

Openforum europe

open, competitive choice for IT users

Position Paper

Comment on the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy

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Introduction

With this paper, OpenForum Europe (OFE) would like to contribute to the discussion following the publication by the European Commission of its public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy¹.

OFE welcomes the European Commission's initiative on the Digital Single Market (DSM) Strategy, and acknowledges its intentions to launch a comprehensive assessment of the role of platforms, including in the sharing economy, and of online intermediaries. We also note that the main purpose of this exercise is for the Commission to gather practical evidence on which any policy decision will be based. In a recent speech², Vice-President Andrus Ansip explained “we need to know and understand clearly whether there really are problems – and if yes, how to deal with them.”

This paper is meant as a complement to our response to the public consultation – as such, it follows the same structure as the questionnaire.

General comments

No 'one-size-fits-all'

The scope of the consultation is extremely broad, covering issues as different as online platforms, intermediary liability, big data, IoT, cloud computing and the sharing economy. Each of these constitute a separate market, with its own actors and a unique set of practices and challenges. As a result, it should be apparent that no single instrument can address all the issues identified in the questionnaire. The framing of the consultation and the surrounding debates may identify apparent similarities between the various policy areas; nevertheless, the Commission should carefully consider whether any proposed solution respects the legal principle of necessity, proportionality and takes into account the specificities of each issue that it is meant to address. Furthermore the consultation format and phrasing of questions make it difficult for providers, intermediaries and organisational users to effectively use the consultation document as a vehicle for constructive comments. Furthermore, the definition of what the questionnaire covers is rather broad and subject to differing interpretations, making the consultation less workable as a vehicle for broad input.

Online platforms

Scope and definitions

In the consultation, the Commission proposes a new definition of the term “online platform”, which we believe is currently not legally defined in EU law. It is essential that any definition that ends up

1 <https://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>

2 http://europa.eu/rapid/press-release_SPEECH-15-4999_en.htm

being agreed does not bring further complexity to the already intricate set of rules which EU law already applies to online platforms. Furthermore, creating a new non-future proof category meant to cover such a broad range of sectors and business models presents the high risk of creating legal uncertainty for businesses and consumers. The proposed definition describes online platforms as having three main attributes: “two (or multi)-sided markets”; “use the Internet to enable interactions between two or more independent groups”; and “so as to generate value for at least one of the groups”. This drafting is overly broad, and may apply to a majority of Internet *transactions* as opposed to *platforms*. Furthermore, the text goes on to list examples of services that would be considered falling under the definition, despite their not being multi-sided markets.

Assessing the value of economic disruption

Online platforms can be evolutionary or can have a highly disruptive economic impact to established marketplaces. Where most disruptive, this will generate resistance, often vocal, from established players. The Commission should appropriately consider the context of the market and the role of the platform by assessing not only the disruption, but also the full added-value of these new services, particularly to its (often less vocal) user base.

The role of competition law

Many of the concerns around problematic practices imposed by online platforms pertain to the leverage that they could exert through their dominant position. Typically, this type of issue is addressed on a case-by-case basis through competition law, and there no reason has been demonstrated for why online platforms should constitute any exception in this regard. Any new regulatory intervention should be based on clearly identified and documented market gaps, and strictly proportional to what cannot be effectively addressed through competition law.

Transparency and clear expectations

If any legal measure is needed in addition to the instruments provided by competition law, it should focus on ensuring transparency and setting clear expectations for users of the platform. In particular, the terms under which a platform curates its content should be made clear from the start, so that any supplier wishing to offer its services or goods through the platform can confidently do so without ending up arbitrarily excluded, particularly when substantial initial investment is required to compete on the platform (for example, in the case of app markets). This does not mean that the ability of platforms to curate content freely should be limited; in fact, curation is often one of the main forms of added value that a platform can provide to its users, in a world where we are faced with a virtually infinite amount of content. Nor does it mean that the specific process by which curation is performed should be disclosed. This pertains to commercial secrecy and can often be one of a platform's key differentiator versus its competitors. Explaining the general principles

underlying how platform content is curated is important, but it should not be necessary to disclose the specific algorithms used for curation.

Data portability

Ensuring portability of data between platforms is and should remain an important policy objective. Any user should be able to retrieve the data that the user has provided to a platform in an open, re-usable format. Imposing open standards is one of the best tools available to achieve this, and the Commission should continue to raise awareness, particularly in the context of public sector use, building upon the work done in the context of action 23 of the Digital Agenda. At the same time, it should however be noted that many platforms offer a highly tailored, unique service, and hence the scope for practical porting and re-use of data provided to some such platforms may in practice be limited.

Tackling illegal content online, and the liability of online intermediaries

Distinguishing illegal content from legal content shared unlawfully

The consultation perpetuates a common confusion between illegal content and legal content accessed or distributed in an unauthorised manner. This is problematic in a number of respects. Most notably, these issues require very different types of response in order for them to be effectively addressed: dealing with illegal content (such as child pornography) shared on the Internet may require measures in the realm of criminal law. On the other hand, it is widely recognised that the best response to legal content accessed or distributed in an unauthorised way is a combination of providing better, more accessible legal alternatives, together with requirements placed on intermediaries by the current e-Commerce Directive.

If it ain't broke, don't fix it

The current system of intermediary liability based on the e-Commerce Directive has proved its worth and robustness. The market has taken some time to adapt to these rules, and any significant changes to them at this stage would bring about a new period of unnecessary uncertainty and confusion for all stakeholders. This is confirmed by the responses to the 2010 consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce³, in which respondents overwhelmingly made the point that revision of the liability regime for online intermediaries was not necessary. The limited liability of intermediaries underpinned the development of an open Internet and is key to protecting fundamental rights, legal

3 http://ec.europa.eu/internal_market/consultations/docs/2010/e-commerce/summary_report_en.pdf

certainty and innovation. Therefore the Commission should adduce new evidence to justify any new proposed measure in this area.

No back door for the introduction of an EU-wide ancillary copyright

Some of the questions in the questionnaire could be read as supporting the suggestion that the Commission is considering the introduction of some kind of ancillary copyright mechanism at the EU level. All real life examples point to the failure of such systems. The introduction of such measures in Spain⁴ resulted in the closing down of the Google News service, and ended up hurting everyone – including the publishers it was meant to protect.

Data and cloud in digital ecosystems

Clearer definitions

This section of the consultation introduces some new concepts without clearly first defining them. OFE would like to point to two of them in particular:

- 'Open Service Platform': the use of this term is not only unclear, it is also confusing as the consultation simultaneously introduces (and proposes a definition for) the concept of 'online platform' earlier in the questionnaire. The link between these two terms is not clarified. This could for example be understood to mean cloud services made available under an Open Source licence.
- 'Personal data cloud space': again, it's not clear what the Commission is referring to with the use of this term. It should be noted that there is already a very wide range of offerings of private cloud solutions in the B2C market, which can deploy a cloud infrastructure for strictly personal use. These services often require significant expertise and may not offer the same scalability and economies of scale of a fully public cloud solution. The most effective contribution that the Commission can make to this space would seem to be by raising awareness through guidance/capacity building and transparency about the availability, the benefits and also the limitations of such services.

Cloud interoperability

Cloud interoperability is important to ensure a competitive market and avoid lock-in; as public and private organizations move to cloud computing, users should not overlook the implications of any requirement which may arise for them to switch vendors at a later date. Care needs to be taken up-front in order to assure maximum freedom and flexibility.

Open interfaces and data formats—based on open standards—are important. An interface is the

4 <https://www.boe.es/boe/dias/2014/11/05/pdfs/BOE-A-2014-11404.pdf>

software that serves as the conduit by which systems, programs and applications interact. Closed or proprietary interfaces may cede many key decisions and options to the discretion of the cloud provider. Closed interfaces and data formats may also limit the ability of the user efficiently to transfer their data in the future. Users need to look well ahead and anticipate that they may at a later date (i) wish to move part or all of their data to another cloud environment, or (ii) want to move certain implementations into or out of the cloud that they're seeking to use or build.

Free flow of data and data location restrictions

While justified in some circumstances, data location requirements imposed by public procurement authorities inherently limit the potential benefits of cloud computing solutions. Therefore the Commission should continue to strive gradually to phase them out whenever they are considered unnecessary. In particular, the Commission should encourage public authorities to replace formal legal requirements (such as geographic location of the data) by corresponding functional requirements (such as ensuring the accessibility and security of the data).

Improving trust and encouraging adoption

Studies⁵ point to the lack of awareness of the benefits of cloud computing as the main blocker to further adoption of the technology in Europe. Based on this assessment, the Commission's efforts in this area should focus on raising awareness about the practical benefits of adopting cloud services and using data analytics, and seeking to dispel misconceptions or ensure greater legal certainty in this area. Public authorities need to help provide legal certainty and better guidance on how solutions can be used to enable the provision of cloud services, in compliance with EU data protection rules.

The collaborative economy

Acknowledging the extra-economic benefits of the sharing economy

The contribution of 'sharing economy' services to the European economy is already widely recognised and documented⁶. However it must be noted that traditional tools used to measure economic benefits, mainly based on GDP and the job creation, might well not be the most appropriate ones to estimate the overall benefits of the collaborative economy. For example, new services exist to facilitate a more direct, individual-to-individual (or consumer-to-consumer) exchange of goods or services, sometimes with no economic transaction to speak of taking place (with applications such as TimeRepublik⁷). Such services would not be registered as contributing to the European economy in any way, and yet they clearly contribute to the well-being of European

5 For example, see <https://ec.europa.eu/digital-agenda/en/news/final-report-study-smart-20130043-uptake-cloud-europe>

6 http://pwc.blogs.com/files/sharing-economy-final_0814.pdf

7 <https://timerepublik.com/>

citizens.

Hence when assessing the role of the collaborative economy, new, non-traditional measuring tools should be used, so allowing the whole value-chain to be considered.

About OpenForum Europe

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