



December 17, 2015

DG Communication Networks, Content & Technology
European Commission
Unit F1 – Digital Single Market
Avenue de Beaulieu 25
B-1049 Brussels – Belgium

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

Dear Sir or Madam,

On behalf of the Center for Data Innovation (datainnovation.org), I am pleased to submit these comments in response to the European Commission’s public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing, and the collaborative economy.¹

The Center for Data Innovation is the leading think tank studying the intersection of data, technology, and public policy. With staff in Washington, DC and Brussels, the Center formulates and promotes pragmatic public policies designed to maximize the benefits of data-driven innovation in the public and private sectors. It educates policymakers and the public about the opportunities and challenges associated with data, as well as technology trends such as predictive analytics, open data, cloud computing, and the Internet of Things. The Center is a non-profit, non-partisan research institute affiliated with the Information Technology and Innovation Foundation.

An “online platform,” as described by the Commission, is “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.” Examples of online platforms include 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

¹ “Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy,” European Commission, September 24, 2015, <http://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>.



(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, BlaBlaCar).

In this submission, we argue that the Commission should do more to unlock the potential of data-driven innovation in online platforms by: eliminating restrictions on the free flow of data, encouraging open data policies, and avoiding preemptive regulation on technologies like cloud computing.

Attached please find the Center's responses to the relevant Commission's questions.

Sincerely,

Paul MacDonnell

Head of European Policy
Center for Data Innovation

pmacdonnell@datainnovation.org



SOCIAL AND ECONOMIC ROLE OF ONLINE PLATFORMS

USE OF INFORMATION BY ONLINE PLATFORMS

In your view, do online platforms provide sufficient and accessible information with regard to:

a) the personal and non-personal data they collect?

Yes

b) what use is made of the personal and non-personal data collected, including trading of the data to other platforms and actors in the Internet economy?

Yes

c) adapting prices, for instance dynamic pricing and conditions in function of data gathered on the buyer (both consumer and trader)?

Yes

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

Online platforms use information for multiple purposes including for operations and product development. Platforms use information to maintain business records, deliver personalized services, and prevent fraud and misuse. In addition, many platforms use data analytics to discover preferences about customers and understand the evolving needs of different consumer groups in order to develop products and services to meet their needs. From a consumer point of view these uses of information are valuable because they help ensure businesses meet the needs of consumers.

CONSTRAINTS ON THE ABILITY OF CONSUMERS AND TRADERS TO MOVE FROM ONE PLATFORM TO ANOTHER

Do you see a need to strengthen the technical capacity of online platforms and address possible other constraints on switching freely and easily from one platform to another and move user data (e.g. emails, messages, search and order history, or customer reviews)?

No



Should there be a mandatory requirement allowing non-personal data to be easily extracted and moved between comparable online services?

No.

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

There is no compelling evidence to suggest that any limitation on how consumers can move their personal information between online platforms has created market failures warranting intervention by the European Commission. For example, in the case of ride-sharing and taxi apps, consumers have a number of options and many use more than one service. There is no evidence that online platforms are anti-competitive or that consumers are “locked in” to them in ways that unfairly harm consumers. Moreover, many of the benefits of these platforms come from large scale use, not from the number of competitors, so policymakers should be more concerned about encouraging adoption than in creating more competitors.

The result of imposing requirements on companies to engineer expensive new features to allow consumers to extract data from their services will require them to impose new costs on consumers. The result will likely be European consumers paying more for existing products and services with no additional benefit. In particular, this would hurt the ability of people on low incomes to access many platforms that currently provide services for little or no cost.

The Commission’s rule in considering such measures should simply be to ask whether there is any anti-competitive behavior by platforms. The determination that such behavior exists should always rely on evidence that their role impacts negatively on consumers. Any hypothesis that Europe “needs more platform competition” should be tested against actual consumer experience and not treated as self-evident.

ACCESS TO DATA

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

There is no evidence that consumers are experiencing problems accessing data on online platforms. In particular, with regard to cloud computing storage solutions, any attempt on the part of providers to restrict consumers’ access to or use of their data would generate severe commercial and reputational risks. Hence, there is little danger to consumers.

With regard to social networks and two or multi-sided trading platforms there is no evidence that consumers are seeking legislative intervention to alter standard relationships with platform providers



or that any inability to move data from one platform to another warrants government intervention. Attempts to regulate such access are likely to add expense to their use and cause a large number of low-income users to be excluded from these services.

FREE FLOW OF DATA

ON DATA LOCATION RESTRICTIONS

Have restrictions on the location of data affected your strategy in doing business (e.g. limiting your choice regarding the use of certain digital technologies and services)?

No.

Do you think that there are particular reasons in relation to which data location restrictions are or should be justifiable?

No

ON DATA ACCESS AND TRANSFER

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?

Yes. European contract law is already sufficient to protect parties to data transfers including arrangements where one of the parties is outside Europe. The ownership of non-personal data is something which can already be addressed in contract law and does not need new legislation. The European Commission should allow new technologies and platforms to continue to evolve and should expect new norms of information use and ownership suitable to the parties to develop in parallel to this evolution.

In order to ensure the free flow of data within the European Union, in your opinion, is regulating access to, transfer and the use of non-personal data at European level necessary?

No.

When non-personal data is generated by a device in an automated manner, do you think that it should be subject to specific measures (binding or non-binding) at EU level?

No



Please share your general comments or ideas regarding data access, ownership, and use:

The free flow of data is critical to the digital economy. The goal of the Commission should be to ensure the free flow of data across borders by eliminating unnecessary restrictions on where data can be stored or how parties share it with others. In particular, regulators should not impose different rules on data held by digital platforms than data held by other businesses. All companies, including those providing digital platforms, should adopt and use agreed upon codes of practice, and they should be held responsible for data breaches that compromise their customers' privacy. Existing legislation, as well as fear of bad publicity and damaged reputations, provide a powerful incentive for firms to protect their data. The financial services industry uses rules on outsourcing whereby firms are held responsible for critical services provided to them by contractors to the extent that any failure of contractors to meet required EU standards will be treated as a breach by the original firm. We think this approach could serve as a model for firms doing business in Europe and processing the personal data of EU citizens.

Legislation that tries to anticipate future arrangements to share or use information, including information that is produced automatically, risks unanticipated consequences, such as freezing current patterns of information use, thus preventing further evolution and the future discovery of processes and business models that may yield considerable economic and social benefits.

ON DATA MARKETS

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

There is widespread misunderstanding of the 1995 Data Protection Directive and widespread inconsistency in its implementation in legislation and regulation throughout Member States. The proposed Data Protection Regulation attempts to standardize the approach to the protection of personal data and, in principle, this is to be welcomed. However, the draft regulation fails to provide desired standardization and regulatory certainty due to the vagueness of a number of its concepts whilst at the same time it introduces new uncertainties that will prove to be major difficulties for the development of the Digital Single Market. For example, the regulation is designed for a pre-“big data” environment and a number of its measures take aim (possibly unintendedly) at key processes that underpin the development of data-driven innovations. For example, big data blurs the distinction between personal and non-personal data. Big data has the capacity to create “new” information—based upon the correlative application of algorithms to information provided with consent—that has never been collected from the data subject in the first place. This creates two challenges: first, firms using data mining are in no position to notify customers or users—they do not know what they will find until it is too late; second, “new” data are created by correlations and no one can consent to this



and it is unclear whether the 1995 Data Protection Directive or the proposed Data Protection Regulation can apply to new data derived from correlations.

Also the regulation contains provisions on the “right to be forgotten” which, whilst aimed at the protection of persons on social networks, could affect the business of organizations that need to hold personal data for longer periods for reasons of public interest—such as insurance companies who wish to prevent fraudulent claims. Insurers are also potential innovators through application of data analytics and the potential for such innovation to extend their understanding of—and ability to insure—risks could have far-reaching economic benefits. Regulations designed to protect privacy on platforms could unintentionally impede the development of such innovation and create significant opportunity costs across the entire economy.

ON ACCESS TO OPEN DATA

Do you think more could be done to open up public sector data for re-use in addition to the recently revised EU legislation (Directive 2013/37/EU)?

Yes. All of the following proposals should be considered: introducing the principle of “open by default”; licensing of open data to help persons and organizations wishing to re-use public sector information (e.g., Standard European License), further expanding the scope of the directive (e.g. to include public service broadcasters, public undertakings); improving interoperability (e.g., common data formats); further limiting the possibility to charge for re-use of public sector information; remedies available to potential re-users against unfavorable decisions; mandatory standards for the formatting of public data that will facilitate interoperability.

Do you think that there is a case for the opening up of data held by private entities to promote its re-use by public and/or private sector, while respecting the existing provisions on data protection?

Yes. Data held by private entities that is the result of public funding should, with certain exceptions (such as the need to protect public safety), be open to the public where a clear case has been made that use can be made of the data that does not compromise its value to its owner or disincentivize its owner or other private entities from collecting such information in the first place. An example of this could be the collection of meta-data from drug trials that yield insights that could serve the interests of public health or accelerate medical research. In addition, non-private data already collected by regulators, such as financial reporting for publicly-traded companies, should be made available to the public in open, machine-readable formats.



ON ACCESS AND REUSE OF (NON-PERSONAL) SCIENTIFIC DATA

Do you think that data generated by research is sufficiently, findable, accessible identifiable, and reusable enough?

No. Open data principles should be applied to publicly funded research, except in situations where this could endanger national security or run counter to the public interest. The Commission should also encourage international efforts, such as the Research Data Alliance, designed to develop the global information infrastructure (tools, policies, standards, etc.) necessary for the scientific research community to share data and engage in open science.

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

Yes.

ON LIABILITY IN RELATION TO THE FREE FLOW OF DATA AND THE INTERNET OF THINGS

In order to ensure the roll-out of IoT and the free flow of data, should liability issues of these services and connected tangible goods be addressed at EU level?

Yes.

ON OPEN SERVICE PLATFORMS

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?

The Commission should explain what it means by “Open Service Platform.” If it means operating systems and mobile platforms (such as Linux or Android) that will accept applications software developed by anyone then such platforms can, under different circumstances, be perceived by consumers as having advantages or disadvantages with respect to closed platforms. One should not, by definition, be viewed or treated as better, or more desirable, than the other. Open platforms allow for greater individual innovation, promoting entrepreneurship from individual developers and small technology companies. Closed platforms offer benefits to end-users in terms of consistency, usability, and security. Customers currently are able to choose between open and closed platforms and the market for these platforms is working quite well. In particular, any attempt to mandate greater openness in platforms is likely to increase the expense for end-users who will try to compensate for the loss of those features that are characteristic of the closed platforms that some



of them may prefer. Furthermore, intervention could unintentionally act as a disincentive for entrepreneurs and developers within Europe's €6 billion app industry.

PERSONAL DATA MANAGEMENT SYSTEMS

Do you think that technical innovations, such as personal data spaces, should be promoted to improve transparency in compliance with the current and future EU data protection legal framework? Such innovations can take the form of "personal data cloud spaces" or trusted frameworks and are often referred to as "personal data banks/stores/vaults"?

No.

EUROPEAN CLOUD INITIATIVE

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?

Sufficient market diversity will ensure the availability of choices for those wishing to take up these services - regardless of the terms and conditions of any one service.

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

There is no evidence that there is any significant unmet demand for customers to switch between cloud providers. Cloud brokers, which connect clients to multiple vendors, can help mitigate this problem as well.

Possibility for the supplier to unilaterally modify the cloud service

Cloud services function as platforms and, so far, no modification of their services has, impeded the take up of cloud services in general. Unilateral changes often reflect desirable improvements to security and functionality and these types of updates should be encouraged.

Far reaching limitations of the supplier's liability for malfunctioning cloud services (including depriving the user of key remedies)



Service Level Agreements do exist for those who wish to pay for them. For other customers, the combined security, robustness, and cost benefits of cloud-based platforms invariably exceeds that of traditional computing environments. Also the reputational risk of poor security or data loss should be taken into account as a powerful incentive for cloud services to provide good security and reliability.

What are the main benefits of a specific European Open Science Cloud which would facilitate access and make publicly funded research data re-useable?

Benefits include: making Science more reliable by better quality assurance of the data; making Science more efficient by better sharing of resources at national and international level; making Science more efficient by leading faster to scientific discoveries and insights; creating economic benefits through better access to data by economic operators; making science more responsive to quickly tackle societal challenges.

Would model contracts for cloud service providers be a useful tool for building trust in cloud services?

No.

Would your answer differ for consumer and commercial (i.e. business to business) cloud contracts?

No.

What approach would you prefer?

We do not believe there is any requirement for intervention by the Commission in the cloud services market.

Please share your general comments or ideas regarding data, cloud computing, and the topics addressed in this section of the questionnaire.

The European Science cloud is an important initiative to increase access to government and EU-funded research and development data, as well as improve the quality, interoperability, and reusability of the data. The Commission should not only support this effort, but strive to make this resource compatible with other global efforts to develop a scientific data commons that will have enormous value to the global scientific and business community.



In the private sector, the cloud computing industry is developing quickly and effectively for commercial use, and there is not a strong case for new regulation of cloud services and contracts. There is no market need, for example, for the government to build trust in cloud services as a model. Cloud services have proved to be exceptionally trustworthy both in terms of security and in terms of reliability, and the private sector is continuing to create new cloud services to meet customer demand.

Moreover, concerns about the security of cloud services are misplaced. Many high-profile breaches of data security in recent years have been the result of poor security in traditional computing environments, including lost laptops and lack of proper authentication, rather than poor security on modern cloud services.

With regard to technical innovations such as personal data spaces we believe that regulation should be restricted to allowing rather than mandating these and that the possible emergence of private business models should not be preempted by a prescriptive approach in this area.