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Implications of a
Digital Single Market

A conference report

2015

On 16 October 2015, CMS hosted a conference on the implications of the European Commission's plans to create a Digital Single Market. The conference generated meaningful discussions on the true impact, reality and consequences of the proposed framework. Key figures from leading global businesses provided thought provoking insight on consolidation, net neutrality, e-commerce, copyright and data protection. This report provides a snapshot of the discussions which took place on the day, with commentary from our keynote speaker and panellists.

Foreword

Chris Watson
Global Head of TMC
CMS

The European Commission's aim to create a Digital Single Market could be one of the most important and ambitious initiatives ever attempted, but is it potentially a brave new world or an unattainable dream?

It is no surprise that we do not have a Digital Single Market in Europe yet as there are a substantial number of deep, complex issues that need to be resolved and not all are within the bailiwick of the EU Commission's DG Connect unit.

Many of the challenges that need to be overcome are not only practical, such as the roll-out of broadband, but also cultural, reflecting inherent behaviours and thought processes built up over time. These national, regional and cultural sentiments can run deep in our institutions and systems and it is not possible simply to tinker with some without considering the whole.

At a time when many are questioning the very fundamentals of the European Union and when significant international challenges have arisen, such as the end of Europe's `safe harbour` agreement with the US, a way forward must be found.

We need the EU Commission to lead from the front and not simply act as a referee between competing parties and interests.

There also has to be a realisation that there are trade and economic issues at stake here and some of these challenges can only be resolved by strengthening and developing inter-governmental agreements. Now may be the time to consider a new chapter to the World Trade Organisation's General Agreement on Trade in Services.

If we do not approach this in a holistic manner we will never fully overcome the underlying obstacles to achieving a Digital Single Market in Europe. This is why the EU Commission's DG Connect is seeking to incorporate a deep range of inter-connected views and objectives in its new framework.

A Digital Single Market affects everyone and not just those operating in the world of technology, media and communications (TMC). As they say about this increasingly single electronic world in which we live and make our living - `It's Convergence, Stupid`.

This is why CMS has hosted a conference on Europe's hopes for a digital single market. We need to create a body of thought leadership that will propel debate and action on these complicated issues.

It is a testament to CMS's global depth of experience in and knowledge of the TMC sector that we could host a conference of this scale and with such high level representation from some of the world's largest organisations.

However, while we may be moving towards the aim of a digital single market with more determination than ever before, should we be aiming for something more?

We need to ask ourselves why it is the US and not Europe that has produced industry giants like Apple, Ebay, Amazon and Microsoft. The impact of not being able to replicate conditions that inspire such innovation at a European level is really quite profound.

Our conference has provided a great catalogue of some of the reasons why Europe has struggled in this regard and what we need to do to find a clear vision going forward.

And above all, in trying to create a Digital Single Market in Europe we must avoid limited zero-sum game outcomes.

Keynote speech

Reinald Krueger
Head of the unit for regulatory coordination and markets at the European Commission's DG Connect, which manages Europe's digital agenda.

Europe's hope for a Digital Single Market has one main goal which is to achieve a real internal and vibrant market for a digital economy across the continent.

We have not been able to achieve that aim yet which is why we want to put in place a comprehensive new Digital Single Market framework to guide us to 2030.

The three main pillars of this new strategy involve: breaking down the barriers to better online access to digital services and goods; creating the right regulatory environment for investment and innovation and driving effective competition in networks and digital services; and, using the digital economy as a driver of growth and employment across all areas of European industry.

Europe needs investment into our future networks to ensure they are fit for purpose and we need regulatory predictability.

We have launched extensive public consultations into our plan for digital unity in Europe. It will do two things - evaluate what Europe's current digital framework has achieved, and ascertain what we can do better.

In everything we do, connectivity is the overriding objective informing the debate and any future policies. We need to future-proof broadband connectivity across Europe as a whole and not just the digital sector. If we do not, we cannot reap the economies of scale and scope for our entire population.

There are a number of objectives we need to achieve and questions we must ask.

Does Europe have the right regulatory incentives for encouraging investment in broadband in big cities, as well as for rural areas which will not have the same competitive conditions? Should we think about special network access regimes?

How do we reward someone who is first to invest in future-proofing our infrastructure? How can we deregulate markets as quickly as possible when market competition is self-supporting? Do we have the right competitive checks in place?

There is a lot of bureaucracy across the different jurisdictions and there has sometimes been inconsistent application of the rules. We must create a situation where we are able to bring regulatory interventions very quickly into the market. We cannot afford to take four or five years while the technology evolves around us.
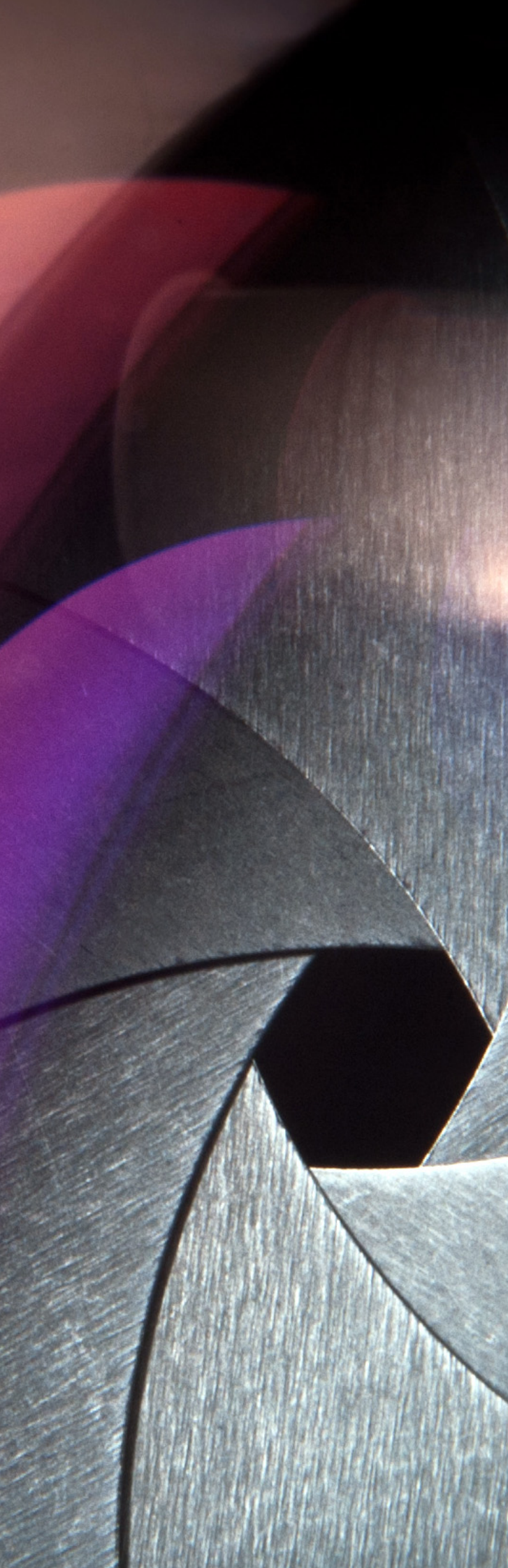
If we look at what we have achieved so far, there has been a successful and clear market deregulation trend as we have adapted to changing markets and technologies.

In major parts of the EU we have helped generate infrastructure competition by granting access to the networks of `dominant` incumbents such as Telefonica and Deutsche Telekom. However, in other parts of the EU, given specific demand and supply patterns, this is working less well.

We have had a less successful track record in deploying high speed networks across the board, and in future we may have to consider different approaches to infrastructure competition in certain less-competitive areas. Europe may also have to adapt its policy with regard to infrastructure competition in a 5G environment, where the number of independent networks competing over all layers may be limited.

Key to our policy drive for a Digital Single Market is ensuring we have the right regulatory framework in place. At a time of convergence, it does not make sense to consider only one type of network infrastructure, for example mobile play, or only one source of competition for the same end customer. Will an overhaul of EU telecoms rules create a level playing field for all? Do we need to adapt the intervention threshold in current regulations? It is a buzzword, but convergence has happened.

The next steps now involve building up our knowledge. Our public consultations on the review of the EU telecoms regulations will be completed before Christmas. We are also consulting with the board of regulators in Europe, BEREC. We have a large number of studies out there and we must carry out a detailed impact assessment.

Europe has the potential to succeed in a single digital era. Exploiting and investing in transformative technologies – big data, the cloud, the internet-of-things – across all industries and sectors will be a source of strength for the future.

Is consolidation really hurting the market? | Mergers & acquisitions

Size clearly matters in the world of technology, media and communications with $67 billion worth of mergers and acquisitions carried out in the first half of this year alone.

But what is driving this trend for consolidation and does it help with the aim of creating a Digital Single Market in Europe?

Herve Malausenna, a Managing Director at Moelis, the US investment banking boutique, said that the last time there was this level of consolidation in the industry was in the late 1990s. However, he believes the consolidation `this time around is even stronger as the pressure is very acute on European operators`.

He says that the current wave of deal-making is being driven by the convergence of services as consumers become increasingly keen to have `interplay` between their fixed line and mobile devices.

Many companies are also joining forces as they seek to meet highly capital-intensive demands for investment in technology and building networks. The need to consolidate in emerging markets is also becoming more pressing as the cost of capital rises in these regions and pushes more fragile players out of the market.

The big question now is whether there is still a significant wave of deals to come, particularly in Europe which still has hundreds of operators compared to only a handful in the US.

Enrique Medina Malo, the Chief Policy Officer at Telefonica, said sometimes `scaling up` was the only way to compete: `Whatever you do, at least every 10 years you will have a new technology disrupting the market. You want to keep the old technology working but you still have to invest huge amounts in the new technology.

`We are just starting to build 4G in Europe and already people are talking about 5G. The combination of these two factors simply means that size matters, otherwise you cannot make these huge investments.`

Tommaso Panico, Head of Northern Region for Colt Technology Services, which recently expanded in Asia through the acquisition of KVH, said that `focus, as well as size matters` and expansion should be strategically-led.

However, Stuart Blythe, the Global Co-Head of TMC M&A at CMS, said that this new consolidation frontier was sometimes bringing companies into conflict with regulators and sparking questions about whether it was in the interests of consumers.
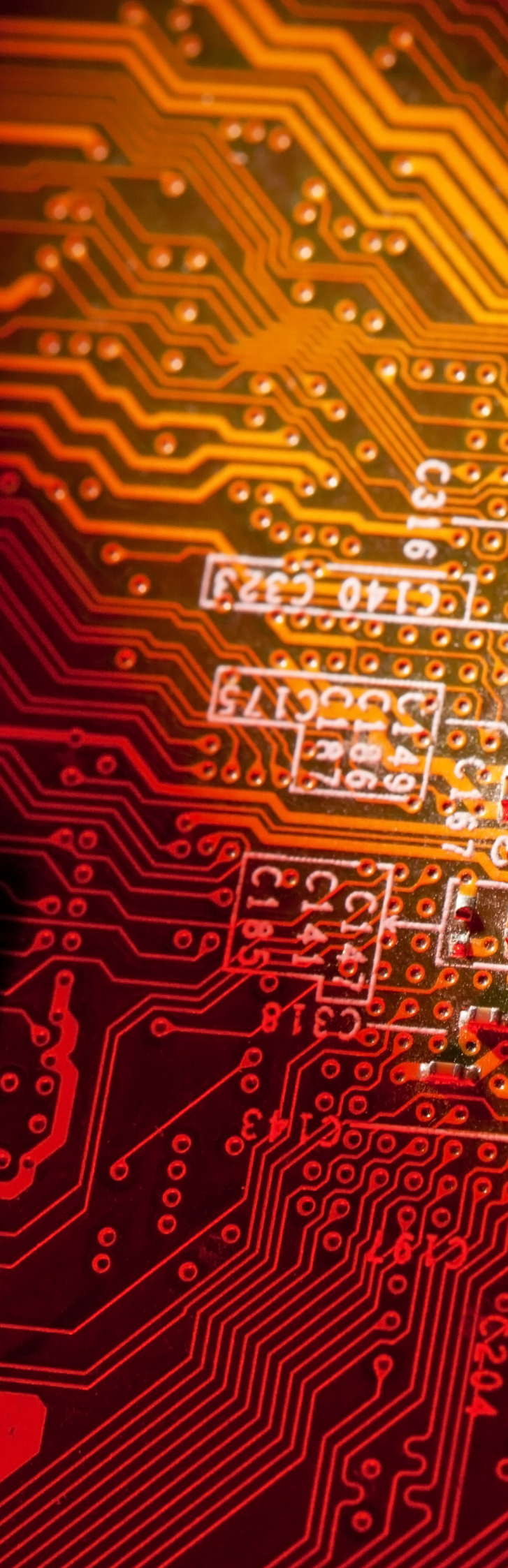
Mobile phone prices in Austria, for example, rose after the regulator allowed the number of large operators in the market to consolidate from four to three.

But Irek Piecuch, the Senior Vice President for Strategy, International Relations and IT at Poczta Polska, said the Austrian regulator had, instead, allowed for a market-based solution to increase competition. There are now three or four virtual network operators in Austria, gaining access to the incumbents' networks compared to none previously. This should in time exert downward pressure on prices.

Mr Piecuch warned, however, that consolidation was a tool rather than a goal in itself: `I don't think it matters how much consolidation takes place as long as we have a policy [in Europe] that supports investment.`

He called on regulators to appreciate the challenges that the industry faced. Poland, for example, has four mobile operators who compete for customers that pay some of Europe's lowest prices and yet must still find billions of euros to invest in the latest spectrum auction.

Telefonica's Mr Malo said European regulators had to encourage investment and innovation: `Investment has never been led [solely] by competition, it is led by reducing the risk of investment. A reward for investment risk is a wonderful principle.'

Browsing in the free world | Net neutrality

`Net neutrality`, where internet service providers offer free and equal access to all sites, may have started out as a catchy marketing slogan 30 years ago but it has since become a key battleground in both the United States and Europe.

In America, federal regulators are in a bitter tussle over whether cable and telecoms companies, which have invested billions of dollars in infrastructure, should be allowed to package and manage their own traffic and sites. In Europe, less than a year after the European Parliament voted to enshrine net neutrality in law (by next year), it has already come under attack from most of the 28 member states.

At the heart of the debate is whether net neutrality is a good or bad thing.

Steve Best, the Managing Director of product management, strategy and regulatory affairs at BT, believes that when it comes to the UK the answer is a `definite no`.

`We have an incredibly competitive market place for broadband and internet access in the UK. We are even in an environment where the regulator is backing out of formal regulation of broadband simply because of the competitive position,` he said.

`Ninety per cent of premises in the UK have three or more providers that have unbundled the local loop. Then sitting on top of the networks there are hundreds of internet service providers providing competitive differences. So there is no need for regulation in an environment where competition is doing exactly what it should be doing in providing great services and stimulating innovation.`

Tom Dailey, Vice President and General Counsel of Verizon's international business agreed, but said much of the debate centred on how you define `net neutrality`. Verizon is America's largest wireless and telecoms company and offers fibre-to-the-home services extensively across the mid-Atlantic region of the US.

`In the US net neutrality means open access to networks and that is something that really shouldn't be very controversial. It is something that should be fundamental, like mom and apple pie,` he said. `If you are an internet service provider there is zero incentive for you to try and block access to applications that your customers want. If an ISP decided to block access to a popular website, what is the customer going to do? They are going to go to a competing network provider or just go wireless. So competition solves a lot of the problems.`

However, Mr Dailey said that the recent move by the Federal Communications Commission (FCC) to regulate `net neutrality` was `an attempt to grab onto the internet and take regulation back about 100 years`.

`The FCC has said we are going to regulate internet the way we regulate phone services [under title 2 of the FCC's regulations] and that to us seems backward,` he said. `It is not going to stimulate investment, it is not going to stimulate innovation, and Europe may be heading in a better direction than America on this point.`

Rickard Granberg, Head of Regulation and Compliance at Talk Talk, warned that net neutrality regulation could introduce 'red tape' and have `unintended consequences`, such as sparking consumer concerns about how internet service providers `traffic manage` during times of peak congestion.

Mr Dailey agreed: `you have to be aware of regulatory creep, which is what we see happening with the move into internet regulation under the guise of net neutrality,` he said. `It is like the old metaphor of allowing a camel's nose under the tent.'

Retail without borders | E-commerce

Margrethe Vestager, the European Commissioner in charge of competition policy, has been clear since her appointment that she believes Europeans are facing `too many barriers to accessing goods and services online across borders`.

However, what she is less clear on is whether this is a result of anti-competitive practices among businesses, such as contractual restrictions in distribution agreements.

This is why the European Commission launched an e-commerce anti-trust sector inquiry in May with the aim of exploring the obstacles to cross-border trade. The report on what is going right or wrong in the industry is expected by early 2017 and should help inform Europe's Digital Single Market framework.

Kai Neuhaus, a competition partner at CMS, said a sector inquiry was a `normal` investigation tool that the EU Commission used to find out more about an industry, and was not aimed at a particular company.

More than 2,000 companies, such as dealers and intermediaries in the electronics, clothing and shoes sectors mainly, have already been sent documents seeking answers to questions such as how exclusivity and prices are negotiated.

Any company that receives such an inquiry should realise that it is not mandatory to respond, and reporting any infringements of EU anti-trust law could result in a fine. It could be advisable to seek advice from competition lawyers.

`The last big sector inquiry was the pharma sector,` said Mr Neuhaus. `There were some quite big fines levied against companies for infringements following that enquiry, which demonstrates the commission's approach to provide 'guidance by enforcement.'

David Bateson, Chief of Legal and Intellectual Property at Canon, said as a large company it had `become accustomed to dealing with competition issues` but sometimes found it more challenging to deal with the different regulatory jurisdictions involved in cross-border trade.

Marina Mirabella-Williams, Senior Legal Counsel at Barclaycard, said the conflicting regulatory regimes in Europe could be a significant barrier to a single market. She has helped launch Bespoke Offers, an online marketing and sales platform that aims to ease some of the obstacles of cross-border trade by providing retailers with targeted marketing and sales capabilities.

These platforms have been criticised by some, but are attractive to small retailers which otherwise would struggle to overcome the regulatory burden of carrying out cross-border e-commerce. Ms Mirabella-Williams said: `We sometimes find it difficult to educate merchants here on just the UK side of how to do things online.`

There has been some harmonisation of regulation across Europe but there is still significant divergence among countries and regulators.

Tom De Cordier, a TMC partner at CMS, said one of the most pressing issues facing cross-border trade now, however, was the end of the Safe Harbour which allowed the legal transfer of European data to the US. The trade pact was ruled invalid by the European Court of Justice in October and has left American companies in a state of flux.

Mr De Cordier said it was unlikely that there would be a replacement for Safe Harbour for `at least six months` but said American companies were, in the interim, using model clauses or binding corporate rules as a substitute. However, there is still a risk that these could be legally challenged in the future too.

The copyright carousel | Copyright reform

Have you ever wondered why your Netflix account does not work in certain countries or why your children cannot watch C-Beebies on holiday in Greece? Does it upset you that you can resell your Peppa Pig DVDs online but not digital copies of Disney's Frozen?

These are questions that many Europeans have asked for some time and now it is a conundrum that the European Commission is trying to solve.

The Commission has long acknowledged that internet and digital technologies are transforming our world, but that existing barriers and conflicting regulations in a 28-member union mean many citizens miss out on the best deals for certain goods and services.

Tom Scourfield, the UK Head of IP and Consumer Products at CMS, said a major part of the problem is the `tectonic plates` conflict between competition, intellectual property and copyright laws in Europe: `Copyright law is the least harmonised across Europe and the most out of date. In the UK, for example, the primary copyright law dates back to 1988. There is a lot that has to be changed.`

The drive for a Digital Single Market in Europe in part means assessing whether tearing down these legal and regulatory walls would mean moving from 28 national markets to one. The European Commission has estimated in its Digital Single Market white paper that by doing this, it could contribute at least €250 billion of additional growth to the European economy and `create hundreds of thousands of new jobs`.

Pietro Fringuelli, Global Head of Media at CMS, said that the `big buzzword` in Europe's drive for unity was the `portability` of services, such as subscription on-demand content, across countries.

`It is like we [Europe] have a big supermarket with lots of lovely products and I am standing in row five and I would like to grab the crispy chicken in row one. So let's abolish defences so everyone can walk around and buy products,` he said. `But the question is, if we abolish these frontiers do we still have this fantastic supermarket with lots of lovely products? Or do we only have a few products?`

He said that the likely outcome of such a change could be the introduction of pan-European licences where territorial borders were no longer relevant. This could potentially have an impact on small businesses that cannot compete with larger pan-European enterprises and could lead to a severe market concentration.

Peter Wiley, European General Counsel at Disney, said there had been an explosion in the ways people could watch films using different technologies and platforms.
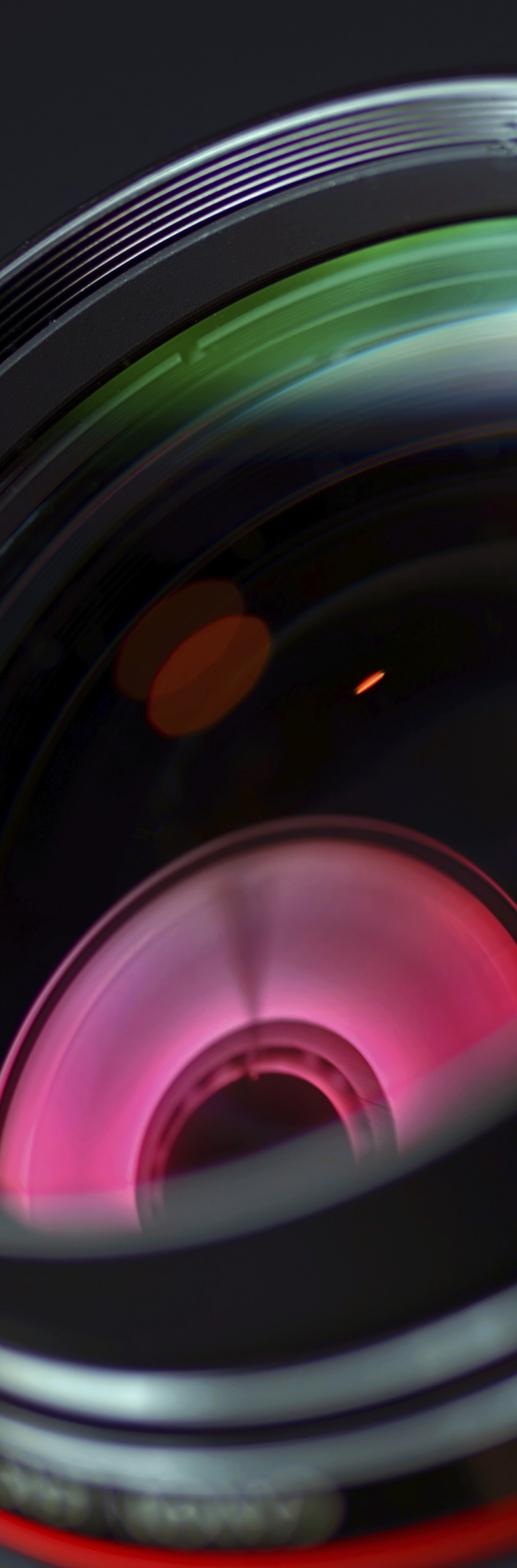
He said that consumers' needs were better served than ever and cautioned against completely changing a system that had served European citizens so well: `Before you try and replace the foundations you need to be sure that this is a sector that justifies the intervention. Of course, no one is deaf to the consumer and I am pretty sure that the industry can adapt to give them what they want but it should be possible to do that without replacing the foundations.`

Andrew Ryan, Group Head of Legal at Perform Group, agreed that `if it ain't broke, don't fix it`. He said `geoblocking` made sense for multimedia sports content which, apart from exceptions such as Formula One, tended to have local markets: `By dividing content on a territorial basis you can direct it to a more localised market.`

While the aim of a single market was laudable, the panel felt that the European Commission should be careful to actually listen to what consumer demands: `It is not necessarily the best one to be choosing what the consumer wants. We are not saying that copyright laws should never be changed, but whatever happens, there should be very close consultation.`

In digital we trust (sometimes) | Data protection

Can the data protection regime in Europe get any worse?

Not really, according to Christian Runte, the Global Co-Head of Data Protection at CMS, who says that companies and organisations in Europe have had to labour under years of the uncertainty about the `upcoming new regulation`.

The European Union's widely-awaited General Data Protection Regulation reform could finally be published by the end of this year, or the beginning of the next, and provide a single set of rules across Europe, and `bring the EU's data protection services into the modern era`.

Mr Runte believes the new data protection framework in Europe `can't get any worse because the differences in national regulation and enforcement practice across the EU are not helping to protect personal data in a better way, it is just making it much more difficult`.

He says there could potentially be much to gain from a clear, new framework with `regulatory predictability`.

Quentyn Taylor, Director of Information Security at Canon, agreed and said that there were `very mixed messages` currently and it would be better `just to get the thing in place`. However, he believes that whatever system was in place, companies must recognise that data protection is not only about meeting legal requirements but understanding the technology and managing `customer perception too`.

`You have to not only understand the legal issues about data protection, you have to really understand the technology. You need to know exactly where the data you have is stored and how it is being used,` he said. `Security events will always happen and you need to know what you are going to do when bad things happen.`

Kathryn Whelan, a privacy analyst at Intel, said any framework that introduced more harmonisation across Europe would be welcomed. She said the semiconductor chip-maker had a privacy programme at the heart of its operations for at least 15 years.

Data protection at Intel is not only about ensuring safe systems for dealing with customer and supplier information but also about educating its more than 100,000 staff: `You can't have privacy without security. The whole point is to get people to realise they are the perimeter.`
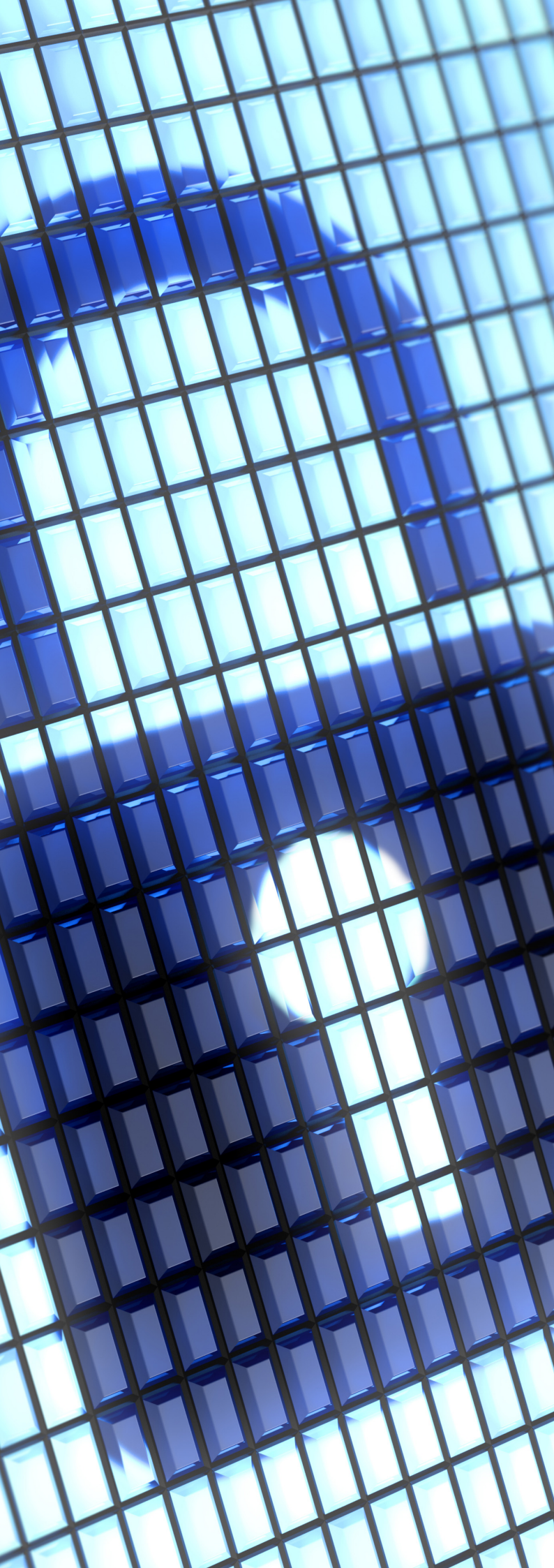
But the wide-ranging potential reform in Europe comes at a time when companies are trying to find a new way forward after the shock `death` of the Safe Harbour data transfer scheme between the US and Europe following the decision by the European Court of Justice in early October.

While the data protection conference panel was underway, the EU's data protection authorities published their first joint statement in an attempt to resolve an extremely unsettled situation. The Article 29 Working Party set an initial deadline for a new `Safe Harbour` agreement and urged the EU and the US to find a solution on how to ensure data transferred to the US is properly protected by the end of January. It also warned that if `no solution` could be found by then, that `data protection authorities across the continent should take all necessary and appropriate action`.

Amanda van der Berg, Information Governance Leader at GE Capital International, said there was `always a solution to data protection problems. We just have to consider all the options available: keep the personal data in the EU, use Binding Corporate Rules (GE Capital's parent company, General Electric, was an early adopter) or use the EU Standard Contractual clauses`. In order to achieve the aim of a secure, digital single market it was better not to `overcomplicate things`. The words of the European Data Protection Supervisor, Giovanni Buttarelli, in relation to the long awaited Regulation give us hope: `We are driven by three abiding concerns: achieving a better deal for citizens, ensuring that the rules work in practice and that the rules will last a generation.`

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The CMS contacts listed below were speakers at the conference. If you would like further detail on the outcomes of their panels, please get in touch.

Alternatively, get in touch with your usual CMS contact who will be more than happy to answer or redirect any specific questions you have.

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