

The European Commission Launched Public Consultation on Online Platforms

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Antitrust & Competition Law

Earlier today, the European Commission (“EC”) [published](#) its long-awaited consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy (“Consultation”). The Consultation, which encompasses a wide range of digital service and Internet-related issues, is part of the EC’s broader Digital Single Market (“DSM”) Strategy (see our prior [alert](#)).

Responses to the consultation are due in December 2015 (the date has yet to be fixed, pending translation of the questionnaire into the full range of EU languages). Once feedback is in, the EC will assess the feedback and consider next steps, which may involve re-opening of key pieces of EU legislation (e.g. the E-Commerce Directive) or the adoption of new rules and policies, such as for “notice and action”.

The Consultation should be of interest to a broad swathe of online stakeholders, including cloud service providers and users, IP rights holders and others interested in online content issues, those with a stake in data analytics, digital rights groups and many others.

Steps To Date – Geo-blocking

The Consultation is the next step in the EC’s DSM-related information gathering regarding online platforms. To date the EC has focused on geo-blocking, *i.e.*, the practice of restricting online content based on someone’s location, digital content distribution and the relationship between online distributors and right holders. In July, DG Competition sent questionnaires addressing these issues to a broad swathe of market players, and [issued](#) a Statement of Objections addressed to Sky UK and six major Hollywood studios regarding restrictions on subscribers’ access to satellite and online pay-TV when they are outside the licensed territory. The EC took the next step on geo-blocking today with the [launch](#) of a public consultation on geo-blocking of access to websites, focusing on restrictions faced by consumers accessing or providing information, and buying or selling across borders in the EU.

Commissioner Vestager has already expressed caution about adopting new regulation on online platforms that might be overtaken by market developments. Moreover, Johannes Laitenberger, the new Director General of DG Competition, recently [clarified](#) that while “[c]ompetition law can deal with specific business practices of online platforms [...] other practices are for regulators, such as the possible misuse of private data, infringements of copyright law, or a lack of transparency in a platforms’ terms of use.”

Online Platforms

Against this background, the Consultation was launched today. Not surprisingly, it proposes a definition of online platforms, a subject that has already been the source of much debate, with Commissioner Vestager noting that Facebook, Uber, SAP, Amazon and eBay, for example, have few characteristics in common: “[s]ome of the services that we see, what they share is the word ‘platform,’ and that’s about it”. Echoing his Commissioner, DG Laitenberger noted earlier this week that “[w]hat needs to be kept in mind is that there’s no single business model for platforms. Instead, there’s a whole range of models from search to app stores, from marketplaces to social-media platforms.”

The Consultation proposes the following definition on an operator of an online platform: “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.” This definition is followed by examples including general Internet search engines, specialised search tools, maps, news aggregators, online market places, audio-visual and music platforms, video sharing platforms, payment systems, social networks, app stores or collaborative economy platforms. This suggests, at least, that certain business models, where the customer pays directly for the service received, may not be “online platforms”. That said, a number of audio-visual and music platforms, collaborative economy platforms and even app stores (which are listed) see customers paying directly for the services they receive, rather than being one side of a multi-sided market.

The Consultation focuses on three main platform-related issues: (i) the level of transparency provided by online platforms in collecting and using users’ data; (ii) the impact of some platforms’ bargaining power on the terms and conditions of access, particularly those offered to SMEs and content providers; and (iii) the dual role of some platforms that act as marketplaces, on the one hand, and compete as suppliers (competing with their marketplace customers), on the other hand.

Several questions potentially raise competition law considerations. For example, beyond the list of illustrative “online platforms”, questions ask respondents to indicate to what extent their business “depends” on each of the online platforms with which they have business relationships, and list business practices potentially implemented by online platforms that may have competition law consequences (including, *inter alia*, the requirement for the other company to exclusively use the platform’s services, practices relating to fees (parity clauses, transparency), refusal to provide access to data or to the platform’s services unless specific restrictions are accepted, promotion of its own services by vertically-integrated platforms, presentation of suppliers/services in a biased way, restrictions on platform switching, *etc.*).

Tackling Illegal Content Online and the Liability of Online Intermediaries

The Consultation also focuses on the potential need for new measures to tackle illegal content online, responding to calls from some quarters for the imposition of greater responsibility on online intermediaries. Among other questions, the Consultation asks for examples that demonstrate that the current liability regime, set out in the EU’s E-Commerce Directive, “has not proven to be fit for purpose or has negatively affected market level playing field”. In assessing “fitness,” the Consultation focuses on whether additional categories of intermediaries (such as

search engines or cloud providers) should be added to the E-Commerce Directive regime, or whether the current categories (mere conduits, caching and hosting) are sufficient.

The Consultation also explores whether there is a need for formal rules governing “notice-and-action” procedures (including rules for the content of notices); whether the rules should differ for different types of content (e.g., hate speech, IP-infringing content, terrorist content, defamatory content); and whether a “duty of care” should be imposed on intermediaries, requiring them to exercise greater responsibility and diligence in the way that they manage their networks and systems.

Additional Topics Addressed by the Consultation

Data and Cloud in Digital Ecosystems

The Consultation also seeks to identify regulatory constraints that could prevent the development of data markets in the EU. In this regard, the Consultation asks for input on the impediments that exist to the free flow of data within the EU and whether localisation requirements are justifiable in some cases. The Consultation also asks a series of questions focused on cloud service providers, including whether they are sufficiently transparent about how they protect data, whether their contractual terms are fair, and whether rules requiring data portability might be warranted. While most of the issues touched on are not new, the EC’s focus on the free flow of data in particular offers cloud service providers an opportunity to tackle existing and perceived sectoral restrictions on data flows at Member State level.

The Collaborative Economy

The EC also seeks to identify whether the EU regulatory environment needs to be modified to accommodate online platforms used in the collaborative economy (such as Uber, AirBnB).

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Antitrust and Competition Law practice group:

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