

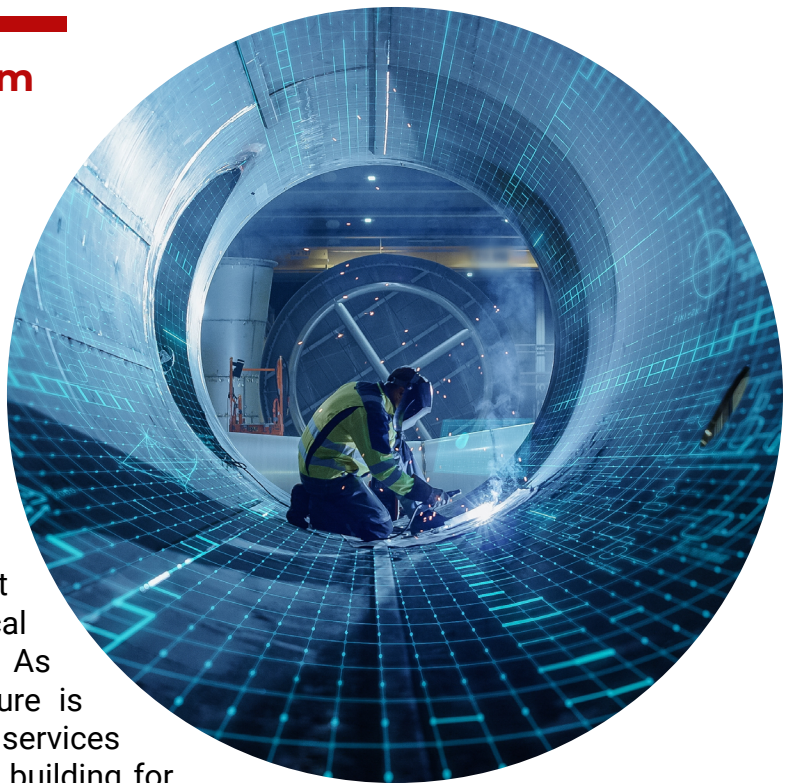


DIGITAL REGULATORY POWER BUT TECHNOLOGY TAKER

How Do We Create An Ecosystem for the European Digital Model

ABSTRACT

Over the last European legislative periods, the EU has gained a reputation as the world's leading regulatory power on technology and private data. In the new legislative period, the EU should focus on ensuring that the regulations it has produced are applied and enforced. In addition, this policy brief argues that rules are, in fact, not enough to create a value-led technological ecosystem and a European digital model. As such, investing in digital public infrastructure is crucial to avoid the reliance of our essential services on private infrastructure. Moreover, capacity building for intermediation and interoperability will allow us to work towards using and sharing data that align with European values and not rely on the harmful extraction of private data, as is the case under the surveillance capitalist model currently used worldwide.



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BACKGROUND

This policy brief follows a discussion at a review meeting with digital policy experts at FEPS in September 2023 and a conference in the European Parliament in December 2023 on "Shaping Europe's digital model", where more than 30 speakers contributed to the discussion.¹ We build on their input and expertise and will, where possible, refer to the research shared with us and the policymakers during these occasions.

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INTRODUCTION – FROM THE DIGITAL MARKET TO THE DIGITAL DECADE

Digital technology has become a central policy area for the EU. Although the first directive to protect citizens' data and privacy was adopted back in 1995, the EU still adopted a rather hands-off approach to the digital transition in the years that followed.² This centred on the e-commerce directive of 2000, which introduced limited liability for platforms with regards to the content they were hosting. Although this allowed a boom in online services that were easily accessible to many, this approach also resulted in a technological landscape in which a few tech giants accumulated most of the power over technology and data. These tech giants, in turn, have prioritised infrastructure that facilitates data hoarding, surveillance, speed ("scaling up") and consumer ease, as well as being attention grabbing.

"The increasing power of large tech firms was mainly addressed through the prism of individual competition law cases, but with virtually no effect."

However, with the exception of Data Protection Law, which aimed to seriously boost the protection of European citizens' fundamental rights, the European Commission has been late in recognising and seriously addressing these issues. For instance, the Junker Commission (2014-2019) still looked at the digital transition from a mainly liberal economic perspective, culminating in developing a Digital Single Market Strategy. The strategy neglected industrial policy concerns and the many public values at stake in the transition underway, notably, because they observed the economic growth potential of having such a market.³ In an attempt to emulate the USA, but without US industrial policy, the legislative proposals originating from the Junker Commission mainly sought to break down barriers between countries in the digital market and to ensure that all citizens had access to the digital market.⁴ The increasing power of large tech firms was mainly addressed through the prism of individual competition law cases, but with virtually no effect – their market share stayed the same or grew, market capitalisation went up, and tech firms

expanded their reach across a range of different sectors. Fines from the European Commission were seen as simply "the cost of doing business".

"The 'Brussels effect': the phenomenon of externalisation of regulations and laws through market mechanisms."

However, increasing criticism of big tech's market abuses and public concern around the effect of social media on democracy – the so-called "tech-lash" – pushed the European Commission to do more in the second half of its term. It adopted the platform-to-business regulation to give businesses more rights in relation to large platforms and started investigating potential changes to EU competition law to better address the power of online platforms. In addition, the modernisation initiative launched by the Commission in 2012 resulted in the adoption of the General Data Protection Regulation (GDPR), which triggered the adoption of similar legislation in other legal systems, leading to what Bradford has called the "Brussels effect": the phenomenon of externalisation of regulations and laws through market mechanisms.⁵ This sparked a lot of enthusiasm among policymakers in Brussels, who discovered a new way of exporting European values, and it paved the way for more ambitious digital policy in the future.⁶

The von der Leyen Commission (2019-2024) made digital policy a top priority, which entailed promoting digital sovereignty and setting standards for what they identified as the "digital decade". This is important because the reality is still that the frontrunners in technological development, such as artificial intelligence (AI), are the US-based big tech companies. Their models are being fed with large swathes of data and the creative work of Europeans. The lack of competition in the market for digital technologies and data is also contrary to the EU's aims.

In addition, this model of digitalisation has exacerbated inequalities and led to a proliferation of security risks, as well as the routine undermining of citizens' fundamental rights – not only the right to privacy, but also the right to conduct a business, the

right not to be discriminated against and the right to self-determination, among others. It also puts pressure on critical public values like transparency, democracy, equality and professionalism in sectors ranging from journalism and mobility to education and the workforce at large. Finally, there is accumulating evidence of adverse effects on the mental health of youth and profoundly ambiguous consequences for democratic processes.⁷ A clear example is the media sector, where quality journalism has come under threat. Financially, because of a drop in advertisement revenue, a large share of this market is now going to big tech companies like Alphabet and Meta, which use journalists' content to gather more user data.⁸ But also operationally, when it comes to reaching new audiences and the dynamics of clickbait on the content of articles.⁹ A healthy media sector is an essential part of a well-functioning democracy. As such, we can conclude that the current model is inappropriate for the digital infrastructure we rely on to communicate, learn, work and run public services.

REGULATIONS ARE ONLY AS EFFICIENT AS ENFORCEMENT

Some of the EU's digital legislation seek to reduce the negative impacts of technological developments on people. For example, the Digital Services Act (DSA) aims to ensure a safe, predictable and trusted online environment, while addressing the dissemination of illegal content online and disinformation. More obviously, the AI Act prohibits certain AI practices, such as cognitive behavioural manipulation and some forms of predictive policing, based on the harm they could cause to citizens, democracy and European values.

Other legislations aim to restore competition in the digital realm by countering the hegemonic power of a few tech giants over the industry. For example, the Digital Markets Act (DMA) aims to ensure interoperability between different platforms and applications, undermining each technology developer's power over the choice of citizens to



Source: Photo by Garry Killian from Shutterstock

use their service or another. The DSA also makes rules on the use of data stricter, thereby hindering the addictive models used by big tech companies by restricting their practices. Another requirement of the DSA is for big tech platforms to share their data with researchers, which reduces their competitive advantage due to the high amounts of data they own. Many of these legislations (the AI Act, the Chips Act, the Digital Governance Act (DGA)) aim to foster a strong EU digital sector capable of competing with US-based tech developers and ensuring strategic autonomy in critical markets, such as semiconductors.

“Tech giants are testing the limits of enforcement by starting legal cases to define and redefine the boundaries of new legislation to their advantage.”

Nonetheless, legislation is only as efficient as its enforcement. Tech giants are testing the limits of enforcement by starting legal cases to define and redefine the boundaries of new legislation to their advantage. For instance, in an action brought against the Commission in November 2023, Apple contested the Commission’s interpretation of iMessage as a “number-independent interpersonal communications service”, the interpretation of Apple’s five App Stores as a single core platform service, as well as the designation of iOS as a gatekeeper, and therefore, the requirement for the interoperability of iOS with other systems.¹⁰ Meta, Microsoft and Amazon (among others) have also challenged the European Commission on its interpretation of their technologies under the DMA, thereby trying to redefine the scope of application of EU law to their advantage.¹¹

A few weeks after the DMA entered into force, the Commission opened a set of non-compliance investigations into Alphabet’s rules on steering in Google Play and self-preferencing on Google Search, Apple’s rules on steering in the App Store, and the choice screen for Safari and Meta’s “pay or consent model”, signalling that this time it is serious about enforcing the rules.¹² This resulted in the preliminary findings that the App Store rules are in breach of the DMA, as they prevent app developers from freely

steering consumers to alternative channels for offers and content, and at the same time, the Commission opened a new non-compliance procedure against Apple over new contractual requirements for third-party app developers, including the “core technology fee”.¹³ The Commission also informed Meta of its preliminary findings that the “pay or consent” advertising model fails to comply with the DMA because this binary choice forces users to consent and fails to provide them with a less personalised but equivalent version of Meta’s social networks.¹⁴

Importantly, how the US regulators and the US-based firms respond to the regulatory action taken by the EU is relevant for its effectiveness, highlighting once again the need for effective enforcement within and beyond European borders. Nonetheless, tech giants have accumulated exceptional economic power over the years, thanks to their quasi-monopoly of digital and tech markets, giving them the financial ability to fight decisions that are made to restrict their rights or power. Hence, while the recent spur in legislation and legislative proposals from the EU will be welcomed by European social democrats, regulating and enforcing regulations is not enough. To effectively counter the harmful and extractive US model, regulations must be accompanied by capacity building for alternatives to change the core values of the digital model we rely on.

TOWARDS A EUROPEAN VALUE-LED DIGITAL MODEL

The EU’s long- and medium-term objectives in digital policy should aim at building capacity for value-led alternatives to extractive and harmful digital models. The recent legislative package has opened a window of opportunity for European actors to provide such alternatives, and it is now time to harness this potential. This policy brief identifies two main avenues for European policymakers to spur the development of a value-led technological ecosystem and digital model, which will contribute to European strategic autonomy.

1. The case for digital public infrastructure investments as part of an industrial policy for the digital age

A European digital model aims to reduce rather than exacerbate inequality and support democracy, workers' rights and public services. In theory, digital technology can enhance forms of social coordination that are not based on commercial motives and competition, such as better public services, a more responsive democracy or social innovation. For example, better public services could mean providing digital services to healthcare centres in remote areas to enable remote specialist diagnostics or treatment advice where such services would otherwise be unavailable.¹⁵

Providing these sorts of services requires a well-functioning digital infrastructure. Bego argues that having an excellent digital public infrastructure could also “redistribute power over the internet by building a vibrant, diverse ecosystem of interoperable tools and solutions, on top of a shared set of rules, open

protocols and standards”.¹⁶ As such, there is an opportunity for innovation regarding the institutions of the digital age, which can be seized in Europe. Digital public infrastructure is crucial for developing a European digital model that is efficient and serves the people, notably by creating better public services for all.

PROBLEMS OF PRIVATELY OWNED INFRASTRUCTURE PLATFORMS

The reality is that many of the digital platforms of the big tech enterprises operate as infrastructure platforms, providing, in reality, essential services for the platform economy of the digital era.¹⁷ Much emphasis and effort has been put into regulating the market power of big tech companies, for example, through the DMA and the antitrust process of competition cases. Despite the Commission's actions in protecting the internal market's functioning, we can fundamentally question whether this is enough.



Source: Photo by Bianco Blue 85 from Shutterstock

“Infrastructure in private hands naturally tends to lead to market power concentrations of the monopolistic kind.”

Infrastructure in private hands naturally tends to lead to market power concentrations of the monopolistic kind. We have seen this in the tech economy, where a few players have secured a dominant position. That is also why essential services in the non-digital part of the economy, like electricity, water and gas, are often in semi-public hands. In many instances, ownership is split between the entity controlling the network and the companies providing the service. The European regulator did not choose a similar approach by breaking up big tech, maybe partly because most big tech infrastructure platforms are US-based companies, and it would be difficult for Europeans to execute such an approach.¹⁸ The DMA does limit the very large platforms from buying up even more competitors to reinforce their market position.

INVESTMENT IN ALTERNATIVE DIGITAL INFRASTRUCTURE TO REDUCE DEPENDENCY

Even though Europe might not be willing or able to break up the big tech platforms, it could provide alternatives. Investment in digital public infrastructure can have many benefits, not only for the European industry but also for the (semi-) public sector that provides essential services like healthcare, public service media and education. Vital public services are an integral part of the European social market economy. In an age of digitalisation, these services have often become reliant on solutions provided by big tech for their functioning.

“The downside of this lock-in and reliance on private infrastructure for public services has become very apparent.”

This raises questions about the strategic autonomy of the EU's essential services and exposes us to the risk of inflating the costs of public services. The downside of this lock-in and reliance on private infrastructure for public services has become very

apparent in the case of Google schools for data privacy reasons and inflating costs, and in the case of Atos, the digital infrastructure of the public sector in multiple member states is reliant on a company that is at risk of bankruptcy.¹⁹

At the European level, there is an economy of scale to create public, alternative tools with European developers and the open-source community that support public services while, for example, better safeguarding the data sovereignty of Europeans. This would open up the possibility of creating tools specifically tailored to the needs of European society and not only driven by the profit and private data-amassing logic of the surveillance capitalism model.²⁰ It would allow for considerations on the healthy use of tech and mental health effects, children's cognitive development, sustainability considerations, empowerment of citizens and privacy-first-based applications to be implemented.

“There have been calls for investment in developing a European tech stack, which means investment in all layers of the digital infrastructure stack.”

This is why there have been calls for investment in developing a European tech stack, which means investment in all layers of the digital infrastructure stack.²¹ Many failures linked to top-layer applications are related to problems deeper in the technology stack, which are connected to the fragile physical infrastructures underpinning our communications and information systems. There are also many single points of failure, like cybersecurity risks and issues of further increasing power concentration, as big tech firms integrate vertically and expand their influence further down the stack by building their own data centres and undersea internet cables.²²

THE NEED TO FIND THE RIGHT INVESTMENT MODEL TO YIELD TANGIBLE RESULTS

One European initiative to build European capacity and regain digital sovereignty is GAIA-X, a membership-based association of companies that aims to create a federated and secure data

infrastructure and establish a cloud ecosystem. Their efforts to develop digital governance based on European values has yet to materialise amid infighting between corporate members – partly due to capture by big tech players like Google and Amazon, who became members – disagreement over its overall aims and a bureaucratic structure.²³

This underscores the need for concrete proposals to develop standards without relying on private sector initiatives to develop public digital infrastructure. Through the European Digital Infrastructure Consortium, the European Commission has created a legal framework to help member states set up and implement multi-country projects.²⁴

“Creating digital tools in Europe reduces our reliance and keeps the money in the European economy instead of leading to windfall profits for big tech firms.”

The development of a European tech ecosystem capable of providing alternatives for essential digital infrastructure technology needs investment on an industrial scale. A sizeable EU investment package for the digital transition will allow the European industry to innovate and catch up with their US, Chinese and Indian competitors in the digitalisation race. Creating digital tools in Europe reduces our reliance and keeps the money in the European economy instead of leading to windfall profits for big tech firms. As Mazzucato proved, many of the innovations by Silicon Valley firms originate from public R&D investment, often by the US defence sector.²⁵

“It raises questions not only about the scale of the investment but also about the method used to fund tech developments with EU funds.”

Even though the EU has prioritised digitalisation in its Horizon research and development funding with the Next Generation Internet programme, this has yielded few tangible results.²⁶ It raises questions not only about the scale of the investment but also about the method used to fund tech developments with EU funds. We should also evaluate the results of the

Recovery and Resilience Facility, a €648 billion fund, of which 20% had to be spent by member states on digitalisation projects.²⁷ More recently, the European Commission launched its STEP programme, an investment package for the strategic autonomy of the EU that targets digital technologies and deep-tech innovation as investment areas.²⁸ This package was relatively underwhelming because of its limited size and the fact that it mainly repackaged existing EU funds. Still, we will have to see what this investment in strategic sectors, such as microchip development, will yield.

There is also enormous potential in strategically harnessing public procurement, and it can work as a standard setter in creating a digital public infrastructure,²⁹ to ensure that EU funds are well spent by setting criteria and stronger coordination for EU-wide projects on digital infrastructure. Klossa and Nogarede argue that without this, the investment will go to big tech providers and deepen dependence on their services. When we put this in perspective, public procurement combined with “buy local” acts were instrumental in the US and China’s establishment of technological leadership. In the EU, the fragmentation of 27 public procurement strategies prevents the development of European frontrunners. There are past examples of successful cooperation between European governments in establishing firms in strategic sectors, such as aeroplane manufacturing.

A CORNERSTONE OF THE INDUSTRIAL POLICY FOR DIGITAL TRANSFORMATION

Within an industrial strategy for the twin green and digital transitions of the new European Commission, a digital public infrastructure investment programme could be the cornerstone of the digital chapter. This should play to the relative strengths of Europe, with solid and innovative public sector institutions, great universities with strong R&D capabilities, a civil society that can contribute and a lively open-source developer community. Part of this programme should link to and cater for the European industry’s needs and look for synergies between the tech applications needed in the public and private sectors.

This links to a report on the future of the single market by Enrico Letta, which connects a modern and effective digital strategy and technological autonomy for the EU to a potential fifth freedom to enhance research, innovation and education and catalyse advancements in areas such as R&D, data utilisation, AI and quantum computing.³⁰ This fifth freedom would require a multifaceted approach, encompassing policy initiatives that establish a solid European technological infrastructure. Letta stresses a shift in governance towards a collective industrial policy at a European scale with centralised coordination. This should be able to draw in substantial private investments to create significant European technology corporations that make the EU less susceptible to cybersecurity threats, misinformation campaigns and potential military confrontations.

“One concrete project Letta puts forward is the creation of a European Knowledge Commons as a centralised, digital platform providing access to publicly funded research”

One concrete project he puts forward is the creation of a European Knowledge Commons as a centralised, digital platform providing access to publicly funded research to tap into a wealth of knowledge for innovation and societal progress. And to harmonise cross-border data flow mechanisms, particularly interoperability and data protection regulations, and invest in robust digital infrastructure to facilitate the secure and efficient transfer of non-personal data, supporting the development of European data spaces in critical sectors like the European Health Data Space (EHDS).

“We need scale and skills, which means creating digital hubs that could work with and for public services and on public digital infrastructure moonshot projects.”

Instead of funding small-scale projects to support SMEs, as was the approach of the Next Generation Internet programme, a different approach could be found.³¹ We need scale and skills, which means creating digital hubs that could work with and for public services and on public digital infrastructure

moonshot projects. These hubs could be physical places in different member states, but should also foster remote collaboration with open-source developers around Europe. As part of the Digital Work Programme, the European Commission has created 150 European Digital Innovation Hubs for networking, cooperation and knowledge transfer between SMEs, mid-caps and the public sector.³² These hubs could be further developed to hire some developers to work on long-term projects. Many within the open-source community are already developing valuable tools, and they would be able to fund their work and make their efforts more sustainable. Another way to facilitate this development is to connect investment to an open-source database of projects, organisations, teams and individual developers that comprise the European digital ecosystem in parallel with the Crunchbase list of start-ups.³³ This would allow for easy collaboration and the search for expertise that is needed to complete different projects.

“Connect investment to an open-source database of projects, organisations, teams and individual developers that comprise the European digital ecosystem.”

2. An alternative model for control over our data requires building digital institutions to provide data intermediation and interoperability

A European digital model also values digital agency and privacy. Citizens should have control over their own data, its access and its use. Currently, data is transferred from consumers to digital service providers, who provide digital services and influence the consumers. However, these data transfers do not operate in actual markets, and consumers, in the case of data transfers, are not really consumers because they do not have a choice about transferring their data.³⁴ Shoshana Zuboff identified this issue in her famous book on surveillance capitalism, where she questioned the extent to which consumers of big tech platforms consent to the use of their data by these platforms.³⁵

It leads to complete personality profiling being used for targeted advertising, which could manipulate

consumers and citizens, especially when coupled with AI capabilities.³⁶ Already, there are national security threats that private data profiles of Secret Service and defence personnel are for sale on the data markets.³⁷ Therefore, we should question the drivers, enforce the existing rules in the GDPR and other legal requirements to limit extractive data practices, and look into a way to restrict or ban targeted advertisements by digital platforms.³⁸

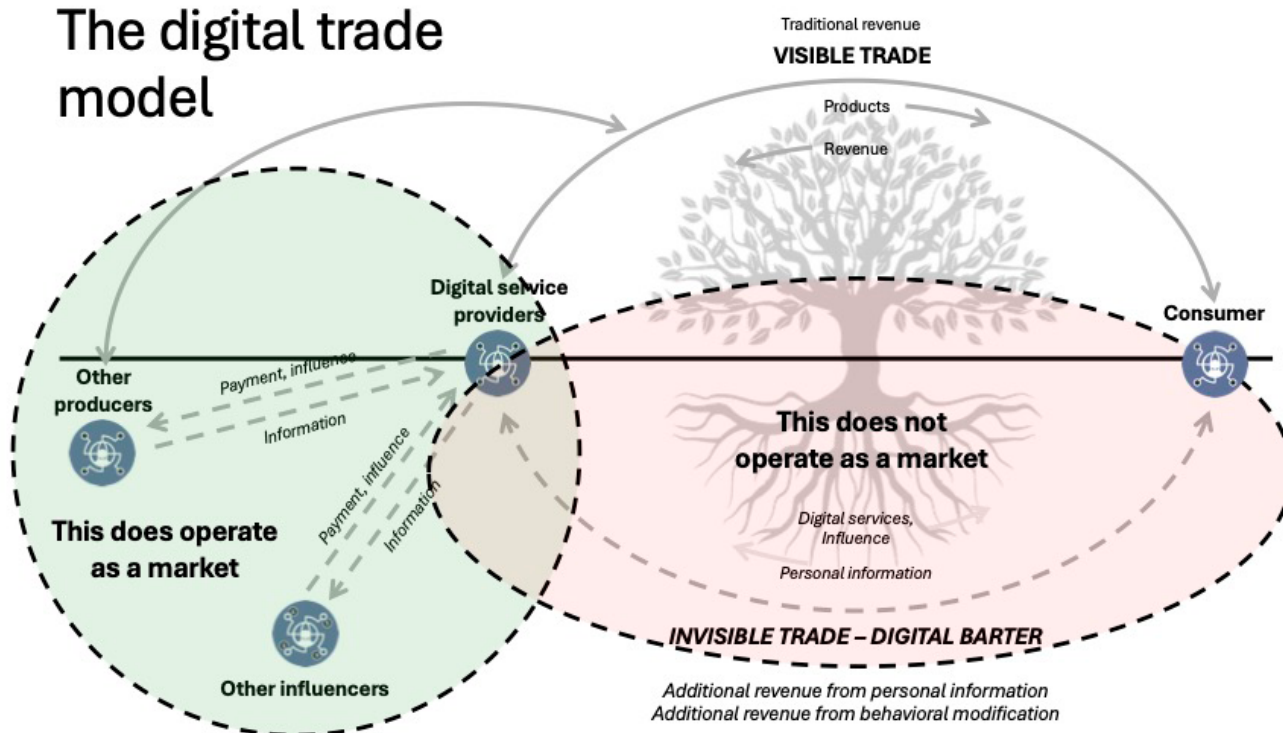
DATA INTERMEDIATION TO REGAIN CONTROL AND CHANGE THE ECONOMIC MODEL

“Data intermediaries could, for example, ensure citizen’s control over their personal data and who has access to it, enable citizens to negotiate the terms under which their personal data is used.”

Having data intermediaries could be an efficient way of recentring data transfer practices around

European values, and the European Data Governance Act adopted in 2022 created a framework for such data intermediation services in the EU.³⁹ These data intermediaries could, for example, ensure citizen’s control over their personal data and who has access to it, enable citizens to negotiate the terms under which their personal data is used and provide effective rights of association and representation for citizens to ensure that skilled professionals can advise groups of citizens and negotiate on their behalf. They could potentially improve cross-border data flows and allow individuals to leverage their personal data to maximise its social impact.⁴⁰ Data intermediaries can take many forms, like services between data subjects and their potential users and data cooperatives. However, they have clear potential to disrupt unfair power relations in the digital area and restore a power balance between big tech and consumers by giving consumers more control over their data.

The digital trade model



Source: Presented by Dr Paul Twomey of The New Institute.

“Potential to disrupt unfair power relations in the digital area and restore a power balance between big tech and consumers.”

The question is how this newly created legal framework will translate into actual services for consumers in a tech landscape dominated by big firms and with whose business model the notion of data intermediation clashes. This will require infrastructure and incentives for consumers or businesses to use these services. We will need further action from the EU, member states, civil society and industry to create a viable alternative economic model for digital trade.

INTEROPERABILITY BEYOND PUBLIC DATA AND MESSAGING SERVICES

“Citizens should, therefore, not only have control over their data but also be able to choose how to engage in the digital sphere.”

Lastly, democracy is at the core of the EU and extends to all policy areas tackled by it. As such, one primary aim of the EU is and should be to democratise the digital transition. Citizens should, therefore, not only have control over their data but also be able to choose how to engage in the digital sphere. At the same time, peer pressure and the monopoly of digital platforms by a few tech giants make it hard for citizens to choose freely which platforms to use and which not to. Interoperability between these platforms and others would ensure fair competition among digital platforms by allowing citizens to choose between them without hindering their social networking practices. Bego defined interoperability in her FEPS policy brief as “the principle that solutions should be able to work together or communicate with each other, regardless of who developed them”.⁴¹

European legislators have already considered this avenue and included the interoperability of messaging services in the DMA.⁴² The Interoperable Europe Act was introduced to facilitate cross-border data exchange for public sector data. The interoperability requirement could also be applied to EU member states’ economic record systems.

This could improve cross-data sharing of health information in the EU, something that is essential for creating the EHDS, thereby enhancing and making cross-border medical care more efficient.⁴³ Lastly, interoperability would not only benefit citizens but also have the potential to increase the EU’s economic and political weight internationally by strengthening the ties between different actors in and outside of the EU.

With these new laws coming into force, we must see how businesses, civil society and the public sector will implement them. This will require concrete capacity building to create institutions for the digital age. The infrastructure for data intermediation and interoperability needs to be constructed. We have to see how the EU can provide the conditions for civil society and European SMEs to play their roles in building them. This could also mean financing civil society organisations that follow up on applying the new rules by tech companies and enforcing digital rights under the EU framework.

CONCLUSION – ENFORCEMENT OF REGULATION ALONE IS NOT ENOUGH

The EU has built up a reputation as the world’s leading regulatory power in tech and private data, a role further reinforced by the legislative work on the DMA, DSA, AI Act, DGA, etc. The coming legislative period should focus on something other than introducing new rules and regulations but rather on ensuring the rules are being applied. This will be a legal battle where the European Commission should play an active role, together with the member states’ competent authorities and with strong involvement from civil society actors.

“Investing in public digital infrastructure in all the layers of the tech stack should be on the agenda for the next European Commission.”

However, more than regulation is needed to create a European digital model. We are relying on big tech companies for some of our crucial digital infrastructure, which has implications beyond the strategic autonomy of the EU. Public services like healthcare and education should rely on something

other than big tech solutions to function. That is why investing in public digital infrastructure in all the layers of the tech stack should be on the agenda for the next European Commission; this is not only a discussion about scaling up the amounts invested but also about the model and methods used to create an alternative tech ecosystem in Europe, learning from the mistakes and successes of previous programmes like the Next Generation Internet. It is also about capacity building and creating new institutions for the digital age in data intermediation and interoperability to get to the core of the issues regarding the extraction of private data deployed under the surveillance capitalist model and to work towards alternative ways of sharing and using data more in line with European values and private data rights under rules like the GDPR.

“Capacity building and creating new institutions for the digital age in data intermediation and interoperability to get to the core of the issues regarding the extraction of private data.”

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