



Digital Single Market

Highlights in 2017

7th February 2017

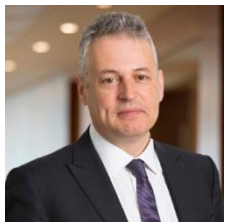
Our key questions for today

- What does politics in 2017 mean for the DSM?
- Will providing online content be more onerous?
- Should VAT and Tax change your business model?
- Can data be a competition issue?
- Will DSM balance privacy and innovation?
- Where does this leave business?



Speakers

What does politics in 2017 mean for the DSM?



Peter Watts
Partner
London

Will providing online content be more onerous?



Nils Rauer
Partner
Frankfurt

Should VAT and Tax change your business model?



Mathias Schönhaus
Counsel
Düsseldorf

Can data be a competition issue?



Dina Jubrail
Associate
Brussels

Will DSM balance privacy and innovation?



Winston Maxwell
Partner
Paris

Where does this leave business?



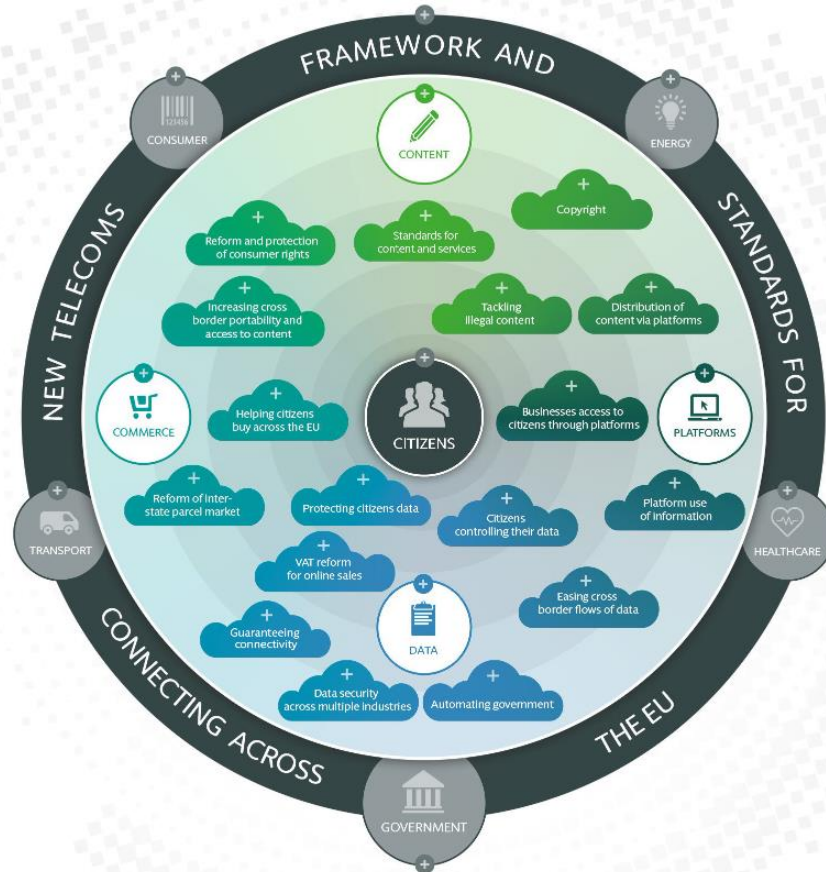
Marco Berliri
Partner
Rome

The 2017 Political Landscape

Peter Watts



An ambitious and wide ranging programme



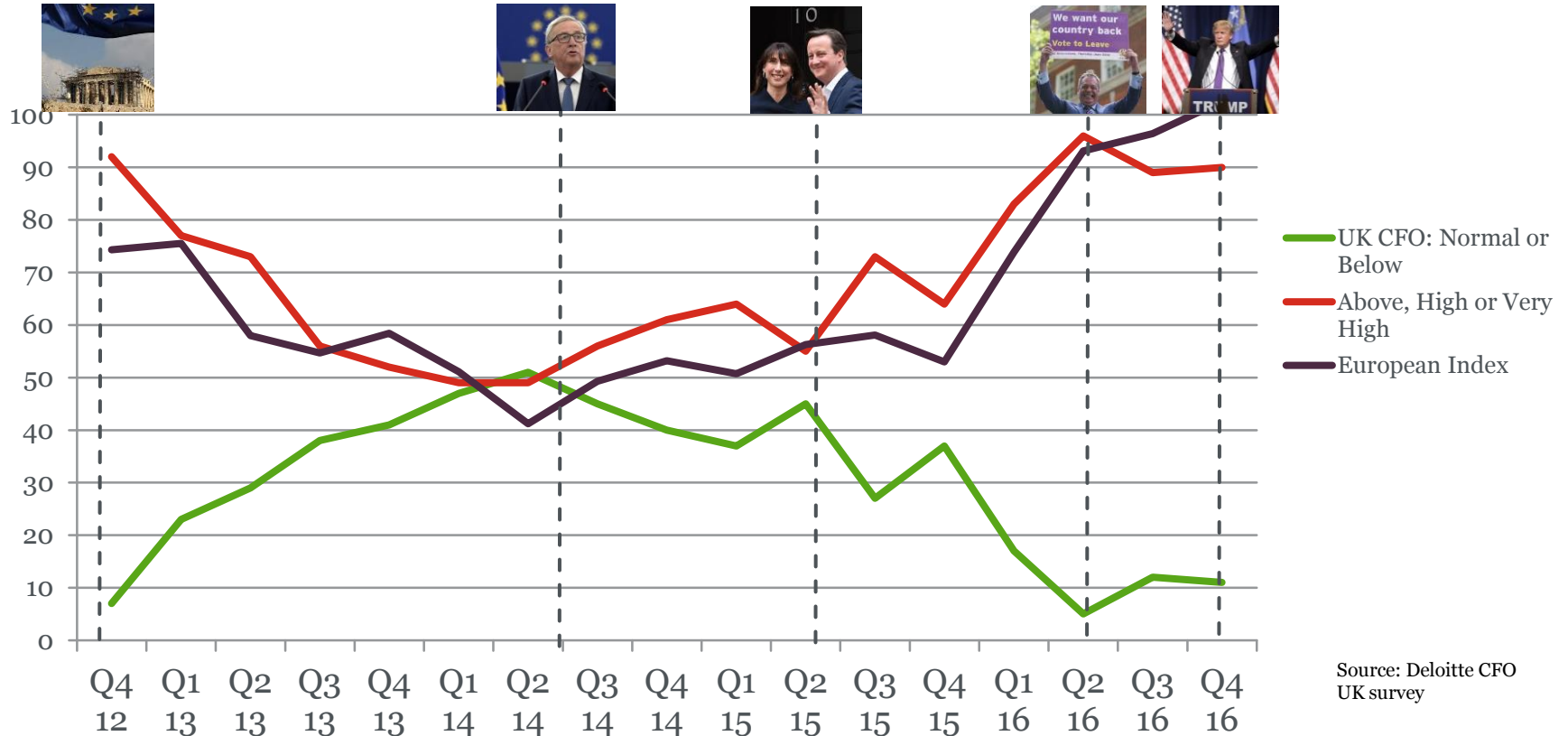
Key themes

Breaking down
internal non-tariff
barriers

Enhanced regulatory
protection

Growing the digital
economy

An uncertain environment



Source: Deloitte CFO UK survey

Politics 2017



“Today, the Wireless Telecommunications Bureau is closing its investigation into wireless carriers' free-data offerings. These free-data plans have proven to be popular among consumers, particularly low-income Americans, and have enhanced competition in the wireless marketplace. Going forward, the Federal Communications Commission will not focus on denying Americans free data. Instead, we will concentrate on expanding broadband deployment and encouraging innovative service offerings”

FCC Chairman Ajit Pai, 3 February 2017

"The UK is currently the EU's biggest broadcasting hub, hosting a large number of international broadcasting companies. In the course of the negotiations, we will focus on ensuring the ability to trade as freely as possible with the EU and supporting the continued growth of the UK's broadcasting sector."

"As we exit the EU, we will want to ensure that UK telecoms companies can continue to trade as freely and competitively as possible with the EU and let European companies do the same in the UK."

"As we leave the EU, we will seek to maintain the stability of data transfer between EU Member States and the UK."

"...the strategic partnership which we seek will underpin free trade between the UK and EU, recognising the deep integration and harmonisation that we have achieved as members of the EU, as well as the closest possible cooperation on key issues like security, foreign policy and science and technology."

UK Government White Paper 2 February 2017

Political and Diplomatic
Distraction

Loss of a Key Policy and
Regulatory Voice

**Pragmatism over
Principle**

Less Benign International
Relationships

Erosion of Accepted
International Norms

Online Access to Content

Nils Rauer



The current law

Making Available vs. Transmission, Caching & Hosting



- **Article 3** InfoSoc Directive 2001/29/EC
 - (1) Member States shall provide **authors** with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the **making available to the public** of their works in such a way that members of the public may access them from a place and at a time individually chosen by them
- **Article 12 to 15** eCommerce Directive 2000/31/EC
 - Liability privilege for **information society services**
 - Article 12: **transmission**
 - Article 13: **caching**
 - Article 14: **hosting**
 - Article 15: **no** general **monitoring obligation**

What the CJEU makes out of this

Interpreting the Directives

- **CJEU**, Judgment of 8 September 2016, C-160/15 – *GS Media*
 - Hyperlink to copyright protected work
 - Own ‘**communication to the public**’?
 - **Criteria:** Had the service provider knowledge or should he have known about the illegal nature of the linked publication?
 - **New: Presumption** of knowledge of the illegal nature of the publication, if **pursuit of financial gain**
 - **Consequence:** Obligation to check whether linked content is freely available with the consent of the copyright holder



What the CJEU makes out of this

Interpreting the Directives

- **CJEU**, Judgment of 15 September 2016, C-44/14 – *McFadden*
 - Open Wi-Fi, transmission and third-party infringement with copyright law
 - No compensation from access provider
 - However, **claiming injunctive relief** against the continuation of that infringement is not precluded by European law
 - Equally, for a judge **granting** an injunction is possible
 - Provider may choose which technical measures to take in order to comply with the injunction
 - **New:** The choice might be limited to a **single measure** consisting of password-protecting the internet connection, provided that those users are required to reveal their **identity**



Draft Copyright Directive (COM(2016) 593 final)

Article 13 – Use of protected content

- **Scope**

- Society service providers storing and giving access to **large amounts** of works and other subject-matter uploaded by their users

- **Obligations**

- Measures to ensure the **functioning of agreements** concluded with rightholders
- **Prevent** the availability on their services of works or other subject-matter identified by rightholders
- Use of effective **content recognition technologies**
- Provide rightholders with **adequate information** on the functioning and deployment of the measures and adequate reporting on the recognition and use of the works and other subject-matter



Draft AVMS Directive (COM(2016) 287 final)

Article 28a – video-sharing platform providers & user-generated content

- **Initial Proposal**

- Broadcasting regulation tends to increasingly capture **online service providers**
- However, regulation shall give priority to **privileges** set out in Articles 12 to 15 of the eCommerce Directive, Article 28a (1)



- **CULT Proposal**

- New Articles -2, -2a, -2b, -2c, -2d, and -2e holding a whole **number of obligations** without a clear indication that the Articles 12 to 15 of the eCommerce Directive shall enjoy priority
- Article 2f: Member States shall be entitled to take **stricter measures** where content is illegal
- However, even the CULT Proposal **refers** on various occasions to measures to be taken "*without prejudice to Articles 14 and 15 of Directive 2000/31/EC*" (including the proposed Article 2f)



Tax Implications for Platforms

Mathias Schönhaus

VAT on "free of charge" digital services

Upcoming discussion regarding the VAT treatment of data collection

- **"Free of charge"** digital services, including online marketplaces, smartphone apps and games, often require a user's registration, which is used for e.g., customized advertising, but also for a transmission to third parties against consideration
- Statements of tax officers (i.e., published in leading tax magazine)
 - Users and providers agreed that the providers offer the digital service in exchange for the user's data
 - User data is a consideration in the meaning of the VAT Directive and, accordingly, the "free of charge" business model should be subject to VAT, although no monetary consideration is paid
 - Tax base is the market value of the user data. The tax base is multiplied with the local VAT rate (range of 17% in Luxembourg to 27% in Hungary)
 - Accordingly, service providers are faced with a substantial risk to be exposed to VAT without receiving liquidity which can be used to settle the VAT liability

VAT on "free of charge" digital services

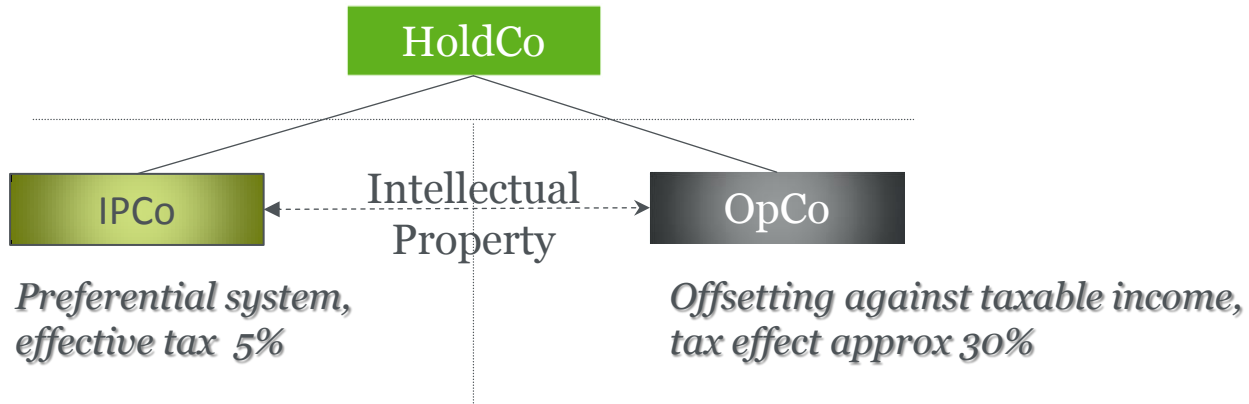
Arguments against such fiscal driven statements

- **"Payment"** with user data is not required, providers use other sources to fund **"free"** digital services
- User data does not represent a consideration
 - User data cannot be exchanged for the service if data collection serves solely for functional purpose (data entry necessary to identify; entry of words into search engine)
 - Exchange requires that the service provider recognizes the value of the consideration
- **"Analog"** data collections would also be affected: promotional contests; test subscriptions of newspapers
- In short → tax authorities should focus on taxing the real economic business model not assume own business models which do not exist

IP tax structure planning

New approach in Germany minimizing tax driven IP structures

- Action Plan 5 of OECD BEPS Report is aimed at minimizing harmful tax competition between OECD member states
- One major issue: tax driven IP structures due to preferential tax regimes (aka patent boxes/ back end-loaded incentives)



IP tax structure planning

German approach on IP structures

- *“We will no longer tolerate that international companies shift their licensing revenues to low-tax jurisdictions without there being any research-related activities,”* Federal Finance Minister, Wolfgang Schauble
- Core element: full/partial **non-deductibility** of royalties if and to the extent
 - IP transfer between related parties (i.e., intra-group)
 - Royalties benefiting from a preferential tax regime
 - Low taxation (tax exposure below 25%)
 - No/minor business activities of licensor regarding IP
- Preferential tax treatment only acceptable if licensor has developed the IP (Nexus approach, OECD Action Plan 5)
 - Substantial impact on current IP structures

Competition Law Aspects of Accumulating Data

Dina Jubrail



Increasing focus on Big Data and the data economy?

Data and competition law: not a new issue

"Data as an asset...companies need to make sure they don't use data in a way that stops others competing. But...We don't just assume that holding a large amount of data lets you stop others competing. After all, it might not be difficult for other companies to get hold of the same data, by collecting it from their own users or even buying it in. Or the data we're talking about might not be all that important in order to compete."

Margrethe Vestager, European Commissioner for Competition

29 September 2016

The relationship between data privacy and competition law

Some potential competition law concerns

- **Leveraging market power:** use of a strong position in one market to improve position in another
- **Exclusionary conduct:** depends on whether holding a big data set is unique. Is access to it in any way essential to allow competitors to compete?
- **Merger control:** whether competitors could be harmed by any increase in market power due to increased data collection capabilities. Recent example in online advertising services:

*"The Commission analysed potential data concentration as a result of the merger with regard to its potential impact on competition in the Single Market. **Privacy related concerns as such do not fall within the scope of EU competition law but can be taken into account in the competition assessment** to the extent that consumers see it as a significant factor of quality, and the merging parties compete with each other on this factor."*

The landscape in 2017

Increased focus on privacy as an objective of competition law?

Commission's Communication on the data economy: January 2017	Reform of EU merger control: consultation
Specific recognition that competition law can be used as a <u>tool</u> to monitor data-related conduct, but that regulation is not yet required.	Possible revision to current turnover-based jurisdictional thresholds to take into account acquisitions where the target is valuable but has not yet generated substantial turnover?

Free Flow of Data

Winston Maxwell



Data ownership, access, liability, localisation regimes

- Does machine-generated data require a new IP right?
 - "De facto" ownership by data producers
- How should third-party data access be organized?
 - "Data commons" – FRAND licensing
 - Public interest access
 - Pure contract
- Are current liability rules adequate?
 - Is IoT a "product" or "service"?
 - Should liability go to the entity that is best placed to avoid the risk?
 - Voluntary or mandatory insurance?
- Data portability beyond GDPR
- Data localisation

Read our blog



"DSM Watch: European Commission's data package explores data ownership, localization, liability and portability, highlighting tensions with GDPR"

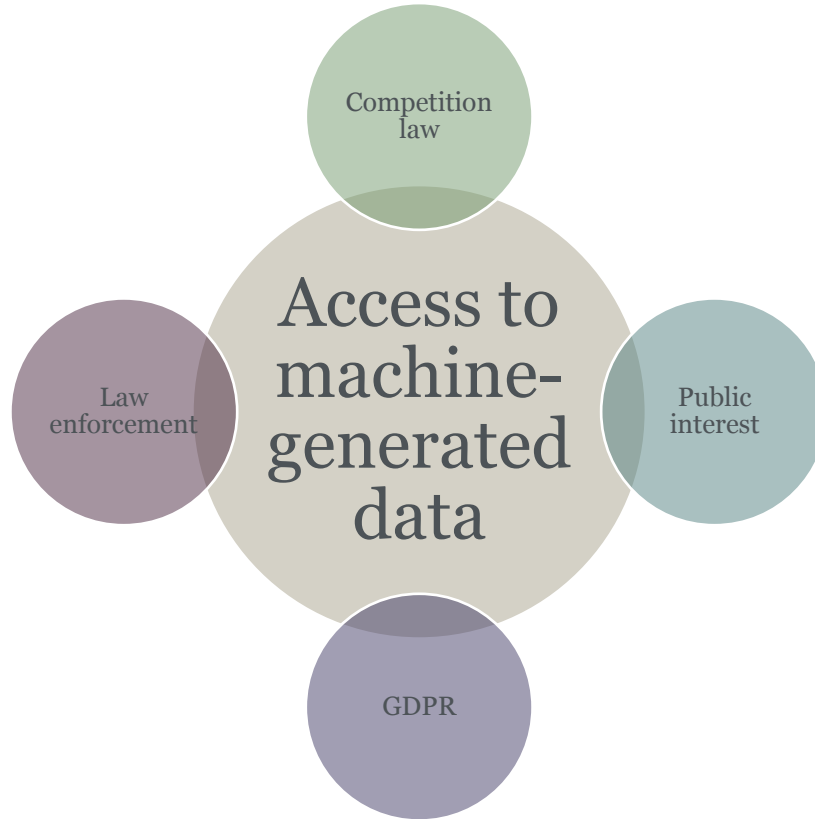
*Jan. 13, 2017,
hlmediacomms.com*

Holistic data governance rules

**Recommendation
to clients**



*Create your own data
access rules to
preempt regulation*



Tension between GDPR and "data economy" objectives

*Fundamental
rights
perspective*

GDPR (personal data)

- Sharing is generally **bad**
- Personal data is **not property**, and cannot be assigned
- Personal data cannot be discussed in trade negotiations
- Personal data generally should not be used for unforeseen new purposes

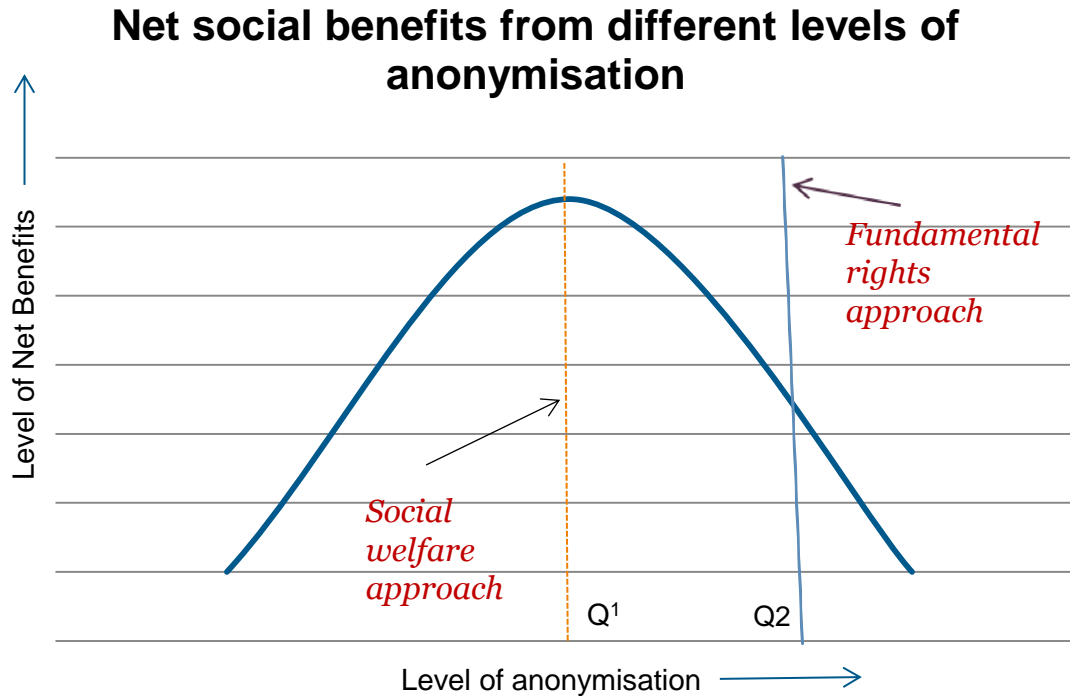
*Social welfare/
economics
perspective*

Data innovation and growth

- Sharing is generally **good**
- Data is **property**, and can be assigned through contract
- Data flows can be discussed in trade negotiations
- Data should be used for unforeseen new purposes (serendipity)

Is anonymisation the key?

Is anonymisation key?



Actions for clients



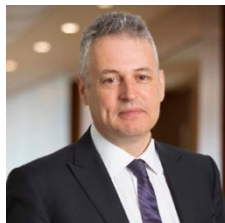
- *Encourage your national legislature to take advantage of Article 89 GDPR to strike a balance between privacy protection and innovation/public interest*
- *Participate in debates on anonymisation*

**Some concluding
thoughts...**

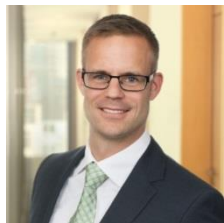


Marco Berliri

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<http://www.hlmediacomms.com/digital-single-market-eu/>

Hogan Lovells GLOBAL MEDIA AND COMMUNICATIONS WATCH
THE INTERNATIONAL LEGAL BLOG FOR THE TECH, MEDIA AND TELECOMS INDUSTRY

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POSTED ON OCTOBER 28TH, 2016 BY WINSTON MAXWELL
POSTED IN DIGITAL SINGLE MARKET (EU), INTERNET, POLICY & REGULATORY

DSM Watch: Hogan Lovells partner discusses digital single market neutrality at BEREC forum

Below are the remarks of Winston Maxwell at the October 17, 2016 Brussels.

The FCC's open Internet order and the BEREC guidelines on net neutrality

Hogan Lovells

FRAMEWORK AND

CONSUMER CONTENT ENERGY

NEW TELECOMS

Reform and protection of consumer rights

Increasing cross border portability and access to content

Helping citizens buy across the EU

Reform of interstate market

COMMERCE

Click each of the clouds and other symbols, for a summary of how the Digital Single Market (DSM) is relevant to that particular area.

Click the logos on the top right for a summary of the DSM, an update on status, in depth analysis from our Global Media and Communications Watch and an introduction to our team.

Select a +

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60 second DSM
DSM News

<http://dsmwatch.com/tool>

Hogan Lovells Copyright: Our Global Capability Statement

MEET OUR TEAM OUR COPYRIGHT PRACTICE COPYRIGHT TOPICS

Copyright Topics: overview

- Acquisition of Copyright Protection >
- Convergence >
- Copyright and Employees >
- Copyright, Software and Gaming >
- Digital Content >
- Licensing >
- Education and copyright >

LimeGreen IP

Visit Hogan Lovells' Intellectual Property know-how resource, [LimeGreen IP News](#)

Please watch our recent video highlighting several copyright trends and hot topics

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<http://maps.hoganlovells.com/copyright>

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