

September 2015

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Draft European Commission Consultation on Online Platforms Leaked

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The European Commission is imminently expected to commence a public consultation on the subject of online platforms as part of the Commission's Digital Single Market strategy.

The consultation may be of particular interest to technology companies operating online platforms, rights holders, major users of online platforms (such as banks), data providers (such as market data or demographic data companies) and consumer or digital rights groups.

The draft of the consultation paper, containing 92 questions, has been leaked onto the Internet [here](#). It covers:

- the regulatory environment for online platforms;
- liability of online intermediaries;
- data and the cloud; and
- the "collaborative economy."

The questions asked suggest that significant reform to existing internet and e-commerce regulation may be in the pipeline, as well as the potential for entirely new regulation aimed specifically at online platform providers and the collaborative economy sector.

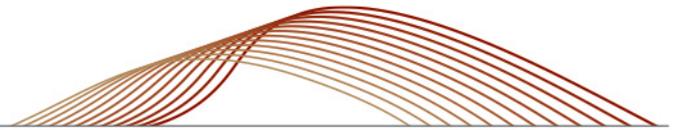
Online Platforms

According to the consultation, an online platform is:

"a firm 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."

The consultation gives a long list of typical examples of online platforms, including "internet search engines, specialised search tools, maps, news aggregators, and online marketplaces, audio-visual and music platforms, video sharing platforms, payment systems, social networks, app stores, and "collaborative economy platforms."

Arguably, this definition does not appear to capture some types of Platform-as-a-Service providers, such as those providing cloud computing capability serving a single group of users (e.g. outsourced infrastructure providers). The definition also appears to exclude 'over-the-top' communications applications serving a common group of customers. The consultation asks the respondent whether they believe that the definition is correct.



The consultation seeks views on a number of 'hot topics', such as the:

- adequacy of data protection notices, and use of personal data, including for uses such as dynamic pricing;
- presentation transparency of search results (*e.g.* paid for listings; promotion of own services);
- reliability and transparency of reputation / trust systems (*e.g.* ratings); and
- availability of and experiences with online dispute resolution.

Data and Cloud Computing

The consultation seeks to support the Commission's forthcoming European "free flow of data" initiative. This initiative is set to look at restrictions to cross-border data flows on a wider basis than only personal data.

The consultation also seeks to support the Commission's "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 questions of the consultation place particular emphasis upon licensing, access to data, and data portability, for example enquiring about:

- location based restrictions upon data;
- whether contract law is fit for purpose to facilitate a free flow of data in the EU (implicitly asking, therefore, whether a *suis generis* 'data right' is required?);
- whether data created by automatic means need to be treated differently from other data;
- the regulation of data markets;
- personal data management solutions; and
- liability in respect of data.

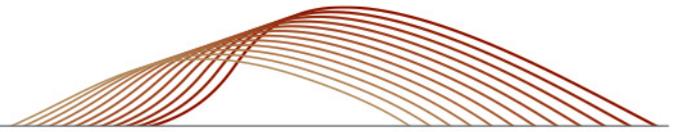
The consultation also asks the respondent whether the legal framework for the Internet of Things is satisfactory.

Liability of Online Intermediaries

EU consultations are no strangers to the subject of online intermediaries. The stated purpose of this consultation is to "seek to improve the Commission's understanding on how to best define 'intermediary,' the fitness of the limited liability regime [for intermediaries] under the E-commerce Directive..., the necessity for Europe-wide notice-and-action procedures, the design of such systems, and finally if there is a need for a 'duty of care' for certain online intermediaries."

The consultation solicits opinions on whether to create specific definitions of various classes of intermediaries (*e.g.* distinguishing caching as a separate activity), with the possible intent to 'better' regulate different types of the "latest generation" of online services.

We note that the consultation refers to "some erratic case-law at national level" in respect of the latest generation of linking services and search engines, as well as other cloud-based services. It appears that the Commission believes that there is work to do in this area.



Additionally, the Commission solicits views on a requirement for:

- a legal duty of care, binding upon certain types of service providers, to remove “certain categories of illegal content” from their services; and
- the requirement to establish a “specific legal officer service to facilitate contact with national authorities for fastest possible notice and removal of illegal contents that constitute a [public security or terrorist] threat.”

Collaborative Economy

The final section of the consultation is designed to help the Commission assess the need to develop specific law and policy in respect of the “collaborative economy.”

The “collaborative economy” is defined as the economy based on markets driven through online platforms which allow users to exchange or ‘share’ assets, resources, time, skills, or capital, sometimes for a temporary period and “without transferring ownership rights.”

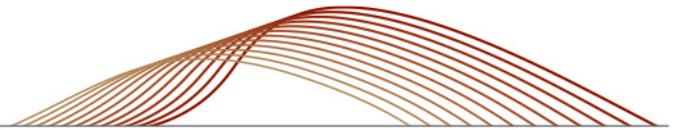
Obvious examples include taxi-sharing, car-pooling, temporary accommodation and co-working spaces. Less obvious examples of what is also known as the ‘sharing economy’ include crowd-funding platforms and potentially even peer-to-peer lending and virtual currency.

The consultation solicits answers on a short set of questions from “collaborative economy” providers and ‘traditional’ providers, including:

- the appropriateness of the existing regulatory regimes;
- the threat to existing ‘traditional’ competitors (including whether it is necessary to “level the playing field”);
- the ease with which providers of online platforms can identify and collect an appropriate tax, and whether there is a need for a special tax regime; and
- whether providers of online platforms which facilitate the collaborative economy are able to find appropriate insurance products to cover sharing services and shared assets.

As the consultation has not been officially launched yet, these questions may be subject to changes. The consultation is expected to be made live by the end of September 2015 on the Commission’s website.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings London lawyers:

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