

ON THE ROAD TO DIGITAL SOCIETY:

Position Paper of the AmCham Digital Society Committee (DSC)

Purpose of the Committee:

DSC is investigating how digitalisation has an effect on individual preferences, social values, corporate goals and public policy-making. Our aim is to raise awareness among companies and Estonian public in general by introducing best practices in managing and benefitting from technological innovation. We do so by arranging thematic workshops and speaker events with local and foreign professionals.

DSC focus topics:

- R&D and Intellectual Property
- Digital Single Market
- 5G
- Data protection and international transfers
- AI
- E-Commerce
- Cyber Security and Online Safety

Our Message on Selected Topics:

1. R&D and Intellectual Property

We are convinced that Estonia should increase its public sector funding to R&D up to 1% of GDP so that universities would have skilled staff and equipment to attract businesses into research partnerships and thereby increase private sector funding. Only then can Estonia compete for large-scale scientific projects and take part in international knowledge transfer. This would bring along brain gain, patentable innovations and creation of additional money into R&D by commercialisation of those innovations. DSC member companies that invest into R&D and collaborate with academia, are ready to share their experience and lessons learned with policy-makers. DSC aims to act as a forum for academia, busi

2. Digital Single Market

Estonia is a Digital Frontrunner and it is in the interest of Estonia to further deepen the Single Market and avoid fragmentation on digital policies or regulation among EU Member States. Estonia should build on its position as a Frontrunner to take the lead and advocate for a positive agenda on trade, digital and innovation within the EU in favor of open economy, free trade and transatlanticism and against protectionism and harmful regulation.

A number of European regulations have been instrumental in enabling the sort of online services and business models we have today. The core principles of the e-Commerce Directive have been the cornerstone of the internal market for digital services. The Directive has allowed innovation to flourish and led to the growth of a

variety of online services and business models. The EU is preparing regulatory changes to e-Commerce via the Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act, the "DSA"). Regulatory changes may be needed but it's important that any changes do not unravel the benefits that the current framework has delivered.

We welcome the joint D9+ statement, which was also signed by Estonia, and we support carefully crafted modernizations based around notice and take down of illegal content, a harmonization and introduction of clear notice formalities, a prohibition on general monitoring, incentives for platforms to take additional action, and the country of origin principle. As the D9+ group wrote in their joint statement, it is the liability exemptions for online intermediaries that *"guarantees that the internet remains an open environment for everyone to us"* and, hence, there should be no liability without positive knowledge. We also welcome that the DSA maintains and improves the core principles of the e-Commerce Directive by adding protections for voluntary efforts to moderate content. But the DSA also needs improvements. In order to protect fundamental rights, it's important the DSA does not capture lawful-but-harmful content. This should be dealt with through self- and co-regulatory initiatives, such as the EU Code of Practice on Disinformation and the EU Code of Conduct on Hate Speech. Differences between specific online services must be considered as well. Their diverse activity and goals must be well understood and reflected in projected regulations. What makes sense for content-sharing platforms may not be appropriate, nor technically feasible,

for a search index, or a platform that hosts other apps. We also support transparency reporting of clear and reliable metrics.

However, any new rules must not risk trade secrets, violate user privacy, data disclosure laws or fundamental rights nor allow bad actors to game systems. Overall, the new rules must provide legal certainty and clarity, as well as ensure the functioning of the EU Single Market.

In a parallel track, the EU is also proposing to regulate large online platforms acting as “gatekeepers”, including via the new ‘ex ante’ rule, the Digital Markets Act (DMA). We are concerned about regulating only certain platforms, e.g. based on their size, as it could reduce platforms’ incentives to grow and expose customers of out-of-scope platforms to potential harm. Any new definition of gatekeepers should be based on clear definitions and supported by evidence and be business model agnostic. The digital ecosystem is very diverse and regulators should not discriminate against particular business models or technologies. A simple assessment (e.g. number of users) would not necessarily reflect whether a specific platform has power over consumers and or other companies. Any gatekeeper definitions should apply to specific business activities in specific markets, and not by reference to the position of the entire company or corporate group.

The proposal should not jeopardize the undeniable benefits that online platforms bring to business users and consumers.

The draft Digital Markets Act regulation details new obligations for online platforms with “gatekeeper” status. We are concerned that ex ante rules can introduce unclarity, regulatory overlap and reduce the benefits of platforms for users. There are calls to introduce an outright ban on vertical integration but this could have inadvertent effects and eliminate synergies and hinder product improvements. Any potential design of any ex ante regulatory framework should focus on promoting innovation and ensuring regulation that remains fit for purpose as technologies and markets evolve. It should take proper account of existing measures, initiatives and competition tools and any potential gaps should be evidenced before considering new initiatives. When defining new obligations for companies with “gatekeeper” status, companies in scope should have the right to show that a specific conduct has pro-competitive effects (e.g. helps retailers), creates efficiencies (e.g. clear benefits to consumers) or advance other objective justifications.

Estonia should work closely with other Digital Frontrunners (the D9+ group) and other like minded countries to shape the DSA and DMA and look towards the Nordic competition authorities for inspiration and collaboration on competition aspects, as they have highlighted a number of important issues in their jointly published paper “Digital platforms and the potential changes to compe-

tion law at the European level”. In general, new regulatory initiatives need to be based on clear evidence, technology neutral, enable innovation and provide legal clarity. Self- and co-regulation often enable much quicker action than prolonged legislative procedures. Regulation should not cause an undue burden, especially on SMEs.

At a broader level, we take note of the European debate on “Digital Sovereignty”. For us, it’s about strengthening the digital ecosystem, through partnerships and investments. A protectionist tech agenda is not in Estonia’s interest and it is important that Estonia - as a Digital Frontrunner and an export driven economy - promotes openness, innovation friendly policies, and transatlantic relationships.

3. 5G

We consider 5G as the fundamental change in technology that enables to build a truly digital society in Estonia if right choices are made by the relevant decision makers. In Europe, year 2021 will be most likely called as the breakthrough for 5G. This should be the year when 5G coverage expands, speeds improve remarkably and the next generation network shows the real start in providing innovative solutions for businesses and consumers. With all those new opportunities the deployment of 5G will contribute to the EU Green Deal - new technology leaves a smaller environmental footprint.

Estonia has always had the goal to be among frontrunners in innovation and likes to introduce itself as an advanced digital society. Despite that, until now Estonia has not enabled operators and society to explore fully the opportunities that 5G technology brings along. Main reason for that is the delayed 5G frequency auction (3500 MHz auction).

The impact of exploring 5G as an innovation platform and as a new way in providing services and its effect to the user experience must not be underestimated. Estonia shall remove regulatory obstacles and enable usage of 5G frequencies in a smart and fast way. As a first step the 3500 MHz frequency range should be allocated in a way that respects the knowledge of experts and recommendations of the policy groups, e.g. RSPG and Estonian 5G roadmap. It is critical that frequency allocation decisions will be made based on expert knowledge. To create the opportunity to provide very high speed services and high level quality based on 5G networks, sufficiently large continuous blocks (80 or 100 MHz) shall be enabled by the state. For example, Finland has made smart choices by making decisions related to 5G (3500 MHz) spectrum allocation and has enabled their operators to acquire as large blocks as possible. As a result of it Finland is the fastest growing 5G country in Nordic and Baltic Region. We hope that Estonia will be able to follow similarly smart approach and will be able to compete with Finland for this title in the future.

4. Digital Services Tax

Regarding transatlantic cooperation, the EU Commission proposed in 2018 to introduce a European Digital Services Tax, which aimed at taxing a handful of American tech companies in the EU. According to the Peterson Institute for International Economics even big EU tech companies like SAP and (likely) Spotify would not be in scope because of the thresholds (revenue related to ads and services connecting users) that very precisely targeted a few, specific companies from the US and because of a number of exclusions and exceptions, including subscriptions, financial trades, payments between households and firms, telecommunications, and crowdfunding.

The proposal was rejected by some member states because they believe the efforts should be focused at an international level led by the Organisation for Economic Co-operation and Development (OECD). For more than a century, the international community has introduced treaties to tax foreign firms in a coordinated way. This framework has always attributed more tax profits to the countries where products and services are produced, rather than where they are consumed. This means that American companies pay most of their taxes in the United States, where their businesses originated, and where most of their products and services are developed. The same mechanism applies to Estonian companies and that is why Estonian export companies pay their taxes in Estonia. But it's time for the system to evolve, ensuring a better distribution of tax income and the need for modernization isn't limited to the technology sector.

OECD and EU experts have said that the wider economy is "digitizing" which creates a need for broad-based reform of current rules. We encourage the Estonian government to support consensus at OECD level to ensure clear and anti-discriminatory rules and to reject discriminatory tax actions at European or domestic levels.

The U.S. Trade Representative found France's digital tax proposal to be discriminatory under Section 301. France's proposal is more or less the same as the EU proposal and imposing specialized taxes on a handful of American technology companies would do little more than claim taxes that are currently owed in the U.S and increase trade tensions. Also, an indirect tax like this would get passed on to customers - like fuel duties, or airline ticket surcharges - and it's a misunderstanding that digital companies are undertaxed. So, these bad tax policies have a local impact, too, which underscores the need to have a sensible, coordinated approach to international tax reform. If governments work together at OECD level, more taxes can be paid where products and services are consumed, in a coordinated and mutually acceptable way.

5. International transfers of personal data

Organisations of all sectors within the European Union (EU), including Estonia, whether public or private, big EU multinationals or smaller organisations, heavily rely on the possibility to transfer personal data to third countries in order to provide their services in the EU and around the world.

On 16 July 2020, the CJEU invalidated the European Commission adequacy decision "Privacy Shield" which enabled EU-US data flows, due to concerns over US surveillance law. However, the Court confirmed the validity of the Standard Contractual Clauses (SCCs), which, depending on the situation of each transfer, would need to be complemented by additional safeguards. The court placed the burden on organisations themselves to assess surveillance legislation of all third countries and risks related to data transfers to those countries. Thus, if the data exporter fails to verify, on a case-by-case basis, whether the law of the recipient country ensures adequate protection within the meaning of the EU law, it will be in breach of the GDPR and will risk being fined for the infringement. The situation is even more critical given that several companies are already or might potentially be the targets of complaints putting into question the possibility to rely on SCCs for international transfers to the United States. This situation could lead to the halt of international transfers of personal data all together, which would negatively affect the whole Estonian and European economy by isolating businesses, public administration and citizens.

In order to preserve the ability to transfer personal data to third countries, we urge all relevant authorities, including national and European institutions, to urgently negotiate with the United States authorities a new transfer mechanism to replace the "Privacy Shield". We also call European data protection authorities to exchange best practices and issue guidelines to data controllers and data processors. Until there is no unanimous approach to the situation, the legal uncertainty remains, and different supervisory authorities in the EU possibly have different approaches to the data transfer questions.

6. AI use in Society

Covid-19 is having a major and negative impact on the economy. GDP growth is declining and the unemployment rate is increasing. The crisis has exposed the critical role digital advancement can play in a business' ability to navigate through challenging times. Consumers are digitizing their behavior even more than before the crisis, and it's important that businesses catch up with them. As one of Europe's digital frontrunners, Estonia and Estonian businesses are in a good position to use technology to recover from the economic crisis caused by Covid-19. Estonia should seize the opportunity to build the world's most digital nation and to lead the way in Europe via positive examples, innovation-friendly policies, and partnerships.

Artificial Intelligence (AI) represents one of the biggest technological opportunities for innovation and productivity growth. DSC supports the proposals included in Estonia's national AI strategy for the period 2019-2021 and accompanying Report of Estonia's AI Taskforce (i.e. Kratt Report). We fully support the detailed report in its proposed way. Wider AI use can only be achieved if both the public and private sector are actively engaged in developing its data management in order to benefit from AI systems. DSC member-companies take part in public tenders and offer their AI systems for better governance. DSC acts as an additional forum for businesses and policymakers to discuss the difficulties and solutions in implementing AI systems. This is important as public-private partnerships in IT integrations in Estonia is extremely low (place 53 out of 63 countries, IMD World Digital Competitiveness Ranking 2019).

AI positively impacts the broader European economy by advancing innovation and global competitiveness for SMEs, startups, and European businesses of all sizes. As a priority, policymakers should encourage the broad adoption of AI while avoiding regulatory measures that limit the ability of European businesses to realize AI's full potential. To avoid creating new conflicting and complex legal obligations, build on existing regulations and legal codes that are broad enough to apply to AI (e.g., GDPR, consumer law, competition, telecoms, audiovisual media regulation, NIS directive, as well as regulations in key sectors such as transportation, healthcare, energy, environment, and finance).

There is no 'one size fits all' AI regulation because of the immense diversity of applications across industries and society as a whole. For example, using AI for medical di-

agnosis is very different from using AI to help translate a language, or to solve traffic challenges. So any potential legislative measures should avoid overarching horizontal rules — a sectoral and application-specific approach for crafting rules is best to realize the full extent of AI's social and economic benefits. In doing so it is important to be pragmatic and focus on specific concrete problems, identifying targeted practical solutions built on principles-based rules rather than overly prescriptive designs.

Finally, it is essential to recognize differences in risk across AI's myriad applications. For example, using AI for medical diagnosis is very different from using AI to help translate a language or organize pictures. We recommend focusing on a risk-based approach for the specific subset of AI applications that are most likely to raise serious adverse effects. These include impacts on public health, the environment, democratic processes, and fundamental civil and human rights. When defining those it's key to build on concepts enshrined in existing legislation.

In order to reap the benefits with emerging technology in a post-Covid global economy, it is important that Estonia invests in education and re-skilling. The IMD World Digital Competitiveness Ranking 2019 shows that technological skills in Estonia are low (place 50 out of 63 countries) as well as the use of robots in education (place 52). And because of Covid-19, there is an urgent case to help job seekers, the unemployed and self-employed get the skills they need to transition quickly into new roles, or help them find work, including that can be done remotely, or temporarily.

DSC member-companies are ready to help overcome this skills gap and share their experience on the new ways to prevent or solve problems, using existing tools and methods to help the society and the workforce cope with and benefit from the opportunities data and technology provide.

Established in 1997, the American Chamber of Commerce Estonia (AmCham Estonia) is a leading foreign business hub in Estonia comprising of 130 companies from a wide range of sectors with operations and employees in Estonia and across Europe. AmCham Estonia speaks for American, Estonian and International companies operating in Estonia and aims to ensure a growth-orientated business and investment climate in the country. AmCham Estonia is a member of the AmChams in Europe Association (ACE) and of the U.S. Chamber of Commerce.