Response to the European Commission’s Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data, Cloud Computing and the Collaborative Economy

December 2015
Executive Summary

Introduction

i) Ofcom welcomes the European Commission’s decision to consult on the regulatory environment for online platforms and intermediaries, and we strongly support the Commission’s objective to ensure that consumers and citizens are able to fully and safely participate in and benefit from the online space. The scale and impact on the European economy of online players, particularly some of the largest ones, is significant, given the central role they play in the operation of the digital marketplace. These players have substantial influence on how consumers access and experience online services, and have therefore an important responsibility towards them.

ii) We fully agree with the Commission, therefore, that it is important to consider whether there may be new sources of consumer harm – and if so, to satisfy ourselves that these can be swiftly identified and addressed. We believe it is appropriate and timely to assess whether the current competition rules and general regulatory frameworks are adequate to continue to protect consumers, and whether additional or different regulation may be needed.

iii) Ofcom’s regulatory functions in relation to most “online platforms” are limited, but we maintain a watching brief given the importance and impact on our regulated stakeholders, on consumers and on the evolution of communications markets more generally. We have therefore not responded to the specific consultation questions, but would like to provide some brief comments on the proposed definition of “online platforms”, and some wider thoughts based on our experience and work to date as a communications and competition regulator.

Definition of “online platforms” and the need for evidence based regulation

iv) Ofcom is concerned that the Commission’s proposed definition (and accompanying examples) points to an extremely broad understanding of what constitutes an online platform – and the consultation questions also embrace a wide range of potential regulatory concerns. Online platforms, as defined, encompass a significant range of business types, sectors and markets – as such, it is hard to see them as a class of business requiring specific sectoral regulation.

v) There is a risk that such a broad definition may be an obstacle to establishing clear objectives and to imposing appropriately targeted obligations in any future regulatory regime. In particular, the issues raised in the platforms debate cover both consumer protection and competition; we consider it essential that the evidence, and any proposed interventions, identify which of these two is the rationale for regulatory action.

The liability of online intermediaries:

vi) Ensuring the openness of the internet, as an engine for innovation is a well understood and widely recognised policy goal. This is reflected in the E-Commerce Directive (ECD), which limits the liability of online intermediaries involved in the transmission/storage of data in order to preserve the consumer and business benefits of an open and innovative online ecosystem “by creating the right conditions for e-commerce and the Internet to flourish.”¹ It is also a clear objective of the recently adopted Telecoms Single Market

Regulation, which prohibits the discriminatory treatment of Internet traffic in order to “guarantee the functioning of the Internet ecosystem as an engine of innovation”\(^2\)

vii) For this reason, we would caution against an expansive interpretation of “duty of care” obligations. Insofar as this requires intermediaries to take additional steps to restrict access to their platform (so as to prevent unlawful use), there is a risk that the openness and the ease of access to such platforms for legitimate individuals and businesses becomes more limited.

viii) Having said that, online intermediaries do play a role in the delivery of public policy goals, for example in the area of protection of minors or in the fight against illegal content. While we believe the current liability regime in the ECD should be preserved, there is some room for improvement. Specifically, we would encourage the Commission to provide further clarification around the operation of the notice and action framework, and in particular the conditions under which hosting intermediaries must take action against unlawful content.

Additional comments:

ix) Finally, we support the Commission’s recognition that transparency of information, ease of switching providers, and tackling unfair contract terms are central to debates about regulation of the digital marketplace and of consumer markets more broadly.

x) Online platforms do not operate in a regulatory vacuum - their services, products and business practices are already subject to a broad range of general European and national regulation, applying to all players. This includes general competition rules, consumer protection, and data protection regulation, as well as some sector specific regulation (e.g., for audio-visual and electronic communications). These frameworks have been recently reviewed (or are about to), in order to ensure that they remain fit for purpose in a digital age, and in particular that they continue to deliver the necessary protection consumers need as they engage online. Ofcom is already actively contributing to a number of Commission initiatives in this area. As part of the Digital Single Market Strategy\(^3\) the Commission is also reviewing some of these frameworks as well as conducting separate sector inquiries under competition law.

xi) We welcome the Commission’s recognition of the need to coordinate and aligning these various work streams as it evaluates the regulatory environment for online platforms. Equally, due consideration should be given to the value and adequacy of self-regulatory industry initiatives as part of the wider efforts to build trust for consumers as they engage online.

Introduction

1. An increasingly connected digital society and economy has led to unprecedented new opportunities for education, communication, collaboration and commerce. At the heart of this transformation is the Internet’s capacity as a global network whose value arises from the volume of people, ideas and resources it interconnects. The digital economy depends on the range and diversity of these interconnections; it has given rise to a breadth of innovative services and consumer benefits which could not have been predicted. At the same time, this changing landscape has also created new sources of risk for consumers and new areas of potential concern for policy makers.

2. Ofcom welcomes the European Commission’s decision to consult on the regulatory environment for platforms and online intermediaries. This consultation represents a timely opportunity to gather evidence in relation to an area of increasing importance for the economy and society as a whole. The speed at which many online platforms evolve, adapt and scale their services, products and underlying business models has fuelled concerns that consumers may be exposed to new forms of potential harm. It is therefore appropriate to consider whether the current competition and consumer protection regulations are fit for purpose in this context, or whether additional or different forms of regulation may be needed.

3. Ofcom’s regulatory functions in relation to most online platforms are limited, but we maintain a watching brief given the importance and impact on our regulated stakeholders, consumers and communications markets more generally. While we do not have detailed evidence on the questions raised in the consultation, we would like to offer some brief comments on the proposed definition of “online platform”, the liability of online intermediaries and some wider thoughts based on our experience and work to date as a communications markets and competition regulator.

Definition of online platforms and the need for evidence-based regulation

4. The consultation proposes a definition of online platform (complemented with an illustrative list of providers and a stipulation that Internet Service Providers fall outside scope):

   "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….Internet access providers are outside the scope of this definition"

5. Together, the definition and list point to a very broad understanding of what “online platforms” are; the range of potential regulatory concerns raised is also wide. We consider that such broad definitions may not be helpful either in defining the scope of a regulatory regime, the relevant concerns or the obligations applied to providers.

6. From Ofcom’s experience, effective regulation requires a clear definition of the services that are to be regulated, a specific account of the potential harm to be addressed, and
hence a clear rationale for the specific regulation. For example, the regulation of audio-
visual media services, under the Audio-Visual Media Services (AVMS) Directive, defines
its scope in terms of services that are provided under the "editorial responsibility" of a
specific provider. AVMS providers are those making editorial decisions – about the
choice of content and how it is labelled and presented to audiences. AVMS providers are
therefore the appropriate subject of obligations relating to the protection of minors from
potentially harmful content, as they are aware of the characteristics of the programmes
they offer, and are in a position to control the presentation and accessibility of those
programmes (for example by determining the time of broadcast on a linear channel).

7. We see a risk that "online platforms", as defined, lacks this specificity. In particular, the
definition spans providers who take a widely varied approach to their responsibilities in
relation to the two sides of their market.

8. For example, Amazon is, in the main, a retailer: it buys products on wholesale markets
and sells them to consumers. In that respect it is a retailer like any other, with effective
control of both sides of its market. If Amazon is an "online platform" in respect of its retail
activities, this suggests a very broad definition of "two-sided market", which might also
reasonably include Tesco.com, or any retail site.

9. Furthermore, platforms serving two-sided markets are not exclusively found online –
traditional examples include shopping centres, auction houses, and newspapers and
radio/TV broadcasters (which facilitate interaction between advertisers and consumers).
This raises questions as to whether online platforms represent a new or distinct class of
economic activity which requires a new form of sectoral regulation.

10. It is similarly notable that the illustrative list includes Netflix, which is an EU-regulated
audio-visual media service provider, and which commissions programmes or buys them
wholesale to create a retail service. If Netflix is an "online platform", then so would be the
BBC iPlayer or any online broadcaster or video-on-demand provider. Service providers
like Netflix or Amazon exercise significant control over the characteristics of the products
or services they make available to consumers – and have commensurate regulatory
responsibilities.

11. In contrast, providers offering online search typically have no contractual relationship
with or control over the characteristics of sites indexed (e.g. in relation to their legality).
Online auction sites like Allegro or eBay sit somewhere in the middle – providing some
help and support to buyers and sellers, such as dispute resolution and refunds in some
circumstances; but not choosing each product to be bought and sold, or offering the
same level of consumer protection as a retailer must.

12. The specific role played by the operator of an online marketplace, and the
responsibilities they should consequently bear, is a central issue in the debate about the
regulation of services online. There is already a range of obligations to which each player
on the list of "online platforms" is subject, such as consumer protection law or general
data protection law. There may well be additional regulation which is appropriate or
necessary for some of the online platforms. However, this seems less likely to be
because they are "online platforms" and rather because they have other, more specific
characteristics to which specific regulatory obligations may reasonably apply.

13. This is illustrated by the recent judgement by the California Labor Commission that the
online taxi service Uber is an employer (in California), that Uber drivers are employees

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Footnote:
The Commission’s may be referring exclusively to ‘Amazon Marketplace’ which allows third party vendors to access its customers, although this is unclear.
not independent contractors – and that in consequence Uber has a range of additional responsibilities to those drivers. This is not a finding about “online platforms”. Rather, the Labor Commission concluded that the particular activities of Uber make it an employer (in California), with consequent regulatory obligations. The finding does not necessarily yield information about the need for sectoral regulation of online platforms generally or of Google or Facebook specifically, as each undertakes quite different activities.

14. The kinds of regulatory obligations relevant to specific online platforms might include, for example, transparency in relation to paid versus “natural” search results for providers of internet search/indexing services; or transparency and the securing of consent in relation to social networks’ gathering and exploitation of personal data.

15. However, some of the concerns raised about “online platforms” may already be covered in the Data Protection Directive, or the new General Data Protection Regulation. To determine whether this is the case, it will be important to clarify how general data protection legislation applies in an online environment (for example, what exactly the obligations are for a provider of a social networking service). The enforcement work of Data Protection Authorities across the EU (along with clarification provided by the Courts, as in the recent Google “right to be forgotten” case); already have direct consequences for “online platforms” of all types. Obligations like those relating to transparency, and the securing consent of consumers to data gathering and exploitation are central to the existing data protection regime, and may therefore already cover online platforms.

16. The issues raised in the Commission’s consultation cover both consumer protection and competition; we consider it essential that the evidence, and any proposed interventions, should clearly identify which of these two is the rationale for action.

17. Consumer protection regulation is intended to mitigate a risk of harm, through the creation of consumer rights and the imposition and enforcement of rules governing industry behaviour. Consumer protection regulation may apply at a general level, or where the specific characteristics of a market require it, through a sectoral framework. The creation of a new sectoral framework should only proceed when there is evidence that existing, general consumer protection regulation is inadequate to mitigate the risk of harm.

18. In developing new regulations, we consider it is critical to ensure that:

   ✷ the specific consumer or business harm is identified and supported with evidence;
   ✷ there is a clear and targeted definition of the type of provider to which the regulation should apply
   ✷ the regulatory obligations are relevant to the actual business activity undertaken by those providers
   ✷ existing general regulations are inadequate to deal with the identified harm.

19. The consultation also raises a number of questions about the competition concerns to which the operation of “online platforms” may give rise. As a competition regulator, we pay close attention to the trading relationships between providers in our sectors when there may be a position of market power. We also take considerable care to assess when and where enduring bottlenecks may emerge. When we intervene, we consider static and dynamic competition effects, and the potential impact of any intervention on innovation in the relevant market under consideration. In this context we acknowledge that some online platforms would appear to have very powerful market positions. While
such powerful positions may not be intrinsically harmful, it is entirely appropriate to explore to the possibility that there may be abuse of those positions.

20. However, we would also encourage the Commission to bear in mind the substantial consumer and business benefits of maintaining innovative and rapidly growing digital economy across the EU, in which online platforms of various descriptions play a significant role. The suggestion that the major platforms constrain innovation and market entry is hard to reconcile with the general scale and pace of development of the digital economy. For this reason, we would urge caution over the introduction of new competition regulations, without a clear understanding of the risks and the potential for such intervention to undermine this vigorous digital marketplace.

21. The unintended consequences of regulatory intervention could include stifling innovation and consumer benefits and even limiting the opportunities and incentives for new market entrants. In this context, the proposal that the general competition regulation framework is inadequate to deal with online platforms, and that a new approach is required, should equally be approached with caution.

The liability of online intermediaries

22. The consultation includes a series of questions covering online illegal content and the liability regime which applies to online intermediaries as set out in Articles 12-15 of the E-Commerce Directive (ECD).

23. The approach adopted in the ECD provides broad liability protection for ISPs, and more limited but still material protection for hosting service providers. It also precludes the imposition on hosts and ISPs of obligations to undertake general monitoring of the data they transmit or host. This framework was arrived through a process which sought to balance two sets of legitimate purposes, which are potentially in tension:

- To protect consumers and businesses who may be at risk or face harm as a result of unlawful online activity
- To protect the wider consumer and business benefits of an open and innovative Internet ecosystem

24. The regulatory balance struck by the ECD was designed to preserve the consumer and business benefits of an open and innovative online ecosystem “by creating the right conditions for e-commerce and the Internet to flourish”. As the Commission noted in its 2003 review of the ECD: “the limitations on the liability of intermediaries in the Directive were considered indispensable to ensuring both the provision of basic services which safeguard the continued free flow of information in the network and the provision of a framework which allows the Internet and e-commerce to develop.”

25. The recently adopted Telecoms Single Market Regulation prohibits the discriminatory treatment of Internet traffic and demonstrates the continued importance of openness to the Digital Single Market.

26. The common objective of these two regulatory frameworks is to protect the open, innovative internet, while maintaining an appropriate level of protection for businesses and consumers. This is illustrated in Recital 1 of the TSM Regulation which states its purpose is “to protect end-users and simultaneously to guarantee the functioning of the Internet ecosystem as an engine of innovation”.\(^7\)

27. Ofcom fully shares the underlying policy goal to maintain the openness of the internet, as an engine for innovation. We believe that the principles and balance struck in the E-commerce Directive should be preserved. We consider, however, that there are a number of opportunities for refining the application of current Notice and Action procedures to online intermediaries – specifically through additional codification and clarification of the obligations that apply. For example:

- It is clear from current Notice and Action procedures that a host must remove illegal content in response to a notice – but it remains unclear what obligations a host may have after removing that piece of content.
- Recent court cases\(^8\) illustrate that uncertainty continues to exist around what does and does not constitute general monitoring activity.
- There is an absence of clear guidance in relation to the status and role of stakeholders who submit a notice informing online intermediaries of illegal or infringing content. In comparison, the US Digital Millennium Copyright Act (DCMA) notice-and-takedown procedure specifies that the person making a claim of infringement has to be (or have been delegated by) the copyright owner.

28. We note that the discussion on Page 21 of the consultation explores potentially wider changes to the ECD, developing the idea of “duties of care” for online intermediaries. While Article 15 of the ECD clearly prohibits the imposition of “a general obligation to monitor”, Recital 48 of the ECD suggests that Member States may require online intermediaries to “apply duties of care…to detect and prevent certain types of illegal activities”.

29. The challenge, in considering further development of “duty of care” obligations, is to understand their specific consequences, both for unlawful uses made of platform services and for lawful uses. For these reasons, we would caution against an expansive interpretation of “duty of care” obligations. To the extent that such new obligations mean that intermediary platforms must take steps to restrict access to their platform (so as to prevent unlawful use), they may also limit openness and the ease of access to such platforms for legitimate individuals and businesses.

30. When considering the introduction of additional platform obligations in this area, we would encourage the Commission to carefully assess the trade-off between consumer and business benefits linked to the restriction of unlawful activity, and those associated with preserving the Internet as an “engine of innovation”.

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\(^8\) The European Court of Justice (Court of Justice of the European Union, Judgement in Case C-360/10, 16th February 2012), the German Federal Supreme Court (German Federal Supreme Court rules in the RapidShare case, 18th July 2012) and France’s Court of Cassation (Arrêt n° 828 du 12 juillet 2012 (11-13.666) - Cour de cassation - Première chambre civile - ECLI:FR:CCASS:2012:C100828) have taken divergent positions on what constitutes general monitoring duties.
Additional comments

31. It has become clear, from our work on communications markets, that informing and empowering consumers is a significant task, requiring work from industry and regulators, as well as consumer support and advocacy groups. The digital environment generally – and arguably the new business models on which some “online platform” operate – present new challenges to consumers, and require new skills and understanding. It will be essential for industry and regulators take full account of the diversity in the consumer population, in terms of individuals’ ability (or willingness) to develop these new skills and to hence benefit from the digital marketplace.

32. In this context, we welcome the Commission’s attention to issues of transparency of information, ease of switching providers, and unfair contract terms. Each of these themes is central to Ofcom’s work on consumer protection and empowerment in the communications sector. As such we would support making these central themes of any debate about regulation of the digital marketplace and of consumer markets more broadly.

33. Finally, we would like to stress that online platforms do not operate in a regulatory vacuum - their services, products and business practices are already subject to a broad range of general regulations, such as those covering competition, consumer protection, and data protection regulation.

34. The Digital Single Market programme includes a number of other initiatives which raise questions about platforms and intermediaries – such as:

   - The General Data Protection Regulation (GDPR)
   - Review of the European Framework for Electronic Communications
   - Forthcoming Commission sectoral inquiry into e-commerce

35. We welcome the Commission’s recognition of the importance of coordinating and aligning these various work streams as it considers the regulatory environment for online platforms. Equally, careful consideration should be given to the applicability and adequacy of existing general and sector specific regulatory frameworks to address the issues raised – alongside the value and effectiveness of self-regulatory industry initiatives.

36. The Commission has rightly identified the substantial consumer and business benefits of maintaining an innovative and rapidly growing digital economy across the EU, and the role which online platforms play in enabling it. In support of that objective we would suggest caution over the introduction of new regulation designed to address potential concerns, without a clear understanding of the potential consumer harm and the risks of unintended harms to the operation of that digital economy.