

REGULATORY MODERNIZATION IN THE DIGITAL ECONOMY: DEVELOPING AN ENABLING POLICY ENVIRONMENT FOR INNOVATION, COMPETITION, AND GROWTH

POLICY STATEMENT

Prepared by the ICC Commission on the Digital Economy

Summary and highlights

This policy statement explores principles for regulatory modernization for the digital economy and promotes a refreshed understanding of policy goals and market place facts, to ensure as much competition, investment and innovation across the ICT sector as possible. Given the imperative of business investment in delivering jobs and economic growth, as well as driving innovation and competition, regulators are encouraged to engage meaningfully with business throughout the policymaking process.

I. Setting the scene: Transformation and growth of the digital economy

Information and communication technology (ICT) and services have had a remarkable impact empowering individuals, transforming industries and economies, and bringing new ideas to governments. This transformation is more than mere digitization. It is more than converging services and industries, we are also seeing convergence across technologies, channels platforms and business models. This has brought unprecedented growth in flexible consumer access to communications and innovative applications in all industries via the Internet. The high levels of private sector deployment of new networks, services and applications supported by enhanced technologies and analytics have been driven by market liberalization, competition, investment and innovation. While critically important work remains ahead to realize the desired goal to connect all people and communities, achievements to date are profound in their transformational impact.

The digital economy is creating a transparent, inclusive and sustainable path for growth and development. It provides tools for transforming industries, services and economic structures, for open and accountable institutions; for partnerships and collaboration through extended networks; and for open and inclusive innovation¹. Globally, 82 percent of consumers are moving towards a networked lifestyle². To achieve the goals ahead, there must be a review of policymaking in the modern digital economy.

Globalization of the digital economy has brought unparalleled growth for all segments of the public and private sectors, enabling a globally accessible marketplace. Digital services and businesses have expanded their activities in parallel ways:

- Expanding **geographical** reach; the world is becoming a global market place for companies and communities both small and large, with companies of all sizes offering services across borders to a global customer base³.
- Expanding into **new or adjacent markets in all sectors is now easier and more cost-effective**; digital businesses have lower entry barriers compared to traditional “brick and mortar” business models, and have been able to quickly penetrate vast numbers of product markets, frequently using new business models that increase competition and consumer choice. Similarly emerging technologies like cloud computing have lowered both the cost and difficulty for entry to complex computing environments, by transforming fixed capital costs into operating costs in a pay as you consume model. This has also improved flexibility for businesses, by making it easy to add capacity, security and functionality.
- Increasing **customer-centric** services; as digital services expand markets globally, they also provide more customization to the individual’s needs and preferences. Concepts of customer-centricity are a beneficial consequence of digital transformation.

II. Consequence of the digital economic transformation: The need for review and revision of outdated regulatory models

These trends have created remarkable growth, innovation and competition for the benefit of users and the global economy⁴. Convergence⁵ and competition in digital markets have led to improved

¹ <http://www.ericsson.com/res/thecompany/docs/publications/business-review/2014/mastering-digital-transformation-a-policy-makers-guide.pdf>

² <http://www.ericsson.com/res/docs/2015/consumerlab/ericsson-consumerlab-the-networked-life.pdf>

³ A great example of this is the Connect Americas Community. <https://connectamericas.com/>

⁴ <http://www.broadbandcommission.org/Documents/publications/davos-discussion-paper-jan2016.pdf> (The Broadband Commission reports that a 10% increase in broadband penetration is likely to have a positive impact, and could raise economic growth by between 0.25% - 1.4%. If broadband speed is doubled, GDP may increase, potentially by up to 0.3%)

⁵ Convergence refers to the evolution of previously distinguishable digitalized information formats, services, applications, networks, and business models in ways that reduce or blend the distinctions. Convergence is driven by the rapid development of digital technology. <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2008/ICC-policy-statement-on-digital-convergence-an-economic-opportunity/>

economic efficiency and productivity, fostered innovation, increased choice and lowered prices – benefiting consumers and businesses. Emerging technologies including big data, cloud computing and the Internet of things are driving new economic opportunity and enhancing societal benefit in applications including medical research, health care, logistics, urban planning, sustainable development and consumption.

At the same time, the rapid growth and pace of innovation both of new technologies and also convergence with existing ones have sometimes outpaced traditional regulatory models, which were often organized decades ago around silos for previously separate industries. As a result, public policies may not fully take into account the increased competition across former silos, which can now warrant a reduction of traditional regulation.

Similarly, consumer protection going forward would become more relevant and easier to understand for the consumer when harmonized to apply consistently to services from former silos that are now similar, competing and substitutable for users. This would reduce the confusion experienced by consumers that exists when similar services are not governed by similar rules.

However, this is not a simple task. In rapidly changing and innovative markets, it is not always easy to determine which services are similar, competing and substitutable. Careful analysis is required and sweeping generalisations should be avoided.

In modernizing policy and regulatory frameworks for the digital economy, policymakers should be expected to be guided throughout by their responsibility for achieving outcomes that serve the public interest. Smart, light touch policies that simplify and/or harmonize are potential mechanisms, and there should generally be a preference for horizontal regulations that apply across all sectors where possible (e.g., consumer protection, competition law).

Given the unprecedented changes in technology and competition in recent decades — and especially the ways in which the Internet has enabled convergence within the digital economy — there is a compelling argument that the policy and regulatory framework governing the digital services ecosystem requires a careful review to ensure that policies and regulations remain relevant.

The need for careful and fact-based review is especially evident in areas related to fast-changing and emerging technology. As new technologies spawn new services and business models, one should consider whether such innovations need to be regulated, and if so how. To optimize the interests of consumer protection and innovation, existing models of sectoral regulation should be evaluated for relevance and appropriateness before being applied.

When modernizing regulatory frameworks, one must also consider consistency, predictability and granularity of regulation as drafted and applied. Regulatory frameworks should be applied consistently across those engaging in similar activity; should have predictable outcomes and should be drafted at a level of granularity that is appropriate and proportionate to the subject matter in question. Rapidly evolving technologies and business models may be more suited to guiding principles than to prescriptive regulations, thereby ensuring flexibility to be relevant over periods of time. Overly granular or prescriptive regulation in those cases may result in premature regulatory obsolescence. One should also be careful not to confuse flexibility with a lack of rigour in the quality, application or implementation of regulation. Flexibility can be an attribute of a sound and effective regulatory model.

Reconsidering traditional regulatory frameworks

A fundamental starting point for a modern regulatory review is to reconsider the need for silos of traditional regulatory frameworks. Whereas many regulatory frameworks have remained fairly static in recent decades, the way consumers communicate has changed immensely during those years – unrecognisable from 25 years ago, or even 10 years ago. For the vast majority of countries, the

world of the state-owned monopoly, providing the consumer with the only voice and data service over one network is a memory. In liberalized markets around the world, consumers experience multiple competing fixed, mobile and satellite broadband network platforms, and often on top of these, a vast range of independently competitive services and applications. This increased complexity of interactions of parties across the value chain is a driver for policymakers to adjust traditional regulatory models that were likely designed for monopolistic or “siloes” industries⁶.

ICC wishes to outline several aspects of this process of review of traditional frameworks. Policymakers will of course continue to ensure public interest, including consumer protection, while seeking to better reflect the current and future digital economy. In lieu of outdated sector-specific policies, policymakers likely will find cross-sectoral horizontally-applicable policies to be more effective for many topics. Similarly, given the scale and pace of change, policymakers should avoid prescriptive *ex ante* regulations, especially ones that are sector-specific. Whenever possible, policymakers should rely primarily on *ex post* competition law and general horizontal regulation.⁷

III. Regulatory modernization: Unique characteristics of the digital economy to guide regulatory review

Given the speed at which new services, players and industries can appear or disappear, it is vital that regulatory regimes are forward looking and encourage innovation and large-scale private sector investment by all parties. Furthermore, these regimes need to be sufficiently flexible to adjust to rapidly evolving markets and emerging and innovative technology and business models. As previously noted by ICC, using the example of cloud computing, an appropriate regulatory regime focuses first and foremost on critical societal objectives and flexible and light touch regulations for achieving those objectives in the provision of services and capabilities to consumers⁸.

Regulators need to be cautious not to regulate prescriptively at too granular a level, which may limit the flexibility needed to consider or capitalize on innovative potential. Overly detailed regulation risks becoming outdated by technological evolution and advancements or inhibiting potential benefits of these.

It is also critical that policymakers and regulators adopt a policy mindset that appreciates the value and understands the nature and particularities of the entire digital communications, information technology (IT) and services ecosystem. That policymaking ecosystem is no longer limited to the operators of physical network infrastructure. Rather, the realm of digital communications and services now includes the traditional network operators as well as everyone involved in the application layers on those networks. Sometimes, these players and their functionalities are closely integrated (or converged) into hybrid combinations of networks, services, and applications.

Developments in the digital economy have strengthened the interdependent relationships between services and networks. Applications depend on massive amounts of long-term private sector capital investments in high-speed broadband networks to provide the connectivity everyone needs to access and use applications. Conversely, networks depend on the demand for highly innovative applications to drive demand for more and better connectivity. Moreover, providers of applications increasingly offer services traditionally associated with network operators, and vice versa – thus increasing competition and choice for consumers.

The ultimate beneficiaries of this virtuous cycle and symbiosis are national economies. The private sector investment in broadband networks, and the Internet access and applications used by consumers around the globe, are immense drivers of economic opportunity. Accordingly, there is a

⁶ <http://www.ericsson.com/res/thecompany/docs/publications/business-review/2014/mastering-digital-transformation-a-policy-makers-guide.pdf>

⁷ See World Economic Forum, *Delivering Digital Infrastructure: Advancing the Internet Economy* (2014) at pp 25-26. http://www3.weforum.org/docs/WEF_TC_DeliveringDigitalInfrastructure_InternetEconomy_Report_2014.pdf

⁸ Please refer to ICC policy statement on business views on regulatory aspects of cloud computing: <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-policy-statement-on-business-views-on-regulatory-aspects-of-cloud-computing/>

compelling economic logic to develop policy frameworks that will promote the private sector investment in such networks and applications, given the economic growth and returns it creates.

The low barriers to entry, the low cost of global delivery, and the vibrant competition among application and service providers ensure that everyone with an Internet connection can have access to capabilities previously out of reach for many people and businesses. Where the policy environment enables these capabilities for the applications economy, new business models as well as the investment necessary for broadband connectivity, innovation and entrepreneurial opportunities throughout the digital ecosystem have flourished, driving further economic growth.

Regulations promoting investment and innovation for all players

Accordingly, this evolution of the digital economy is something for regulatory frameworks to welcome and encourage, and it necessitates both policies that promote the deployment of broadband infrastructure, and also a positive environment in which the services, applications, and content accessible over those facilities can thrive. It is therefore essential for regulatory frameworks and policies to encourage investment, innovation and new ways of bringing services to all components of this communications ecosystem.

Designing a regulatory framework that reflects the value of the entire digital communications and services landscape should be a strategic priority. This means integrating a regulatory impact assessment approach, in which proposed regulatory objectives are clearly defined, and the full range of historical, current and emerging risks are carefully analyzed relative to their impact on the desired objectives⁹. From this perspective, regulators are better placed to introduce sufficiently flexible policies that support investment and innovation for all the players in that ecosystem. By doing so, regulators can enable and promote a strong economy through a robust global digital ecosystem as a platform for innovation, competition, and economic growth today and in the years to come.

III. Issues to consider in modernizing regulatory frameworks

The need for a modernized regulatory framework can be observed in many complex areas. For example:

- **Promoting private sector investment** — As the vast majority of investment in the digital economy will come from the private sector, all policymaking should apply an economic-based lens that examines whether rules will create opportunities for investment and competition among all players.
- **Developing interoperable policy frameworks** — The global nature of the Internet is creating friction points with national and/or regional legal frameworks. The power of the Internet lies in its cohesive technological and commercial platform. Build it once, operate it everywhere, with unprecedented efficiency. At the same time, the Westphalian system of sovereign states has a real and persistent reach to cyberspace. Indeed, notwithstanding the global technical consistency of the Internet, some underlying rights and obligations driving the Internet economy are governed by fragmented legal frameworks both for companies and consumers. For services that are inherently cross-border in nature, governments and industry need to work continually towards interoperable frameworks that provide an adequate level of consumer protection in multiple countries.
- **Protecting consumer interests** — Protecting consumers using different digital platforms and different business models, drives a need to constantly evaluate how best to ensure the implementation of traditional economic, social and safety policies, and whether to apply those

⁹ Deighton-Smith, R., A. Erbacci and C. Kauffmann (2016), "Promoting inclusive growth through better regulation: The role of regulatory impact assessment", *OECD Regulatory Policy Working Papers*, No. 3, OECD Publishing, Paris. DOI: <http://dx.doi.org/10.1787/5jm3tqwq1vj-en>

policies through *ex ante* regulations or through *ex post* competition law. The competitive market for both communications and digital services is flourishing and rapidly evolving, with consumers benefiting from many options to experience voice, messaging, video and other services and the economic opportunity they create. In this evolving competitive landscape, policymakers need to explore and answer important questions about how best to protect consumer interests, taking into account and understanding the nature of all of the diverse services and service providers in the digital economy.

- **Establishing a public interest need** — Due to the great efficiencies created from dynamic and competitive markets, some policymakers and regulators are in the position to approach all regulatory questions from a zero base. They achieve this effectively by putting in place a biennial review of all regulations to identify necessary adjustments, or by providing mechanisms for case-by-case forbearance from regulations that are no longer warranted. In any event, no regulations should be imposed on new (or old) industry participants without evidence of a clear forward-looking public interest need.
- **Taking a holistic approach** — A holistic approach to modernize policy frameworks across the digital ecosystem will promote consumer confidence, and will also promote industry investment and innovation. Relevant frameworks for data protection, security, legal intercept, taxes and consumer protection need to be revisited and reviewed on an ongoing basis. This review should take into account market developments with the aim of promoting vibrant competition and effective consumer protection, as well as “permissionless innovation”¹⁰ and extensive investment by all players.
- **Operationalizing modernization reviews** — Relevant questions that policymakers should therefore carefully evaluate in considering the above issues can include: (1) where the emergence of new forms of competition and innovation can lead to a reduction in regulatory obligations across the entire competitive landscape; (2) where sector-specific regulation can be eliminated because of adequate horizontal regulation; (3) where economic regulation can be replaced by competition law; (4) whether consumers are adequately and uniformly protected across their uses of substitutable services; (5) whether allocations of regulatory fees that support the administrative work of government are uniform across substitutable product markets; and (6) whether similar services are subject to the same social, safety, security and privacy protections.

Regulatory modernization should neither equate to a need to increase regulatory measures for the full digital market ecosystem, nor should it presume a need for new sectoral regulation. Regulation should be flexible enough to meet policy objectives without stifling development or innovation. The convergence of many industries towards one competitive landscape often should enable a re-definition or a reduction of regulation. This is especially the case when it is found that economic, social or safety policy goals are being sufficiently addressed through a wider perspective of competitive market forces, particularly when the regulation originally responded to technologies and legal frameworks of a different era, and different competition conditions.

At times, of course, the consumer interest in the achievement of these established policy goals will merit applying similar rules across the actors in the competitive landscape. The key is to apply regulations designed to achieve fundamental societal objectives to all services necessary to the realization of those objectives. This consistency can improve competition, innovation, and investment throughout the digital economy.

Policy recommendations

¹⁰ The term “permissionless innovation” refers to the notion that experimentation with new technologies and business models should generally be permitted by default. See: <http://mercatus.org/publication/permissionless-innovation-continuing-case-comprehensive-technological-freedom>

In order to modernize the regulatory and competition framework, the following recommendations are relevant to consider by policymakers and regulators:

- **Adopt a regulatory mindset that promotes the value of the entire communications and digital services ecosystem, and considers the public interest.** This will foster a positive environment for the investment in the development and proliferation of capable and compelling digital networks, content, applications, and services. Future regulatory landscapes must reflect and embody that mindset.
- **Provide consumers with predictable levels of protection by reforming regulatory frameworks for communications and digital services to apply consistent approaches to similar, competing and substitutable services.** This is about finding the appropriate level of rules for consistently protecting consumer rights in the digital economy and fostering the development of new services and innovation for all. Careful and comprehensive analysis is required to determine which services are similar, competing and substitutable in today's rapidly changing and highly innovative markets.
- **Apply competition and consumer protection laws across the entire economy, and favour the use of such broad tools to the creation of new sector specific regulations.** With the objective to ensure consumer protection, while also providing incentives for investment and innovation by all parties, policymakers should be mindful of the unintended consequences of new regulations. Building in a comprehensive risk impact assessment is encouraged, where objectives are clearly defined, and risks fully analyzed in light of the objective. Wherever possible, reliance on existing general competition and consumer protection laws is preferable to new prescriptive regulations that could stifle investment and innovation.
- **Encourage the open and unfragmented Internet to continue to flourish.** The open and global nature of the Internet has enabled an unprecedented boost in terms of competition, consumer choice, innovation and entrepreneurship.
- **Use competition law to evaluate product and geographic market definitions on a continuous basis.** In an era of convergence and rapidly evolving technologies and business models, there are strong merits to relying on *ex post* competition law over prescriptive *ex ante* regulations. Given this, it is important to ensure that competition policies are based on current or forward-looking product and geographic market definitions for services enjoyed by consumers, as well as continuously updated views on market power across the digital economy.

Conclusion

Regulatory modernization – that is, updated rules that match new facts – will promote investment, competition and innovation throughout the digital economy ecosystem, and will protect consumer interests and expectations no matter who is providing the service. Markets and technologies are evolving with great speed. Policy frameworks must not lag decades behind.

In this process, close consultation with all stakeholders is important to avoid unintended consequences of new policies or regulations. Such consultation will help strike the right level of protection for consumers while fostering competition, investment and innovation. Given the imperative of business investment in delivering jobs and economic growth, as well as driving innovation and competition, regulators are encouraged to engage meaningfully with business throughout the policy-making process.



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