

Background

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

Objectives of the public consultation

In its Communication on a [Digital Single Market Strategy](#) for Europe¹ adopted on the 6th of May 2015, the Commission committed to undertake a **comprehensive assessment on the role of platforms**, covering the social and economic role of online platforms, transparency (e.g. in search results), terms of use, ratings and reviews, the use of information by platforms, the relation between platforms and their suppliers, the conditions of switching between comparable services offered by platforms, and the **role of online intermediaries**, including ways to tackle illegal content on the Internet. The strategy also includes **initiatives on data** – a free flow of data initiative and a **European Cloud** initiative.

The DSM also announces that the wider issue of the **collaborative economy** will be addressed both under its remit and in the forthcoming [Internal Market Strategy](#).

With the present public consultation the Commission services now seek the views of stakeholders on specific issues related to the issues above.

Online platforms

Online platforms (search engines, social media, knowledge and video sharing websites, app stores, etc.) play an increasingly central role in social and economic life and are an important part of a thriving internet-enabled economy. They bring many benefits to both consumers and suppliers by allowing market participants to exploit the advantages of digitisation and e-commerce. They have also changed the manner in which cultural content is distributed. Increasingly, certain platforms play a more or less active role in making the content available to the public.

While their emergence has been generally seen as beneficial, the way that online platforms operate raises issues that require further exploration. These include how online platforms collect and make use of users' data and the transparency with which they do it, the impact of some platforms' relative bargaining power when negotiating the terms and conditions with other market players (particularly SMEs or content providers), as well as in some cases the dual role of some platforms, acting both as marketplace operators and suppliers competing with some of their customers in downstream markets. The growing role of platforms also poses challenges as regards consumer protection. There is a need to further explore whether platforms provide sufficient information and safeguards to consumers where they act on their own behalf, or on behalf of their suppliers. There is also the question of whether certain platforms engaging directly or indirectly in content distribution use the limitation of

¹ COM(2015) 192 final

liability provided under article 14 of the E-commerce directive to refuse to obtain or negotiate licencing agreements with the holders of rights in digital content.

With the following questions on online platforms and their economic role the Commission would like to enhance its understanding of the social and economic role of platforms, market trends, the dynamics of platform-development and the various business models underpinning platforms.

Tackling illegal content online and the liability of online intermediaries

The principle, enshrined in the E-commerce Directive 2000/31, that Internet intermediary service providers should not be held liable for the content that they transmit, store or host, as long as they act in a strictly passive manner has underpinned the development of the Internet in Europe (articles 12 to 14). It is however not always easy to define the limits on what intermediaries can do with the content that they transmit, store or host before losing the possibility to benefit from the limitations of liability set out in the e-Commerce Directive. In addition, there could be instances where online service providers engaging directly or indirectly in copyright protected content distribution argue that they are mere hosting providers and thus are covered by the liability limitations established in the E-commerce Directive.

At the same time when intermediaries providing hosting services become aware of illegal content, whether it be illegal activities such as terrorism/child pornography or information that infringes the property rights of others (e.g. copyright, trademarks), they are required to expeditiously take effective action to remove it or to disable access thereto, if they want to benefit from the liability exemption currently set out in the E-commerce Directive. However, assessing the illegality of content or activities – which may be illegal for a wide range of reasons, and may at times even be illegal pursuant to the rules of one state and legal according to the rules of another – can present a significant challenge for intermediaries. As a result, today the disabling of access to and the removal of illegal content by providers of hosting services can be slow and complicated while content that is actually legal may be taken down erroneously. Differences in national practices can impede enforcement and undermine users' confidence.

In 2010 and in 2012 the Commission consulted the public on the future of e-commerce, the implementation of the E-commerce Directive and in particular on its liability regime. In general terms, the consultations gave as a result a general impression that the Directive was still "fit for purpose", but that there were difficulties with the interpretation of its Article 14 (liability regime applicable to hosting services). However, these last five years have seen important technological, legal and political developments which merit being taken into consideration in order to resubmit new elements of this issue to the general public.

In its DSM Strategy, the Commission announced its intention to analyse the need for new measures to tackle illegal content on the Internet, with due regard to their impact on the fundamental right to freedom of expression and information, such as rigorous procedures for removing illegal content while avoiding the take down of legal content, and whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems – a duty of care.

The following questions seek to improve the Commission's understanding on how best to define 'intermediaries', the fitness of the limited liability regime provided under the E-commerce Directive for the transmission, and temporary or permanent storage of infringing information on behalf of third

parties, and if there is a role for the EU in relation to the design of notice-and-action procedures and to the intermediaries' 'duty of care' to detect and prevent certain types of illegal activities.

Data and cloud in digital ecosystems

Data and digital technologies and services that can be used for the collection, processing and storage of that data, such as big data, cloud services and the Internet of Things, are becoming essential production factors for the digital economy.

In order to maximise the growth potential of the digital economy in Europe, an effective free movement of data in the Union needs to be ensured. It should be noted that the free flow of personal data is regulated under the framework of Directives 95/46/EC and 2002/58/EC. The principle of free flow of personal data will be enhanced with the adoption of the General Data Protection Regulation, currently going through the legislative process in European Parliament and Council. The free movement of non-personal data in the Union is not yet a reality, being hampered by legal and technical barriers.

In the Digital Single Market strategy, the European Commission committed to launching a European 'Free flow of data' initiative in 2016, which will tackle restrictions to the free movement of data within the EU. This will complement the provisions on the free flow of personal data. The initiative will address unjustified restrictions on the location of data for storage or processing purposes. Data location restrictions specify a particular, often geographically defined, area where data needs to be collected, processed or stored, hence restricting the cross-border flow of data within the Union. The Digital Single Market strategy also indicated that addressing emerging issues in relation to data ownership and access is a priority and that providing legal certainty as to the allocation of liability between providers and users (other than personal data related) is important for the roll-out of the Internet of Things.

The European Commission also undertook to launch a 'European Cloud initiative' with the aim to create trust in cloud computing, including cloud services certification, balanced and clear contracts, switching of cloud services providers and a research open science cloud.

The collaborative economy

The following questions focus on certain issues raised by the collaborative economy and seek to improve the Commission's understanding by collecting the views of stakeholders on the regulatory environment, the effects of collaborative economy platforms on existing suppliers, innovation, and consumer choice. More broadly, they aim also at assessing the impact of the development of the collaborative economy on the rest of the economy and of the opportunities as well as the challenges it raises. They should help devising a European agenda for the collaborative economy to be considered in the context of the forthcoming Internal Market Strategy. The main question is whether EU law is fit to support this new phenomenon and whether existing policy is sufficient to let it develop and grow further, while addressing potential issues that may arise, including public policy objectives that may have already been identified.