Consultation Survey Responses of the International Center for Law & Economics

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In the Matter of:

The European Union Consultation Regarding the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

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Following are the questions for which we provided extended answers in the Commission's online survey. This is not the complete questionnaire.

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1. ***Do you agree with the definition of "Online platform" as provided below?***

   "Online platform" refers to an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers. Typical examples include general internet search engines (e.g. Google, Bing), specialised search tools (e.g. Google Shopping, Kelkoo, Twenga, Google Local, TripAdvisor, Yelp,), location-based business directories or some maps (e.g. Google or Bing Maps), news aggregators (e.g. Google News), online market places (e.g. Amazon, eBay, Allegro, Booking.com), audio-visual and music platforms (e.g. Deezer, Spotify, Netflix, Canal play, Apple TV), video sharing platforms (e.g. YouTube, Dailymotion), payment systems (e.g. PayPal, Apple Pay), social networks (e.g. Facebook, Linkedin, Twitter, Tuenti), app stores (e.g. Apple App Store, Google Play) or collaborative economy platforms (e.g. AirBnB, Uber, Taskrabbit, Bla-bla car). Internet access providers fall outside the scope of this definition.

   [ ] Yes

   [X] No

   Please explain how you would change the definition:

Response:

Though the definition is technically accurate, we challenge its suitability, as it is both under/over-inclusive in problematic ways. There's nothing exceptional about firms operating on the Internet that warrants special scrutiny. Online or offline, the essential function is to connect different groups, and there's nothing fundamentally distinct about the regulation appropriate for online as opposed to offline entities. Of course, while there's nothing unique about an online platform, there are unique characteristics of firms operating online—where the focus is on the locus of activity, not the nature of the firm. But there is existing regulation that targets online-specific activities under, e.g., the E-Commerce Directive, the InterSoc Directive, etc. The proper question is not whether there needs to be a redefinition of the nature of a particular business because it operates on the Internet, but whether existing regulation is serving the ends for which it was designed.

2. ***Do you think that online platforms should ensure, as regards their own activities and those of the traders that use them, more transparency in relation to:***

a) information required by consumer law (e.g. the contact details of the supplier, the main characteristics of products, the total price including delivery charges, and consumers' rights, such as the right of withdrawal)?

[ ] Yes

[ ] No

[X] I don't know

b) information in response to a search query by the user, in particular if the displayed results are sponsored or not?

[ ] Yes

[ ] No

[X] I don't know

c) information on who the actual supplier is, offering products or services on the platform

[ ] Yes

[ ] No

[X] I don't know

d) information to discourage misleading marketing by professional suppliers (traders), including fake reviews?

[ ] Yes

[ ] No

[X] I don't know

e) is there any additional information that, in your opinion, online platforms should be obliged to display?

Response:

These questions are not answerable without more information. All else equal, more transparency is generally desirable, but even transparency mandates impose obvious & non-obvious costs that must be considered. But the questions do not describe how transparency would be achieved, what the costs may be, or what particular sorts of harms transparency is meant to address. It is thus impossible to answer these questions.

3. ***What are the main benefits and drawbacks of reputation systems and other trust mechanisms operated by online platforms? Please describe their main benefits and drawbacks.***

Response:

Well-run reputation systems allow for an efficient aggregation and transmission of a large amount of relevant data regarding the actual function of entities. Trust systems -- like those operated by Uber -- are capable of providing much more granular information about safety and dependability than generalized regulatory agencies could ever hope to provide. Such systems facilitate the self-help and consumption decisions by consumers that are the most powerful means of constraining potentially harmful conduct.

4. ***Please share your general comments or ideas regarding the use of information by online platforms***

Response:

With respect to collected data, we believe that platforms do generally provide sufficient information (both because of market forces, as well as existing legal obligations) to enable meaningful consumer choice about data collection & use. With respect to price discrimination, the question assumes that the practice is "bad," and necessitates disclosure/regulation. That assumption is unfounded and unwarranted. It is our belief that price discrimination does occur based on various aspects of online behavior, and that often information about such discrimination isn't plainly disclosed. But whether the current level of disclosure is "sufficient" is crucially dependent on the harm the practice might cause -- and there isn't evidence that it does harm overall consumer welfare. Without more, it is impossible to assess the sufficiency of such disclosure. The Commission should first collect meaningful evidence and carefully analyze whether this is something that merits addressing at all before assuming that disclosure is needed at all.

5. ***Platforms (including hosting service providers and content aggregators) or any other interested party are invited to express their positions with regard to relations of platforms with holders of rights in digital content.***

Response:

Platforms are frequently too lax in protecting digital content rights. This is not to say that an affirmative obligation of care or the like should be imposed on them -- there are important trade-offs and over-burdening intermediaries with the obligation to protect content could impose significant costs. But there can be no doubt that online intermediaries frequently trade on, make available, and benefit from illegal content. A well-run notice and takedown sort of regime -- where the initial monitoring burden is on the rightsholder, but where the intermediary has obligations to reduce piracy once notified -- seems appropriate and has functioned fairly well in many countries.

6. ***Please share your general comments or ideas regarding the ability of consumers and traders to move from one platform to another***

Response:

There is no justification for a data portability mandate, particularly one that would treat all online platforms (which, here, would lump together a mind-boggling array of widely diverse businesses and business models) the same. Consumers can and do move between platforms, and even more frequently mutli-home. One of the benefits of online platforms is precisely the reduction in switching costs. It is difficult to see any problem here meriting a regulatory response.

7. ***Please share your general comments or ideas regarding access to data on online platforms***

Response:

First, there is not a generalized problem with online services and the portability of data. Data portability may be an aspect of product quality that informs a consumer's decision to use a particular platform, but there is no abstract "optimal" level of portability appropriate to all platforms. Attempting to mandate portability may enhance new entry in some areas, but it will deter it in others (where a prospective new entrant will become subject to the same rules). Moreover, to the extent that the ability to collect and use proprietary data substitutes (as it so often does for online platforms) for the imposition of positive monetary prices on consumers, such a mandate would potentially deter transactions (and may even deter businesses from starting in the first place). Both of these effects would harm consumers. Finally, it must be noted that, for the most part, the general practice on the Internet is one that permits a high degree of consumer access to data, its portability and the ability to delete data. In sum, mandatory data portability looks like a solution in search of a problem -- and one that could impose significant costs for little or no benefit.

8. ***Mere conduit/caching/hosting describe the activities that are undertaken by a service provider. However, new business models and services have appeared since the adopting of the E-commerce Directive. For instance, some cloud service providers might also be covered under hosting services e.g. pure data storage. Other cloud-based services, as processing, might fall under a different category or not fit correctly into any of the existing ones. The same can apply to linking services and search engines, where there has been some diverging case-law at national level. Do you think that further categories of intermediary services should be established, besides mere conduit/caching/hosting and/or should the existing categories be clarified?***

   [ ] Yes

   [X] No

   On the "notice": Do you consider that different categories of illegal content require different policy approaches as regards notice-and-action procedures, and in particular different requirements as regards the content of the notice?

   [ ] Yes

   [X] No

   On the "action": Should the content providers be given the opportunity to give their views to the hosting service provider on the alleged illegality of the content?

   [X] Yes

   [ ] No

   Please explain your answer

Response:

The answer here is actually "it depends." Overall, the notice and action procedures should be efficient and fair to all parties involved. Certainly, this means that the involvement of content providers is important, so long as the overall proceeding is quickly able to target illegal content and remove it from the Internet. Care should be taken to ensure that the notice and action (and provider response) process is not abused in such a way that the quick and effective removal of illegal content is not frustrated. This can be an issue on both sides -- it is certainly not only content owners that may seek action beyond what might be legally required; it is also plainly the case that providers seek to maintain illegal content on their sites as much as possible where it benefits them economically to do so. Careful study is warranted regarding the best set of notice and action practices that will optimize costs and benefits by facilitating removal of as much illegal content as possible at reasonable cost and without also causing significant amounts of legal content to be removed in the process. This is not an easy balance to strike, but it is important that an actual balance be struck -- not that it be assumed that intermediaries should bear no cost or that inadvertent removal of any legal content is more problematic than the non-removal of illegal content.

9. ***Should action taken by hosting service providers remain effective over time ("take down and stay down" principle)?***

[X] Yes

[ ] No

Please explain

Response:

Mere take down, while better than nothing, does little to thwart ongoing infringement. Once infringement has occurred, even if a particular instance is taken down, it is the nature of digital content distributed online that it can and will be almost immediately replaced by new infringing instances, often even before the original file is removed. Although the "devil is in the details," of course, the only sort of regime that is likely to appreciably affect mass piracy is one that obligates hosting providers to continue to monitor and remove other instances of infringement once a particular piece of infringing content -- not merely its particular location or link -- is identified. In principle such as regime has been feasible in the past and (again, depending on how precisely it is implemented) need not impose excessive costs on hosting providers.

For more on this, please see our supplemental position paper.

10. ***Do you think that the existing contract law framework and current contractual practices are fit for purpose to facilitate a free flow of data including sufficient and fair access to and use of data in the EU, while safeguarding fundamental interests of parties involved?***

[X] Yes

[ ] No

Please explain your position

Response:

Generally, existing contract law can sufficiently facilitate data flows in Europe. Contracts provide a flexible method for individual parties to structure their relationship – including the nature of rights in data – in a manner fitted to the needs of their respective situations.

Further, to the extent that contracts fail to provide for any subtle or unexpected situations in a particular relationship, EU law provides a necessary backstop that avoids harsh effects for various parties. The Consumer Rights Directive (2001/83/EC), for instance, provides a variety of consumer protection provisions that guard against possible bad effects from bargaining imbalances.

More to the point, however, is that the Data Protection Directive (95/46/EC) establishes a number of provisions that strictly define the minimally necessary aspects of a data relationship. Combined with general contract principles, these rules provide sufficient protection for data and the ability for platforms to make use of data.

That said, recent data protection rules in the EU like the right to be forgotten are shifting this balance, and dramatically constraining welfare-enhancing uses of data with little corresponding benefit. Such rules that treat personal data as a user's property, subject always to his control and decision-rights, despite contractual agreements to forego complete control are deeply problematic and their continued expansion a troubling prospect.

11. ***What regulatory constraints hold back the development of data markets in Europe and how could the EU encourage the development of such markets?***

Response:

Data markets in Europe are significantly constrained by an overall regime that treats data as the perpetual property of its originator. Limits on the ability to contract away complete rights in perpetuity to data are problematic and impede the development of data markets. Similarly, data localization requirements that prevent global online entities from combining and processing data across jurisdictions significantly limits the value of data to these companies and thus impedes the

development of data markets and business models built on the collection and use of data.

12. ***Do you agree with a default policy which would make data generated by publicly funded research available through open access?***

[ ] Yes

[X] No

Why not?

Response:

It might make sense in certain types of research that are fully publicly funded to open the data generated to public consumption. Of course, such openness can be required as a condition of a research grant or other public funding; there is no need to impose a blanket requirement. There are important cases in which otherwise private research is supplemented by some public data and/or some public funds. In cases in which public funding merely supplements non-public research, or where proprietary data analysis uses public data as part of its process, the original authors of the research should be entitled to retain ownership of their work and data.

13. ***Do you think that the existing legal framework (laws, or guidelines or contractual practices) is fit for purpose in addressing liability issues of IoT or / and Data driven services and connected tangible goods?***

[X] Yes

[ ] No

[ ] I don't know

Is the legal framework future proof? Please explain, using examples.

Response:

To the extent that regulation and laws are designed for general applicability, they will tend to be relatively more future-proof than more targeted forms of law and regulation. Despite the apparent newness of IoT and connected devices, they still, at root, exist as artifacts in a well defined system of laws and regulations. Liability still attaches to offending parties, and harmed parties can seek redress. Courts may have to tailor application of certain legal principles to new circumstances but, again, this is a practice that is well established in jurisprudence through the world. What would be problematic is a specific regime and set of ex ante rules targeted specifically at IoT devices (or other business models). Ex ante rules will always be subject to obsolescence by technology and/or changing consumer demand. And inevitably the rules long outlive the changes in circumstance that render them harmful. It is far

preferable to rely on ex post, case-by-case adjudication of harms arising under laws of general applicability to address issues in the IoT (and online platform) space.

14. *Please explain what, in your view, should be the liability regime for these services and connected tangible goods to increase your trust and confidence in them?*

Response:

So long as a general regime of basic contract, tort, antitrust and consumer protection law exists, there is a sufficient base line for trusting these devices. Further, many of the EU's regulations -- for instance the E-Commerce Directive and the Data Protection Regulation -- provide further reinforcement of the basic legal protections provided by background law.

15. *What are in your opinion the socio-economic and innovation advantages of open versus closed service platforms and what regulatory or other policy initiatives do you propose to accelerate the emergence and take-up of open service platforms?*

Response:

This question starts from an incorrect assumption: somehow there is a precise calculus that can be performed ex ante that determines the right mix of open, closed, or whatever other form of platform emerges. The nature of markets is that they adapt to consumer demand (ideally), and the nature of innovators is that they seek to serve unmet demand in those markets and consequently to provide the service that is perceived to be needed.

By way of example, consider the flourishing mobile ecosystem, which contains both open and closed platforms. Apple is well-known for maintaining strict control over all the elements of the iOS ecosystem–from hardware, to software, to the requirements that third-party developers must meet in order to work within the ecosystem. Android, by contrast, is a relatively open ecosystem that works on a wide variety of devices, and is open, more or less, to a greater amount of user tinkering and technological diversity.

How do we know that the mix of iOS and Android is the right one? Frankly, we don't. All we can know is that the nature of expressed consumer preferences reveals that there is some mix between these two platforms -- and indeed their approaches to managing a mobile ecosystem -- that is serving consumer demand. The decisions to opt for one or the other are necessarily on the margins, and are highly sensitive to a large number of inputs: from cost of raw materials all the way through to carrier incentives. Thus, it seems like a generally desirable approach is to allow society itself to sort out which sorts of platforms it desires and in what mix.

The assumption that open platforms are preferable is a dangerous and unsupported one. Such thinking, for example, would have killed, delayed, or hobbled the smartphone revolution that Apple ushered in with its closed platform, and that has brought enormous economic benefit to the citizens of Europe – especially its poorest citizens.

16. ***What would be the benefit of cloud computing services interacting with each other (ensuring interoperability)***

Response:

Systems that can interoperate allow for novel combinations of computer resources. Thus, to the extent that systems can be made more compatible, we would expect to see an increase in the availability of innovative solutions. But there can be benefits to non-interoperability, as well -- not least the incentives for developing standards and technologies that can accomplish the interconnectedness desired. To take just one example, Microsoft's .doc is a proprietary standard that, while it doesn't permit unfettered interoperability, was nevertheless developed to allow enormous degrees of interoperability and portability, even without any mandated interoperability. There is no reason not to expect such developments to continue.

17. ***Have you encountered any of the following contractual practices in relation to cloud based services? In your view, to what extent could those practices hamper the uptake of cloud based services? Please explain your reasoning.***

Difficulties with negotiating contractual terms and conditions for cloud services stemming from uneven bargaining power of the parties and/or undefined standards

[X] Never

[ ] Sometimes

[ ] Often

[ ] Always

Response:

The large variety of various services have guaranteed that competitive services have anticipated and met consumer demand. And the relative homogeneity of consumers of each different competing platform ensures that take-it-or-leave it contracts without room for negotiation are appropriate for the vast majority of a given service's users.

Limitations as regards the possibility to switch between different cloud service providers

[X] Never

[ ] Sometimes

[ ] Often

[ ] Always

Response:

Typically, data is very accessible and portable through common file formats or by means of technological solutions implemented by the services themselves. Porting data between cloud services is generally very easy.

18. ***Do you see any obstacle to the development and scaling-up of collaborative economy across borders in Europe and/or to the emergence of European market leaders?***

    [X] Yes

    [ ] No

    Please explain

Response:

The actions taken by some incumbents to prevent collaborative economy competitors, and the acquiescence of some governments in the attempt to staunch this competition are significant obstacles to the development of the collaborative economy.