchmark. It would not be realistic to expect AI to achieve an error-free perfection where, in the same field, the same standard is not currently applied. This requirement could significantly stifle innovation, especially from SMEs and new entrants.

If the two proposed cumulative criteria to determine “high-risk” AI applications seem quite logical and could help provide legal certainty, exceptional additional instances should be better defined and limited to specific cases in order to avoid any ambiguity, where the aim of the risk-assessment approach is exactly the opposite.

Concerning enforcement, the regulatory framework should mostly rely on ex-ante self-assessment, instead of an external procedure. This would speed up the innovation process and ensure a thriving European AI ecosystem, setting low compliance costs for SMEs, and ex-post enforcement, guaranteeing full compliance by AI developers and deployers.

2. Towards the Digital Services Act - Promoting Innovation, Protecting Citizens' Rights

The Digital Services Act was announced by President von der Leyen in her political guidelines and in the Commission's Communication “Shaping Europe's Digital Future” of 19 February as a cornerstone of the Commission's Digital Strategy, with the objective to strengthen the Single Market for digital services and foster innovation and competitiveness of the European online environment. As confirmed by the adjusted Commission Work Programme 2020 presented in May 2020, the Commission announced its intention to put forward the legislative proposal on the DSA in Q4 2020.

The legal framework for digital services has remained unchanged since the adoption of the e-Commerce Directive in 2000, which harmonised the basic principles allowing for the cross-border provision of services and has been a cornerstone for EU regulating digital services.

According to the Commission, the current regulatory framework has helped in the growth of European digital services but has not provided answers to many of today's pressing questions on the role and responsibility of online platforms, especially the largest ones. Therefore, Europe would need a modernised regulatory framework to reduce the ever-increasing regulatory fragmentation across Member States, to better ensure that everyone across Europe is protected online, as they are offline, and to offer to all European businesses a level playing field to innovate, grow and compete globally.

The Commission highlighted that user safety, as well as respect for their fundamental rights, especially freedom of expression, must be systematically guaranteed.

On June 2, the Commission launched a public consultation on the DSA⁵, in order to gather views, evidence and data from people, businesses, online platforms, academics, civil society and all interested parties «to help in shaping the future rulebook for digital services». The consultation covered the two work strands announced by the Commission as part of the DSA package:

- **The first set of rules would relate to the fundamentals of the e-commerce directive, in particular the freedom to provide digital services across the EU Single Market** in accordance with the rules of the place of establishment and a broad limitation of liability for content created by users. Building on these principles, the EU government aims to establish clearer and modern rules concerning the role and obligations of online intermediaries, including non-EU ones active in the EU, as well as a more effective governance system to ensure that such rules are correctly enforced across the EU Single Market while guaranteeing respect for fundamental rights.
- **The second measure would address the issue of the level playing field in European digital markets, where currently only a few large online platforms act as gatekeepers.** Rules will be explored to address these market imbalances, to ensure that consumers have the widest choice and that the EU Single Market for digital services remains competitive and open to innovation. This could be through additional general rules for all platforms of a certain scale, such as rules on self-preferencing, and/or through tailored regulatory obligations for specific gatekeepers, such as non-personal data access obligations, specific requirements regarding personal data portability, or interoperability requirements.

In its conclusions on Shaping Europe's Digital Future (9 June 2020), the Council – inter alia - emphasised «the need for clear and harmonised evidence-based rules on responsibilities and accountability for digital services that would guarantee internet intermediaries an appropriate level of legal certainty» and stressed « the need for effective and proportionate action against illegal activities and content online, including the distribution of illegal, counterfeited and dangerous goods, whilst ensuring the protection of fundamental rights, in particular the freedom of expression, in an open, free and secure Internet»⁶.

In the European Parliament, the Committee on the Internal Market and Consumer Protection (IMCO), the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Legal Affairs Committee (JURI)

⁵ Press Release: Commission launches consultation to seek views on Digital Services Act package: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_962

⁶ Shaping Europe's Digital Future - Council Conclusions (9 June 2020): <https://data.consilium.europa.eu/doc/document/ST-8711-2020-INIT/en/pdf>

approved their respective reports in Committees in September and October 2020: *Digital Services Act: Improving the functioning of the Single Market*, rapporteur Alex Agius Saliba, S&D, Malta) (2020/2018(INL); *Digital Services Act and fundamental rights issues posed*, 2020/2022(INI) and *Digital Services Act: adapting commercial and civil law rules for commercial entities operating online*, 2020/2019(INL). Voting will take place during the 19-22 October plenary session. These “legislative initiative” reports will then be sent to the Commission to feed into its Digital Services Act package.

In the “legislative initiative” report approved in the Internal Market and Consumer Protection Committee, MEPs requested that the Commission addresses and tackles current shortcomings in the online environment in its DSA package⁷. The principle of “what is illegal offline is also illegal online”, as well as the principles of consumer protection and user safety, should become “guiding principles” of the future DSA, IMCO Committee’s report states. The committee recommendations touch upon a wide range of issues, including obligations related to transparency and information for online marketplaces, product safety online, effective enforcement and supervision measures, including fines, the spread of illegal content online, artificial intelligence (AI), and ex-ante regulation to prevent (instead of merely remedy) market failures caused by the big platforms.

2.1 PromethEUs’ first remarks on the DSA package

PromethEUs agrees that the gradual and massive transfer of many socio-economic activities to the Internet is highlighting the need to rethink the role and responsibilities for online platforms and other digital service providers. According to the network, in redesigning the rules, it is important to ensure an effective system of protection for users, but it is essential, at the same time, to avoid the risk that the regulatory system hinders the entry into the market of new companies (intermediaries and sellers) and discourages innovation and the provision of new affordable services to citizens and businesses. Therefore, PromethEUs highlights that the regulatory framework should guarantee a trustful and reliable playing field, without overbearing platforms hindering new entrants and SMEs from entering their marketplaces. At the same time, full liability should be required for platforms selling their own labelled products.

In PromethEUs’ view, online disinformation needs to be tackled more vigorously than in the past. Source transparency and exposure to high-quality information are two key issues. As well, authorities should be in a position to constantly monitor online disinformation and the effectiveness of digital platforms in fighting against it. However, regulation should be limited to specific aspects and light-handed, in order to keep innovation and market dynamics lively.

Regarding liability for online intermediaries and the different types of services set by the e-Commerce Directive, PromethEUs highlights that the current legislation has seen the Internet as a

⁷ MEPs spell out their priorities for the Digital Services Act: <https://www.europarl.europa.eu/news/en/press-room/20200925IPR87924/meps-spell-out-their-priorities-for-the-digital-services-act>

fairly unexplored terrain and favoured, with its rules, the search for new business models with low liability risk. Here a subdivision into a few specific categories was envisaged, while now, instead, a rethinking is needed according to a logic, once again, aimed at refraining from hindering innovation and the creation of new businesses, key to a competitive economy and, at the same time, ensuring adequate protection for users.

Concerning the criteria to accurately identify large online platform companies with a gatekeeper role, PromethEUs argues that different criteria should be combined taking into account both static and dynamic competition. For example, if a large digital platform enters another market or provides new services, it may increase competition to the incumbent digital platform(s), other than bringing benefits to its users. This potential beneficial impact could be positively correlated with factors such as a large user base, existing assets, etc. At the same time, PromethEUs believes that anti-competitive behaviour such as lock-in practices should be decisively tackled if associated with a dominant role in the respective market or service.

On the need to consider specific regulatory rules for large online platforms acting as gatekeepers, PromethEUs highlights that, generally speaking, large online platforms have provided huge benefits to users, and an overly restrictive regulatory framework could reduce innovation and raise costs or reduce services for consumers and businesses currently provided often for free of charge or at low cost. However, some specific regulation addressing information and commercial fairness should be adopted, strengthening provisions already included in the GDPR and P2B regulation. Users should also be provided with clear information concerning the use of their data and its sharing with third parties, how to ensure effective data portability and the existence of a commercial link of other services and goods advertised or recommended on the platform to the same platform. As well, digital gatekeepers should treat potential competitors operating on their platform based on fairness and third-party principles.

3. Key questions

Panel I - Artificial Intelligence

- 1. Can the EU become a real global competitor in the race for AI? How can the upcoming AI legislation help us to achieve this, and what other priorities should it pursue?*
- 2. Can the EU's human-centred approach to AI – which includes preventing biases in algorithms, promoting a trustworthy AI and protecting human rights – coexist with the goal of becoming a more effective competitor in the AI race?*
- 3. Can the EU bridge the AI readiness and digital gap that exists within its borders? Does the Commission's White Paper address this topic effectively?*

4. *Does the Commission's approach to AI effectively help in enhancing Europe's industrial competitiveness? Could the proposed ecosystems of excellence and trust improve the output of businesses, especially SMEs?*
5. *How can we design an effective liability system for AI that does not hamper AI implementation, especially by SMEs? Can the risk-based system also be detrimental in this regard?*
6. *Does the risk-based system proposed by the Commission hamper SME's incentives to invest in AI or innovation prospects?*
7. *How can the EU solve its data fragmentation problems besides adopting a single market for data?*

Panel II – DSA

8. *Could the DSA promote further business digitalization, especially when the digital gap between Northern and Southern Europe is considered?*
9. *What key policy issues could the DSA bring to the global digital trade and how could it affect the position of the EU?*
10. *What could be the key policy measures to protect and promote the participation of SMEs in digital markets? What do you think will be the impact on SMEs wishing to develop their e-commerce channels in the short run?*
11. *Do you feel that with the new DSA consumers will be better informed on their data use and its sharing with third parties? Or will further regulation be needed, and if so, how should it be envisaged?*
12. *How will consumers react to the changes that the DSA is bringing? Will it help them to use digital means more extensively in their everyday activities or will it add further burdens?*
13. *What are the expectations of the DSA's final impact on different sectors? Could there be different effects for different industries? What industries could have more advantages?*
14. *How do you assess the possible obstacles that such a new regulation may pose (if any) to new entrants (intermediaries and sellers)? Could this be stifling innovation?*