

Brussels December 16th 2015

Re: Explanation of EDiMA's submissions in response to the European Commission public consultation on Online Platforms

Dear Sir or Madame,

EDiMA, the European association representing online platforms, welcomes the initiative of the European Commission to gather views and opinions on the workings of online platforms in Europe.

Although the public consultation aims at gathering information objectively EDiMA believes that the process used to gather input lacks transparency and objectivity. Many of the questions seem to be quite leading in nature and the way the consultation has been set-up limited us to only be able to access targeted sections of the consultation and also prevented us from providing sufficient explanation of our positioning and responses by the character limitations set.

EDiMA represents online platforms in Europe and as such would like to provide input on most of the areas of interest to the European Commission and our membership as part of the public consultation process.

In an attempt to add to the consultation process in a meaningful manner, EDiMA would like to submit a comprehensive response to the consultation and has therefore opted to:

- Submit this PDF version with our full responses to the questions asked by the European Commission
- Submit multiple versions of the online form to allow us at least to cover all the areas our membership would like to respond to

Should you have any questions or queries regarding the EDiMA submission please do not hesitate to contact me.

Kind regards,

A handwritten signature in black ink, appearing to read 'Siada El Ramly'.

Siada El Ramly

EDiMA Director General

Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy (EN)

Objectives and General Information

General Information

The views expressed in this public consultation document may not be interpreted as stating an official position of the European Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to differing definitions the Commission may use under current or future EU law, including any revision of the definitions by the Commission concerning the same subject matters.

You are invited to read the privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with.

This public consultation will close on 30 December 2015 (12 weeks from the day when all language versions have been made available).

Please complete this section of the public consultation before moving to other sections

- Respondents living with disabilities can request the questionnaire in .docx format and send their replies in email to the following address: CNECT-PLATFORMS-CONSULTATION@ec.europa.eu.
- If you are an association representing several other organisations and intend to gather the views of your members by circulating the questionnaire to them, please send us a request in email and we will send you the questionnaire in .docx format. However, we ask you to introduce the aggregated answers into EU Survey. In such cases we will not consider answers submitted in other channels than EU Survey.
- If you want to submit position papers or other information in addition to the information you share with the Commission in EU Survey, please send them to CNECT-PLATFORMS-CONSULTATION@ec.europa.eu and make reference to the "Case Id" displayed after you have concluded the online questionnaire. This helps the Commission to properly identify your contribution.
- Given the volume of this consultation, you may wish to download a PDF version before responding to the survey online. The PDF version includes all possible questions. When you fill the survey in online, you will not see all of the questions; only those applicable to your chosen respondent category and to other choices made when you answer previous questions.

Please indicate your role for the purpose of this consultation



An association or trade organization representing businesses

Please describe the type of online platforms that you represent, a brief description of the online platform and indicate its name and web address

EDiMA is the European trade association representing online platforms. Our membership constitutes: Airbnb, allegro group, Amazon, Apple, ebay, Expedia, facebook, Google, King, Linkedin, Microsoft, NETFLIX, PayPal, TripAdvisor, Twitter, YAHOO! And Yelp

Please briefly explain the nature of your activities, the main services you provide and your relation to the online platform(s) which you use to provide services

EDiMA is the European trade association representing online platforms.

Are you a SME or micro enterprise?

☒ No

Please specify

Please indicate your country of residence

☒ Belgium

Please specify the Non-EU country

Please provide your contact information (name, address and e-mail address)

Name: EDiMA

Address: rue du trone 60, 1050 Brussels, Belgium

E-mail: info@edima-eu.org

Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

Note: If you are not answering this questionnaire as an individual, please register in the Transparency Register. If your organisation/institution responds without being registered, the Commission will consider its input as that of an individual and will publish it as such.

☒ Yes

Please indicate your organisation's registration number in the Transparency Register

53905947933-43

If you are an economic operator, please enter the NACE code, which best describes the economic activity you conduct. [You can find here the NACE classification.](#)

The Statistical classification of economic activities in the European Community, abbreviated as NACE, is the classification of economic activities in the European Union (EU).

I object the publication of my personal data

☐ No

Please provide a brief justification.

Online platforms

Online Platforms

SOCIAL AND ECONOMIC ROLE OF ONLINE PLATFORMS

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, Taskrabbt, Bla-bla car). Internet access providers fall outside the scope of this definition.*

☐ No

Please explain how you would change the definition (1000 max) (

EDiMA believes that trying to define platforms so as to be able to regulate them is a faulty starting point. There are many platforms in the world both offline/online that aren't restricted to new or innovative services. The concept of a platform has existed since commerce began, with buyers and sellers being brought together by intermediaries in markets of all kinds- agricultural cooperatives, travel agencies and variety theatre. Today, TV providers and newspapers connect their users, which can be consumers and businesses. The ability to transform an offline platform online increases its reach, but the concept remains fundamentally the same—connecting buyers and sellers. If the objective of the DSM is to bring together offline and online worlds, then there is little reason to attempt to define online platforms as an attempt to create a new, separate, category of functions that operate across a wide range of business activities is problematic from a legal and regulatory

perspective. Online platforms don't have common and unifying features, for e.g., online payment systems have more in common with payment card systems than with online travel platforms, search engines or social networks. It remains unclear that there are any differences between platforms and "internet society services"(ISS) (defined in Directive 98/34/EC). ISS are already regulated under a number of Directives (including e-Commerce Directive, InfoSoc & ePrivacy Directives).

2. What do you consider to be the key advantages of using online platforms?

Online platforms...

- ☐ make information more accessible
- ☐ make communication and interaction easier
- ☐ increase choice of products and services
- ☐ create more transparent prices and the possibility to compare offers
- ☐ increase trust between peers by providing trust mechanisms (i.e. ratings, reviews, etc.)
- ☐ lower prices for products and services
- ☐ lower the cost of reaching customers for suppliers
- ☐ help with matching supply and demand
- ☐ create new markets or business opportunities
- ☐ help in complying with obligations in cross-border sales
- ☐ help to share resources and improve resource-allocation
- ☐ others:

Please specify: (100 max)

Online platforms have created outlets for creativity¹ and commerce which did not previously exist and have made significant contributions to European citizens, businesses (both traditional and internet using businesses)² and the EU economy.³ Online platforms for example enable micro-producers and niche interests to connect, creating value that otherwise wouldn't exist.

Online platforms provide the support start-ups and new businesses require to scale-up and compete in both European and global online market places. This is achieved through reducing barriers to market entry and supporting entrepreneurship through limiting the capital require to start and grow a business online. They also help establish greater trust between consumers and small businesses by lending their own reputations to the businesses using their platforms as well as empower consumers by providing timely, supportive and comparative information.

Online platforms also continue to create new employment opportunities within the EU. These opportunities are often more flexible and allow greater access for individuals to better balance their lives. The diversity and creativity of online business models has also increased efficiency and

¹ See, Technology is Culture (2014), http://edima-eu.org/pdfs/EDiMA-CCIA_Technology%20is%20Culture.pdf

² For further information see, The Internet – the new helping the old (2015), http://edima-eu.org/pdfs/EDiMA-CCIA_%20The%20New%20Helping%20the%20Old_2015.pdf

³ Reference CE Study

innovation, decreased promotional costs for small and medium sized business, leading to growth, jobs and more consumer choice, thus driving competition. Online platforms enable choice. Users can use as many Internet services as they want – many free of charge. Multi-homing is one of the key features of the Internet economy. Online platforms affect people not only as ‘consumers’ but also as citizens whose utility and well-being depend on factors beyond those that can be captured by standard economic measures. For example, online intermediaries can help support important society goals such as democracy, freedom of speech and media plurality. Further, they enable social capital formation and improve environmental outcomes.

3. Have you encountered, or are you aware of problems faced by **consumers** or **suppliers** when dealing with online platforms?

"Consumer" is any natural person using an online platform for purposes outside the person's trade, business, craft or profession. "Supplier" is any trader or non-professional individual that uses online platforms to provide services to third parties both under their own brand (name) and under the platform's brand.

☐ **No**

TRANSPARENCY OF ONLINE PLATFORMS

4. 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)?

"Trader" is any natural or legal person using an online platform for business or professional purposes. Traders are in particular subject to EU consumer law in their relations with consumers.

☐ **No**

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

☐ **No**

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

☐ **No**

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

☐ No

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

A balance must be struck when addressing the role of platforms in handling content on their services so that they aren't subjected to any increased legal obligations or unreasonable/unworkable conditions. Currently, existing legislation addresses all above issues including acceptable guidelines provided within the framework of the CRD and UCPD including provisions regarding information requirements for consumers preventing companies from providing false/deceiving statements or omitting information that might impact a consumer's decision-making process. In this regard, there is no reason to create a special rule for online platforms that is different than a physical store and to maintain globally focused policies to allow European businesses to remain competitive.

5. Have you experienced that information displayed by the platform (e.g. advertising) has been adapted to the interest or recognisable characteristics of the user?

☒ Yes

EXPLANATION: please refer to the very positive outcomes as a result of using the EDAA principles regarding the advertising space

6. Do you find the information provided by online platforms on their terms of use sufficient and easy-to-understand?

☒ Yes

EXPLANATION: Terms of Service information, which are only visible to actual users of the service, is supplemented by additional information in the product such as contextual notice which provides additional user information.

7. What type of additional information and in what format would you find useful? Please briefly explain your response and share any best practice you are aware of. (1500max)

To make their platforms attractive and personal, most platform providers already go to great expense and effort to provide customized and meaningful information to each user of the platform. The EDAA principles are a good example of an industry led initiative that was far ahead of any legislation to ensure collaboration in this field, further examples below:

- Twitter has endeavoured to make its Privacy Policy and Terms of Service accessible and user friendly. Examples of this include highlighting key points in accessible language throughout both, user notifications of changes and recently the introduction of a data dashboard, a tool that gives users more insight into their account activity.
- When looking for reviews about a business on Yelp, consumers will immediately see above the reviews in prominent manner, a clear message that "businesses can't pay to alter or remove their reviews" with a link to get more information. Consumers can click on the link to get directed to a [page](#) that explains Yelp's approach to reviews. Similarly, users can find information about Yelp's efforts to eliminate fake reviews by clicking on a link provided on

the first page that redirects them to a short explanatory video. Once the Yelp's user support team acquires evidence about a business deliberately attempting to mislead consumers with fake reviews, a "consumer alert" is placed on the business's listing warning consumers and providing them with a link to the evidence.

8. Do you find reputation systems (e.g. ratings, reviews, certifications, trustmarks) and other trust mechanisms operated by online platforms are generally reliable?

☒ Yes

9. Please explain how the transparency of reputation systems and other trust mechanisms could be improved? (1500max)

Users today have many different sources of data to use to judge products or services offered on online platforms. Some of this information will be managed by the platform itself, some may be available through other complementary platforms and yet other information is made available in a "grass roots" nature. Ratings are already part of the well-functioning online economy. Many online services use consumer-generated ratings systems to provide signals of trust and reliability to users. Consumers are aware that these are systems based on the subjective views of other users. Though reputation systems or trust mechanisms can always be improved, like any other service, there is no need for fundamental change in this field. Market solutions are sufficient to addressing these concerns and in general, the best solution to helping all systems improve is enabling them to scale out; more customer engagement in reviewing or providing information about products and services offered on a platform yields better and more accurate overall information.

The adoption of guidelines on the application of the UCPD on online platforms and the proper enforcement of its provisions are the most effective tools to improve transparency e.g. on the issue of paid for reviews and ratings need to be transparent to users and failure to do so is a breach of the UCPD and should be investigated as such. In parallel, the adoption of best practices by the industry has the potential to complement the existing regulatory provisions and help provide consumers with clear and relevant information.

As far as reviews and ratings are concerned, the UK Competition Markets Authority for example has recently published a number of recommendations for businesses running user-generated reviews sites. Those recommendations seek to clarify the existing legal framework and provide legal certainty to both businesses and consumers. A similar exercise is currently being undertaken at EU level with regards to online comparison tools, the scope of which is broad and currently encompasses online reviews.

Trustmark schemes are costly to set up, market and register protect trademarks and few are truly useful.

10. 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. (1500max)

Defining reputational systems on a category as broad as "online platforms" makes it very difficult to identify the main benefits and drawbacks. Before deciding whether any particular reputational system works well or poorly, one would need to study the individual platform, its mechanisms and

the pros and cons of that specific system. At a high level however, the primary benefit of these reputation systems is that they provide additional information for the user to make a more informed choice. User-generated reviews and ratings continue to play an important role in helping consumers to make informed decisions when consumers are looking to purchase/use goods or services online as well as offline. User-generated reviews ensure that consumers can make quicker and confident decision which further boosts competition between businesses offering products and services, and allows for new enterprises and small businesses to enter, compete, expand and build their reputation within a market.

Reputation systems and trust mechanisms operated by online intermediaries are not only reliable, but also allow online communities to play an important role in improving the online environment. Reputation systems and trust mechanisms are some of the most beneficial online tools available to consumers as they provide:

- Speedy responses should concerns arise;
- Due the online reputational issue being so important to companies it is a key driver to companies taking action and making improvements if/where needed, for e.g. adding the “verified buyer” tag to note who has actually purchased an item;
- Put consumers in the driving seat of their choices and empower them to control their online presence.

USE OF INFORMATION BY ONLINE PLATFORMS

11. 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

12. Please explain your choice and share any best practices that you are aware of. (1500max)

Existing legislation has allowed widespread best practices to develop across the industry e.g. data dashboards already provided by a number of companies. For instance, Directive 95/46/EC contains obligations to inform data subjects (including users of online platforms) about collection of personal data, including the fact that personal data is being collected, the identity of the controller and the purpose of the processing. These obligations will become even more detailed in the upcoming General Data Protection Regulation (see in particular Chapter III of legal text). These information provision requirements encompass a very broad range of data, practically anything that has the

potential of identifying an individual. Given the very detailed existing and upcoming legislation in this field, further requirements do not seem necessary. Beyond the legal obligations, industry has also developed numerous tools designed to provide consumers not only with more transparency as to how their data is being used but also allows the consumers to decide which data they want to share and control how they wish to share it. Furthermore the digital industry in Europe promotes and conforms to industry guidelines and codes of practice covering many aspects of data processing, with a view to setting common standards and educating users. One example is the EDAA good practice principles on the processing of data for interest based advertising, which includes the Your Online Choices website and opt out mechanism.

13. Please share your general comments or ideas regarding the use of information by online platforms (3000max)

Platforms use the information from those suppliers, traders and users who use the platforms in order to improve the overall services provided by means of data analytics. For example, data from suppliers, users, and traders can help businesses predict inventory needs more reliably and react to consumer demands in real-time.

Platforms must ensure that they provide a high level of security for the information they handle as in the highly competitive landscape the trust of the users and their general ecosystem is often a market differentiator. At the same time platforms must be able to provide an added value for its users. This requires finding a balance between allowing room for different business models to exist while ensuring the highest level of privacy rights.

14. Are you a holder of rights in digital content protected by copyright, which is used on an online platform?

☒ Yes

15. As a holder of rights in digital content protected by copyright have you faced any of the following circumstances:

An online platform such as a video sharing website or an online content aggregator uses my protected works online without having asked for my authorisation.

☒ No

16. An online platform such as a video sharing website or a content aggregator refuses to enter into or negotiate licensing agreements with me.

☒ No

17. An online platform such as a video sharing website or a content aggregator is willing to enter into a licensing agreement on terms that I consider unfair.

☒ No

18. An online platform uses my protected works but claims it is a hosting provider under Article 14 of the E-Commerce Directive in order to refuse to negotiate a licence or to do so under their own terms.



As you answered YES to some of the above questions, please explain your situation in more detail.
(3000 max)

This line of questions raises several different and seemingly unrelated topics. To the extent the questions address licensing agreements, we believe that a one-size-fits-all approach to regulation is inappropriate.

The online services listed in the proposed definition of platforms are diverse in nature, ranging from online content stores to e-commerce websites. They may allow users to sell second-hand DVDs, enable the online distribution of films, music or books, host videos online or allow users to share photos. Depending on the situation, a licence, permission, exception, or application of the E-commerce liability regime may be considered. As a result, we think it is neither appropriate nor possible to adopt a one-size fits all answer to the questions listed.

Licenses are relevant where the platform's business model is the distribution of licensed content. Where it is not, and the presence of copyright protected content is a breach of their ToS, it should be treated as such. There should be no expectation that they negotiate a license for content a third party (i.e.: a user) put on their platform.

In addition, assessing whether a commercial transaction such as licence is “fair” is a subjective test (the recent Directive 2014/26/EU already lays down different criteria in the specific case of collecting society). We suggest looking first for evidence of market failures, if any, and, from a regulatory perspective, whether the current framework is effective and proportionate. These notions are tried and tested cornerstones for EU intervention. We believe the current framework is effective and proportionate, although the current complex licensing framework, the existence of copyright levies or the creation of new compensation claims or rights for news publishers distort markets and may themselves lead to market failure.

Many services listed in the questions above are not themselves “using” copyright works but are instead information society services coming under the scope of the e-commerce Directive. Users of such services may potentially infringe copyright - a decision ultimately for a court - in which case online services act expeditiously. EDiMA furthermore shares the view that the most effective way to address copyright infringements is through cooperation between all stakeholders. First of all, there is strong evidence suggesting that it is greater innovation, in the form of the introduction of new legal services and convenient distribution techniques that drove the decrease in piracy rates, rather than legislative efforts (further information available [here](#)). The current system strikes a good balance for all parties, including for rights owners, who gather revenue and market insights from these services.

Online services have procedures and high-level policies in place whereby a report of potential copyright and trademark infringements can be made as well as user-friendly dispute resolution mechanisms for counter-notices.

19. If you own/develop an online platform, what are the main constraints that negatively affect the development of your online platform and prevent you from extending your activities to new markets in the EU? (3000 max)

The fragmentation of rules governing the digital economy across 28 Member States creates challenges to building and scaling-up Internet businesses across Europe. Some of the biggest constraints that continue to create barriers to building pan-European businesses and extending services to different areas in the EU include:

- the lack of harmonisation of certain consumer laws across EU Member States;
- the lack of understanding of intricate mechanisms that should trigger action either in the context of copyright or notice and action
- rules around issues like copyright, including levies and cumbersome licensing processes;
- the impact of court decisions which further fragment the EU market;
- fragmented postal legislation;
- VAT complexity, which dissuades small and medium sized business from selling and storing their products in more EU Member States;
- And language requirements that make it difficult to sell products across borders.

Over-regulation and uncertainty in the legal regime also disincentivises investment in European digital businesses and drives many digital companies to choose to scale elsewhere than in Europe. To encourage the growth of European platforms, we need clear, consistent rules around liability. The Commission's 2013 effort to look at establish a single Notice-and-Action regime for illegal content online was a positive step in this direction. More self-regulation and best-practice sharing would benefit innovation.

20. How do you ensure that suppliers of your platform are treated fairly? (1500 max)

The online platform market is highly competitive and consumers will only continue to use the service provided by any given platform if they are satisfied with the level of services provided. Suppliers are competitive market players and are free to strive within the online market in general. This ensures that online platforms continue to provide European consumers and businesses with competitive and innovative goods and services.

Online platforms continue to treat all suppliers and traders fairly and equally as these are the customers for many online platforms, for example within online marketplaces, the sellers on the marketplace are the customers. The aim is to have a robust seller support organisation to assist sellers when they encounter both technical and operational problems while trying to sell their products on an online marketplace. As there are a lot of competing online marketplaces for sellers to offer their products, and if an online marketplace fails to treat their sellers fairly, then they risk losing their trust and their business.

21. Can a supplier personalize its offer of products / services on the platform you represent?

- ☐ Yes
- ☐ No

How? (1500 max)

For many platforms, suppliers have the ability to personalise various aspects to better promote their goods or services. Obviously, there is not a uniform approach across platforms, as there numerous brands, business models and types of platforms that offer and provide different services to suppliers.

On some online marketplace websites, for example, sellers are able to create their own detailed pages for products and use their own text and images in the most effective manner to educate consumers about their products.

Platforms personalise offerings to the user, not the supplier. The supplier can buy this targeting service or choose not to. Furthermore, the data stays with the platform and is never 'sold' to suppliers as it is in the postal direct marketing world so users have greater protection.

22. Is there a room for improvement in the relation between platforms and suppliers using the services of platforms?

- ☒ Yes, through market dynamics.
- ☐

23. Are you aware of any dispute resolution mechanisms operated by online platforms, or independent third parties on the business-to-business level mediating between platforms and their suppliers?

- ☒ Yes

24. Please share your experiences on the key elements of a well-functioning dispute resolution mechanism on platforms (1500 max)

Standard arbitration provisions can be used by online platforms and would likely work well. Judicial process can also be a good option in some cases. The Uniform Domain-Name Dispute-Resolution Policy is a process established by the Internet Corporation for Assigned Names and Numbers for the resolution of disputes regarding the registration of internet domain names. Created in 1999, it is the oldest online dispute resolution system around and has proven itself ever since. Since its inception, the UDRP has decided on 35,000+ cases involving disputes regarding domain names. Interestingly, there are several dispute resolution providers, not just one. Its success can be attributed to the highly-skilled professionals it employs. Overall, it has shown itself to shorten proceedings duration, ease enforcement and have a global reach. A number of platforms have well-functioning dispute resolution mechanisms in place today.

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

25. 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

26. If you can, please provide the description of some best practices (max. 5)

	Name of the online platform	Description of the best practice (max. 1500 characters)
1.	Google	Google Takeout allows a user to remove their data including email history, contacts, browsing history, etc. from Google and transfer them to other competing services.
2.	Yahoo	Yahoo has in place responsible and privacy-protective practices that allow its users to download the information that is relevant to them, such as their emails and attachments, as well as their contacts, calendar, or Flickr photos. Our help pages walk them through the process.
3.		
4.		
5.		

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

☐ No

Please explain your choice and share any best practices that you are aware of. (3000 max)

Data portability concerning personal data of the user is laudable policy objective and indeed will be addressed in details by the upcoming General Data Protection Regulation (GDPR). Each online platform should continue to be incentivised to build the most effective services it can for its users and customers. For example, while sellers should be able to extract all of their own information about sales on the platform, there should not be any requirements on the exact manner in which online marketplaces have to build their technology or the data they are obligated to share with users of their online marketplace. Services are best suited to determine portability technology, not regulators. A top-down approach will hamstring companies in how they build out this tool

Many online services already offer best in class portability to users. However, even in this field the proposed provision raises many questions. What happens, for example, if the data desired to be transmitted also contains relevant information of other data subjects? Introducing a broad portability requirement going beyond personal data would clearly raise an even broader set of compliance questions and challenges, not least in terms of reconciling such right with other parts of the EU acquis related to the protection of intellectual property rights. A broad portability requirement could also result in the disclosure of commercial secrets and the provider's IP such as algorithms.

Regulatory intervention in this area seems to be superfluous as the market is able to provide data portability solutions to users within the framework set out in data protection laws. We believe that in general consumers and traders can easily move data from one platform to another, although any consideration of this issue would necessarily have to focus on the specific online platform, the specific data involved, and the specific options available for moving.

28. Please share your general comments or ideas regarding the ability of consumers and traders to move from one platform to another (3000 max)

An online trader or consumer is always freely able to move from one platform to another. This is the essence of consumer choice online. As there are a number of competing online platforms and marketplaces for traders/sellers to offer their products and services, many of these use this to their advantage to add their products on various marketplaces(s). Any consideration of this question would necessarily have to focus on the specific online platform, the specific data involved, and the specific options available for moving; therefore, it is difficult to generalize across all online platforms to address this issue.

Online platforms also provide solutions to help the seller/trader price their products, improve their delivery capabilities, maximise the sale of their products by selling on multiple different platforms/marketplaces and provide the seller/traders with easily accessible data on their product sales across all platforms/marketplaces and channels where they do business. Different platforms may provide all or some of these services. Therefore, online platforms are already incentivised to make efforts to ensure their platforms are compatible for sellers/traders that are using various online platforms.

In a recent study, Oxera, a leading consulting firm, found that both businesses and consumers use multiple services for similar purposes with ease and do not report issues of 'lock-in'. They move easily between one platform and another. We support portability principles but would caution against strict legal requirements. For example, requiring extremely detailed portability (specific details of formatting) risks replacing innovation in proprietary standards with consistent but inflexible government-mandated standards that deter the development of new kinds of formatting and data handling. Requiring a company to share the fruits of their ingenuity can deter investment, innovation, and economic growth. Data portability should not extend to requiring firms to share sensitive consumer information with rivals, which could violate the terms of a firm's contractual obligations to its users and raise separate individual privacy concerns.

ACCESS TO DATA

29. As a trader or a consumer using the services of online platforms did you experience any of the following problems related to the access of data?

- a) unexpectedly changing conditions of accessing the services of the platforms
☐ No
- b) unexpectedly changing conditions of accessing the Application Programming Interface of the platform
☐ No
- c) unexpectedly changing conditions of accessing the data you shared with or stored on the platform
☐ No
- d) discriminatory treatment in accessing data on the platform
☐ No

30. Would a rating scheme, issued by an independent agency on certain aspects of the platforms' activities, improve the situation?

☐ No

Please explain your answer (1500 max)

Online users already have a number of tools at their disposal on some platforms, including user controlled preferences, and while it is important to understand that changes to access to data may represent inconveniences to consumers, it is important for business to retain the possibility to adjust their services and the related terms of use to the changing business environment and other changing circumstances. This is in particular true in the online environment, which is clearly characterised by dynamic and constant change. While businesses already make important efforts to highlight the changes they make, any obligation that would prohibit companies to adjust their business practices to the competitive environment and even more importantly to the ever evolving needs of their customers would be hugely detrimental to European businesses. Such new rules would hit start-ups especially hard as they would lose their nimbleness, one of their key advantages they hold over bigger competitors. In the interest of the budding start-up scenes in London, Berlin, Stockholm, Paris and Dublin, the European Commission should refrain from adding unnecessary red tape that would prevent European start-ups to scale up.

Furthermore, it is worth noting that there is no offline equivalent to this kind of regulatory intervention. This would be considered overly intrusive

31. Please share your general comments or ideas regarding access to data on online platforms (3000 max)

The high level of innovation activity on digital markets is favoured by low barriers to market entry and access to data. Digitalisation, and the Internet in particular, has reduced a whole range of economic costs for businesses. As the German Monopolies Commission has highlighted in their recent special report on "The challenge of digital markets": "Through such cost reduction companies can set up and expand their operations very quickly. In addition, whereas high investment costs can frequently make a market entry difficult, such costs have in recent times increasingly become variable costs in certain parts of the digital economy. This is the case where computing power or storage space can be rented by companies to fit their needs, for instance thanks to new technologies (e.g. cloud computing) or open source software. These lower barriers to entry increase competition in digital markets.

Tackling illegal content online and the liability of online intermediaries

Tackling illegal content online and the liability of online intermediaries

32. Please indicate your role in the context of this set of questions

*Terms used for the purposes of this consultation: "**Illegal content**" Corresponds to the term "illegal activity or information" used in Article 14 of the E-commerce Directive. The directive does not further specify this term. It may be understood in a wide sense so as to include any infringement of applicable EU or national laws and regulations. This could for instance include defamation, terrorism related*

content, IPR infringements, child abuse content, consumer rights infringements, or incitement to hatred or violence on the basis of race, origin, religion, gender, sexual orientation, malware, illegal online gambling, selling illegal medicines, selling unsafe products. **"Hosting"** According to Article 14 of the E-commerce Directive, hosting is the "storage of (content) that has been provided by the user of an online service". It may for instance be storage of websites on servers. It may also include the services offered by online market places, referencing services and social networks. **"Notice"** Any communication to a hosting service provider that gives the latter knowledge of a particular item of illegal content that it transmits or stores and therefore creates an obligation for it to act expeditiously by removing the illegal content or disabling/blocking access to it.. Such an obligation only arises if the notice provides the internet hosting service provider with actual awareness or knowledge of illegal content. **"Notice provider"** Anyone (a natural or legal person) that informs a hosting service provider about illegal content on the internet. It may for instance be an individual citizen, a hotline or a holder of intellectual property rights. In certain cases it may also include public authorities. **"Provider of content"** In the context of a hosting service the content is initially provided by the user of that service. A provider of content is for instance someone who posts a comment on a social network site or uploads a video on a video sharing site.

☐ none of the above

Please explain(3000 max)

Representing online intermediaries

33. Have you encountered situations suggesting that the liability regime introduced in Section IV of the E-commerce Directive (art. 12-15) has proven not fit for purpose or has negatively affected market level playing field?

☐ No

Please describe the situation. (3000 max)

The e-commerce Directive's liability regime has proven itself effective and proportionate, and promoted dynamic, competitive markets since its inception. It gives online service providers the confidence to deliver their services. The Directive enables them to operate efficient, open platforms where users and third parties can search and exchange goods, services and information. A recent study from Copenhagen Economics argues that the limited liability regime is not only necessary for the functioning and growth of online intermediaries, but is also beneficial to the European economy.

Copenhagen Economics estimates that online intermediaries' activities in the EU contributed around €430 billion to the GDP of the EU27 in 2012. This is comprised of a direct GDP contribution of €220 billion and a long-term indirect GDP contribution due to the productivity impact of intermediaries on other firms of €210 billion. If the market level playing field is affected, it is by platforms located (or hiding) in exotic countries that provide a service within Europe (e.g. pirate sites, counterfeit marketplaces, etc.).

Online intermediaries affect people not only as 'consumers' but also as citizens whose utility and well-being depend on factors beyond those that can be captured by standard economic measures. For example, online intermediaries can help support important society goals such as democracy, freedom of speech and media plurality. Further, they enable social capital formation and improve environmental outcomes.

Any adverse changes to the liability regime and increased legal obligations such as monitoring content could have a chilling effect on privacy and freedom of expression. Holding an online service liable for finding and removing potentially illegal content makes them both judge and juror and could lead to legitimate speech being removed.

It is important to maintain the existing intermediary liability regimes while ensuring that the EU framework remains consistent with legal safeguards provided in competing markets to avoid any negative impacts on the goals set for the digital economy in the EU 2020 strategy. Poor choices in this regard may not only disadvantage the EU in the long term, but also may have a negative impact on some of the Europe's core values such as freedom of expression.

The layered framework in the e-commerce Directive shows huge foresight and has proved enduring, providing precious legal certainty for the digital players in a market where such certainty has been limited. EDiMA should also express concern that the tone and direction of this consultation would cut across that certainty and probably undermine it.

-
34. Do you think that the concept of a "mere technical, automatic and passive nature" of information transmission by information society service providers provided under recital 42 of the ECD is sufficiently clear to be interpreted and applied in a homogeneous way, having in mind the growing involvement in content distribution by some online intermediaries, e.g.: video sharing websites?

☒ Yes

Please explain your answer. (1500 max)

The concept of "mere technical, automatic and passive" information transmission by information society service providers has proven flexible enough to apply in multiple instances and in a variety of cases (media law, intellectual property law, privacy, etc.). The European Court of Justice has clarified in several cases (C-236/08, Google; C-324/09, L'Oréal; C-70/10, Scarlet; C-360/10, SABAM; C-291/13, Papasavvas) the concepts used in the E-commerce Directive and harmonised its construction by national courts. Established websites do not raise specific issues and should not be treated differently than other hosting service providers. Established sites such as Facebook, YouTube, Vimeo, DailyMotion, Vine, Wat TV, etc. promptly remove content when they are given valid notice. Some have developed specific systems to further prevent the sharing of copyright infringing content, for example DailyMotion's signature, YouTube's Content ID, and Facebook's recently announced copyright matching tool. Responsible providers have developed mechanisms for notifying infringements. In some cases, providers allow right holders to keep infringing content on the service and monetise it.

However, such systems are only possible because the flexible and proportionate framework offered by the E-commerce Directive set the incentives and space to engineer them. They are no substitutes to the rule of law, require the collaborations of right holders, and cannot be extended systematically to other types of services.

Some platform providers also create and/or distribute content (i.e.: a layer above the mere transmission layer). For this activity they are not passive but this doesn't mean they also become more liable for content for which there are a mere transmitter.

35. 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?

☒ No

Please provide examples (1500 max)

Retaining the status quo on the special liability regime of the e-commerce Directive is the best option to allow businesses and consumers to benefit from further growth and innovation in the digital economy. This holds true regarding whether to revisit the existing categories of intermediary services. In fact, the key advantage of the e-commerce Directive is its technological neutrality, making it able to adjust to new developments on the market. The directive doesn't list specific business models, instead laying down a resilient, future proof model. There is no doubt that technologies have evolved and that some intermediaries have more capacity of action, for example, access providers that can filter spam so their users aren't flooded with unwanted messages. However this does not change the rationale of the intermediaries liability regime. In other words, it's not because access providers can stop unsolicited mails that they can become liable for all forms of content they carry. Diverging case law at the national level is due to local legal specificities that arguably aren't compatible with the principles of the e-commerce directive, for example the peculiar duty of care ("Störerhaftung") regime in Germany.

Therefore, there is no need for new categories of intermediaries and rather the e-commerce directive should cover search engines to address the divergence of national rules and case law. For example, some Member States introduced the same liability provisions for search engines as for host providers, others qualify such services as mere conduit, whereas in most case Member States have not adopted specific legislation but apply general principles of law.

On the "notice"

36. 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?

☒ No

37. Do you think that any of the following categories of illegal content requires a specific approach:

☐ Other:

Please specify.(500max)

It is important not to modify the horizontal application of art. 14 of the e-commerce Directive. Certain types of content may be more easily identified as illegal and are illegal regardless of context(e.g., child abuse content) while others require difficult legal judgments an intermediary alone cannot make and hence require judicial determination (e.g. defamation where an author may

have a defence or the facts may be true). Therefore, it should not be for the intermediary to make the legal assessment if a piece of content is defamatory or not. Placing the burden on intermediaries risks content being removed without legal grounds and the rights of other parties being inadvertently infringed under threat of litigation.

38. Please explain what approach you would see fit for the relevant category. (1000 max)

Under applicable case law, intermediaries must take action when reported content is obviously unlawful. To facilitate this, intermediaries have developed mechanisms which allow for efficient reporting to them. This is the only framework that intermediaries can use as they are private entities and are not in position to arbitrate complex legal situations. The key lies in how unlawfulness is determined in order for the intermediary to take action and who provides that judgement of unlawfulness.

Thus the E-commerce Directive already distinguishes between content that obviously requires immediate action and other content. This is more effective and rational than distinguishing between different categories or types of illegal content.

There is no need to implement a specific approach for one or several of the categories listed above, as intermediaries have developed their own policies, or adhered to codes of conduct, under which victims can get a broader remedy than what they would get under existing laws, e.g. global removal of copyright infringing content.

On the "action"

39. Should the content providers be given the opportunity to give their views to the hosting service provider on the alleged illegality of the content?

- ☐ Yes
☒ No

Please explain your answer (1500 max) - over

Under the E-commerce Directive, the hosting provider is required to remove or to disable access to the information. None of these two remedies consists of making a judgement on the content. Were the intermediary to receive the views of the content provider on the alleged illegality of the content, this could not have any legal effect as the intermediary is not dealing with the content per se.

Intermediaries are not best placed to act as judges in cases where illegality is not obvious and undeniable, especially in cases of copyright infringement where there is not always a proof of title. In addition, there are existing legal processes that act as a mediator, passing third party complaints to a content providers and passing the content provider's reply back to the complainant and so on. This lack of certainty resulted in that some intermediaries take content down without properly examining the asserted grounds for removal because there is no due legal process. The greater the pressure that is put upon intermediaries in terms of liability and the requirement to mediate or judge third party disputes, the greater will be the incentive to remove content without carefully reviewing, or otherwise testing the validity of the notices received. Before approaching the intermediary, the complainant should first be required to make a reasonable effort, making use of the means and information publicly available, to contact the user, webmaster, or other content

provider responsible for posting the objectionable content to the Internet and ask to have it removed.

Such a requirement would provide effective notice to the person most capable of controlling further dissemination of the content in question: the person who put it online in the first place.

Where a complainant cannot obtain a remedy this way policy efforts should focus on developing processes by which they can apply directly to the intermediary without the intermediary having to take on additional liability – beyond what the Directive envisaged – in order to assist the process. This is a very important principle of the Directive that must be retained.

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

☐ **No**

Please explain

Any policy should take into consideration that there will always be bad actors that circumvent even well-designed policies, and online platforms should not have to worry about being punished for not being perfect. Moreover, notice needs to be specific and regulators should understand that content that is unlawful in one setting, may not in another.

An intermediary should not be subjected to proactive monitoring obligations. As confirmed by the recent Court of Justice of the European Union decisions (SABAM v. Scarlet and SABAM v. Netlog), such general monitoring obligations were both inconsistent with the letter of the E-Commerce Directive and with important underlying rights of users, including the rights of freedom of expression and access to information.

In addition, even if an intermediary had the technical capacity to put in place stay down measures, it would have no effect. The content would quickly be available somewhere else (on a site that does not play by EU rules) and users would still be able to access it. A stay-down requirement would provide significant technical challenges. Even if an automated filter is applied to service, it would need be based on an algorithm with defined parameters. All an infringing party needs to do is change one or two variables to the content for it to go undetected.

On duties of care for online intermediaries:

Recital 48 of the Ecommerce Directive establishes that "[t]his Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities". Moreover, Article 16 of the same Directive calls on Member States and the Commission to encourage the "drawing up of codes of conduct at Community level by trade, professional and consumer associations or organisations designed to contribute to the proper implementation of Articles 5 to 15". At the same time, however, Article 15 sets out a prohibition to impose "a general obligation to monitor".

41. (For online intermediaries): Have you put in place voluntary or proactive measures to remove certain categories of illegal content from your system?

☒ Yes

Please describe them. (1500 max) - over

As is the case under current law, a notice and takedown system designed by the e-Commerce Directive should not itself create additional liability on the intermediary where none exists under the applicable law: where the intermediary is not liable then putting the intermediary on notice does not create liability. In addition, liability for the action taken as a result of a notice should remain with the claimant not the intermediary acting in good faith to take action as per the notice it is given. This is a core principle under e.g. the DMCA and the CDA which is absent in the EU framework.

It is important to distinguish such measures from systems that review websites for the presence of specific products or products that the platform has chosen not to offer on its marketplace. When the platform realises a product can't be sold on its marketplace, the product is removed without hesitation. Many online marketplaces have help pages that inform sellers/traders about products that can't be sold on the marketplace so they have access to this information prior to the removal of any products.

Voluntary systems for notice and action, flagging systems, manual review systems and other content monitoring/optimisation and moderation systems aimed at preventing illegal content, or content that violates terms and conditions of service, shouldn't be counted against the intermediary, when considering whether activities of an intermediary are merely technical, automatic and passive nature, or whether the intermediary has knowledge/control over the data which is transmitted/stored. The adoption of such pro-active measures should not be used as the basis for denying the intermediary the benefit of limited liability set out in the e-commerce Directive.

42. Could you estimate the financial costs to your undertaking of putting in place and running this system? (1500 max)

Documentation on costs of such systems is rare, but the few figures that exist show how expensive they are. YouTube is one of the rare intermediaries which discloses how much it spent in developing Content ID: € 55.8 million for a system that works just for copyright. An Irish court estimated that a software to send notices to users of an intermediary would cost between € 800.000 and 940.000.

43. Could you outline the considerations that have prevented you from putting in place voluntary measures? (1500 max)

Voluntary systems for notice and action, flagging systems, manual review systems, and other content monitoring/optimisation and moderation systems aimed at preventing illegal content, or content that violates terms and conditions of service, should not be counted against the intermediary, when considering whether the activities of an intermediary are of a merely technical, automatic and passive nature, or whether the intermediary has knowledge of or control over the data which is transmitted or stored. Under current EU law that the adoption of such pro-active measures are used as the basis for denying the intermediary the benefit of the limitation of liability set out in the E-commerce Directive. The absence of a legal safe harbour for intermediaries acting

in good faith – i.e.: genuine legal protection from action from claimants and users – remains a significant barrier.

44. Do you see a need to impose specific duties of care for certain categories of illegal content?

☐ No

45. Please specify for which categories of content you would establish such an obligation. (1500 max)

The main obstacle to a well-functioning process for dealing with illegal content online is a process for ascertaining illegality combined with explicit liability on a claimant for a wrongful notice as well as a genuine safe harbour for intermediaries acting in good faith. The policy focus should lie in making this a reality thus making the duty of care concept redundant.

46. Do you see a need for more transparency on the intermediaries' content restriction policies and practices (including the number of notices received as well as their main content and the results of the actions taken following the notices)?

☐ No

47. Should this obligation be limited to those hosting service providers, which receive a sizeable amount of notices per year (e.g. more than 1000)?

☐ No

48. Do you think that online intermediaries should have a specific service to facilitate contact with national authorities for the fastest possible notice and removal of illegal contents that constitute a threat for e.g. public security or fight against terrorism?

☐ No

49. Do you think a minimum size threshold would be appropriate if there was such an obligation?

☐ No

50. Please share your general comments or ideas regarding the liability of online intermediaries and the topics addressed in this section of the questionnaire. (5000 max)

For the first time in history, the Internet allows anyone, anywhere to instantly connect with billions of people around the world. Through a variety of online services -- search engines, social networks,

video sites, blogging tools, auction services, and many others -- we are able to create content, find information published by one other, communicate, and buy and sell goods and services. Platforms and services that help users interact with another are often called "intermediaries," and as the Internet evolves, so too do intermediaries.

Intermediary liability is the concept of holding an online platform responsible for the illegal or harmful content created by users of those services. Who counts as an "intermediary" often includes access providers, search engines, hosting platforms, email providers, payment processors, social networks and many more. The commonality between these entities is that they enable others to do things on the Internet, they are intermediaries in the sense that they provide services that allow for user A to interact with user B in different ways.

Requiring online services to monitor every piece of content or imposing harsh liability would be bad for innovation, free expression, and privacy. This is analogous to the offline world; telephone companies are not forced to monitor people's calls to make sure they are not doing something illegal, and they are not held legally responsible for callers who plan a crime over their phone lines.

The liability regime of the e-commerce Directive (Articles 12-15) remains fit for purpose. The limited liability regime is not only necessary for the functioning and growth of online intermediaries, but it is also beneficial to the European economy. The intermediaries' contributions to the economy would not be possible at the current level without the liability regime as it is currently designed. Any adverse changes to the liability regime – such as increased legal obligations on intermediaries – could have a chilling effect on innovation and the economic activity of online intermediaries, putting this value at risk.

In addition, if a service were automatically liable for illegal content, it would be much more likely to remove all sorts of controversial (though legitimate) speech, for fear of facing legal penalties. The intermediary liability regime is a standard that can be found in several legislations (US, CA, JP, AU, etc.). It would be a fundamental problem for internet commerce if companies can be subject to a more severe liability regime in Europe, and in particular a burden on European start-ups that could not compete on the same basis as companies abroad.

Data and cloud in digital ecosystems

Data and cloud in digital ecosystems

FREE FLOW OF DATA

ON DATA LOCATION RESTRICTIONS

51. In the context of the free flow of data in the Union, do you in practice take measures to make a clear distinction between personal and non-personal data?

☒ Yes

52. 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?)

☒ Yes

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

☒ No

54. What kind(s) of ground(s) do you think are justifiable?

- ☐ National security
- ☐ Public security
- ☐ Other reasons:

Please explain

Security is a fundamental concern when determining where to store and how to transfer data. Yet data localisation requirements increase data security risks and costs by requiring storage of data in a single centralised location that is more vulnerable to natural disaster, intrusion, and surveillance. Data localisation requirements make it more difficult to implement best practices in data security - including redundant geographic storage of data and the usage of distributed security solutions such as sharding and obfuscation. In addition, under these requirements, companies must often increase reliance upon local data centres that lack sufficient capacity, upgraded hardware, or experienced security personnel to counter intrusions and detect signals associated with potential breaches. Storing data in a single centralised location can also present a more attractive target for surveillance. Further information can be supplied if necessary.

ON DATA ACCESS AND TRANSFER

55. 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

Please explain your position (3000 max)

All businesses that operate or transact using digital technology process data for many purposes. Data is analysed to measure the underlying performance of a business and the resilience of the technology that supports it. Data are also used to improve or personalize the customer's experience. It is hard to overstate the importance of data to the success of modern business.

Existing EU law allows this fundamental transformation to proceed because it already provides for sufficient and fair access to and use of data in the EU, while safeguarding fundamental interests of parties involved. Concretely, we would like to highlight a necessary distinction between two separate relationships between the user of an Information Society Services ("ISS") (as defined in the E-commerce Directive, 2000/31/EC) and the provider of that service. On the one hand, the contractual relationship between the user and service provider and, on the other hand, the "data relationship" between those two parties.

The contractual relationship between the user and the service provider is, by definition, primarily governed by contract law and the terms agreed between the parties. When dealing with consumers, the user also enjoys additional consumer law protections under the Consumer Rights Directive (2001/83/EC) and other such instruments. The data relationship between the parties is governed by the Data Protection Directive (95/46/EC) and related instruments. On the whole, the current regulatory framework is sufficiently equipped to facilitate the free flow of data, including the sufficient and fair access to and use of data, and safeguarding fundamental interests of data subjects. However, there is currently insufficient clarity on the legal implications of the European Court of Justice ruling on the invalidation of the Commission's Safe Harbour decision for the transfer of personal data to the United States (Schrems case). Companies may cut off data flows in the current environment to avoid legal risk even where fundamental rights are not at risk.

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

☒ Not necessary

57. 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

58. Please share your general comments or ideas regarding data access, ownership and use (5000 max)

EDiMA shares the view that trust and security in digital services is a key factor to the Digital Single Market. EU data protection rules must find a balance to ensure that they meet the expectations of consumers while being fit for purpose for businesses. The fact that many Member States impose additional layers of data requirements in certain sectors (e.g., health, etc.) creates a barrier to cross-border supply of cloud services to organizations within these sectors, and the sheer complexity of these rules against the backdrop of EU laws makes many organizations reluctant to even consider moving to the cloud—even though many such organizations might achieve a higher level of data protection and security if they were to do so.

The recent OECD Report on Data-driven Innovation for Growth and Well-being highlights the complexity of the policy questions around data, including access, ownership and use: "In contrast to other intangibles, data typically involve complex assignments of different rights across different stakeholders who will typically have different power over the data depending on their role. In cases where the data are considered "personal", the concept of ownership is even less practical, since most privacy regimes grant certain explicit control rights to the data subject that cannot be restricted – see for example the Individual Participation Principle of the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data." Given this complexity, the report suggests that policymakers should engage in further thinking on how issues of data ownership and the attribution of liability between decision makers, data and data analytics providers. It is commendable that the European Commission is committing to this thinking exercise and we would like to assist the Commission in its endeavour.

ON DATA MARKETS

59. What regulatory constraints hold back the development of data markets in Europe and how could the EU encourage the development of such markets? (3000 max)

Before looking at what regulatory constraints hold back the development of data markets in Europe, it is important to consider how commercial decisions are taken on where and what services to offer.

There are, overall, three basic factors that influence businesses' commercial decisions to offer data services: commercial considerations such as language, profitability or market demand variations; where businesses can secure the necessary rights, in particular copyright, to do so; and whether the sale of digital content or a good or the providing of a service leads to additional charges or compliance requirements under national law (e.g. copyright levies). Short of commercial considerations, copyright, data protection and other compliance requirements seems to be the main obstacle to the development of data markets in Europe.

Regulations can be modified without sacrificing privacy protections for individuals, which are of course also essential, not least because they generate trust in data exchanges. Codes of conduct, and certification schemes can help to resolve some of the privacy-related protection concerns relating to exchanges of data for Big Data purposes. Given the borderless nature of DSM technologies, it is also critical that codes of conduct and standards that are developed for European cloud services are also aligned with international efforts. Alignment of European and international cloud standards and codes will enable European cloud businesses to participate in international data markets with less "friction" and cost.

ON ACCESS TO OPEN DATA

60. 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)?

Open by default means: Establish an expectation that all government data be published and made openly re-usable by default, while recognising that there are legitimate reasons why some data cannot be released.

- ☐ Introducing the principle of 'open by default'[1]
- ☐ 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 unfavourable decisions

Please specify

Access to open data will have a positive impact on the economy and society at large. Specifically, there are four main advantages to open data - as identified by the European Commission:

- public data has significant potential for re-use in new products and services;

- addressing societal challenges – having more data openly available will help us discover new and innovative solutions;
- achieving efficiency gains through sharing data inside and between public administrations;
- fostering participation of citizens in political and social life and increasing transparency of government.

To fully reap these four benefits for Europe, the Commission should focus on improving interoperability, introducing the principle of “open by default”, further limiting the possibility to charge for re-use of public sector information and make remedies available to potential re-users against unfavourable decisions. By focusing on these four actions, the Commission will be able to make access to open data even more meaningful and unleash the promises of the Big Data era holds.

61. 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?

☐ No

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

62. Do you think that data generated by research is sufficiently, findable, accessible identifiable, and re-usable enough?

☐ No

63. Why not? What do you think could be done to make data generated by research more effectively re-usable? (3000 max)

The question of access to and re-use of data generated by publicly funded research is only one aspect of the question. Another issue - in relation to research data in general - is the way copyright may impact text-and-data mining activities.

Access to material being mined should be secured - including, if appropriate, with a licence. But once access is secured, there should be no additional copyright permission required to mine the material, irrespective of whether the purposes are commercial or not. Exemptions in the US or Japan are already giving those countries a competitive edge, from research to business applications.

64. 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

65. As a provider/user of Internet of Things (IoT) and/or data driven services and connected tangible devices, have you ever encountered or do you anticipate problems stemming from either an unclear liability regime/non –existence of a clear-cut liability regime?

The "**Internet of Things**" is an ecosystem of physical objects that contain embedded technology to sense their internal statuses and communicate or interact with the external environment. Basically, Internet of things is the rapidly growing network of everyday objects—eyeglasses, cars, thermostats—made smart with sensors and internet addresses that create a network of everyday objects that communicate with one another, with the eventual capability to take actions on behalf of users.

☐ **No**

☐ I don't know

66. If you did not find the legal framework satisfactory, does this affect in any way your use of these services and tangible goods or your trust in them?

☐ **Yes**

67. 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?

☐ **Yes**

68. 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? (3000 max)

We take note that there are already in place various legal instruments governing liability of different actors. Examples include the E-commerce Directive that put in place a specific liability regime for services; or the data protection framework (95/46/EC) that contains a clear division of liability between controllers and processors, which will be not likely to be fundamentally altered by the General Data Protection Regulation. To the extent liability rules are addressed, however we agree they should be consistent and harmonized across the EU.

69. As a user of IoT and/or data driven services and connected tangible devices, does the present legal framework for liability of providers impact your confidence and trust in those services and connected tangible goods?

☐ **I don't know**

70. 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?

☐ **No**

ON OPEN SERVICE PLATFORMS

71. 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?(3000 max)

There are benefits to both open and closed service platforms. These benefits are realised through the advantages of scale, market making and the ability to interact across geographic boundaries. There are both advantages and disadvantages of different approaches to openness. The variety of business models and approaches allow for a proliferation of approaches at the platform and application level. These systems are in the process of being developed and shaped by market forces. We would not encourage intervention into this fast moving market at this time.

PERSONAL DATA MANAGEMENT SYSTEMS

The following questions address the issue whether technical innovations should be promoted and further developed in order to improve transparency and implement efficiently the requirements for lawful processing of personal data, 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'.

72. 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

73. Would you be in favour of supporting an initiative considering and promoting the development of personal data management systems at EU Level?

☐ No

EUROPEAN CLOUD INITIATIVE

74. What are the key elements for ensuring trust in the use of cloud computing services by European businesses and citizens

"Cloud computing" is a paradigm for enabling network access to a scalable and elastic pool of shareable physical or virtual resources with self-service provisioning and administration on-demand. Examples of such resources include: servers, operating systems, networks, software, applications, and storage equipment.

- ☐ Reducing regulatory differences between Member States
- ☐ Standards, certification schemes, quality labels or seals
- ☐ Use of the cloud by public institutions

75. As a (potential) user of cloud computing services, do you think cloud service providers are sufficiently transparent on the security and protection of users' data regarding the services they provide?

☒ Yes

76. What information relevant to the security and protection of users' data do you think cloud service providers should provide?

We believe that concerns about transparency stem in part from a perception issue as a result of a lack of widespread expertise about cloud security and privacy. Given enough knowledge on the matter, cloud customers can ask more demanding questions from their cloud providers and reward providers that offer them the security and privacy protections that they need. As explained below in greater detail, cloud service providers are already regulated sufficiently with regard to security and protection of users' data. When cloud service providers process personal data, they are already under the transparency requirement of the 95/46/EC and will be under similar requirements under the General Data Protection Regulation. We also note that this legislation contains the obligation of securing personal data in the cloud. To the extent that it is not contrary to the objective of achieving a high level security, transparency requirements thus already apply. Furthermore, the ongoing negotiations relating to the Network and Information Security Directive, show that it will be likely that cloud service providers will face reporting new additional security obligations, notably on reporting of security breaches.

77. As a (potential) user of cloud computing services, do you think cloud service providers are sufficiently transparent on the security and protection of users' data regarding the services they provide?

☒ Yes

78. As a (potential) user of cloud computing services, do you agree that existing contractual practices ensure a fair and balanced allocation of legal and technical risks between cloud users and cloud service providers?

☒ Yes

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

☐ Economic benefits

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80. What would be the benefit of guaranteeing the portability of data, including at European level, between different providers of cloud services

☐ **Economic benefits**

81. 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.

	Never (Y[es] or N[no])	Sometimes (Y / N)	Often (Y / N)	Always (Y / N)	Why? (1500 characters max.)
Difficulties with negotiating contractual terms and conditions for cloud services stemming from uneven bargaining power of the parties and/or undefined standards	X				
Limitations as regards the possibility to switch between different cloud service providers	X				
Possibility for the supplier to unilaterally modify the cloud service	X				
Far reaching limitations of the supplier's liability for malfunctioning cloud services (including depriving the user of key remedies)	X				
Other (please explain)					

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

☒ **No**

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

☒ **No**

84. Please share your general comments or ideas regarding data, cloud computing and the topics addressed in this section of the questionnaire (5000 max)

When providing services to a consumer, a provider of cloud computing services just like any other provider of consumer services may use General Terms and Conditions of use. The Directive on unfair

terms in consumer contracts ensures that consumers are more than sufficiently protected against unfair terms. It introduces a notion of "good faith" thereby preventing significant imbalances in the rights and obligations of consumers versus those of sellers and suppliers. Terms that are found unfair under the Directive are not binding for consumers. The Directive also ensures that contract terms are drafted in plain and intelligible language and states that ambiguities will be interpreted in disfavour of sellers and suppliers.

EU countries have implemented effective means under national law to enforce these rights and that invalid terms are no longer used by businesses. In addition Directive 95/46/EC reduces technical risks for consumers as it obliges providers of cloud services that they implement appropriate technical and organisational measures to protect consumers' personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing. It is not possible for a cloud service provider to set forth contractual terms that stay below this high standard of security. In the business to business context, cloud service providers process personal data according customer instructions. It is customers' responsibility to determine the lawfulness of such instructions (e.g. to obtain appropriate consent before proceeding with an email marketing campaign) whilst it is the provider's responsibility to deliver the contracted services securely (i.e. to apply appropriate controls in order to achieve availability, integrity, and confidentiality objectives). Cloud service providers are already under the security requirements of Directive 95/46/EC and will be under similar requirements by GDPR.

In light of current practices, during the pre-contractual phase customers are empowered to evaluate the security measures deployed by cloud service providers in order to determine whether they are appropriate and proportionate to their data. Due to the economies of scale, cloud service providers are able to develop security capabilities very difficult to match.

The collaborative economy

The collaborative economy

The following questions focus on certain issues raised by the collaborative economy and seek to improve the Commission's understanding by collecting the views of stakeholders on the regulatory environment, the effects of collaborative economy platforms on existing suppliers, innovation, and consumer choice. More broadly, they aim also at assessing the impact of the development of the collaborative economy on the rest of the economy and of the opportunities as well as the challenges it raises. They should help devising a European agenda for the collaborative economy to be considered in the context of the forthcoming Internal Market Strategy. The main question is whether EU law is fit to support this new phenomenon and whether existing policy is sufficient to let it develop and grow further, while addressing potential issues that may arise, including public policy objectives that may have already been identified.

Terms used for the purposes of this consultation:

"Collaborative economy"

For the purposes of this consultation the collaborative economy links individuals and/or legal persons through online platforms (collaborative economy platforms) allowing them to provide services and/or exchange assets, resources, time, skills, or capital, sometimes for a temporary period and without

transferring ownership rights. Typical examples are transport services including the use of domestic vehicles for passenger transport and ride-sharing, accommodation or professional services.

"Traditional provider"

Individuals or legal persons who provide their services mainly through other channels, without an extensive involvement of online platforms.

"Provider in the collaborative economy"

Individuals or legal persons who provide the service by offering assets, resources, time, skills or capital through an online platform.

"User in the collaborative economy"

Individuals or legal persons who access and use the transacted assets, resources, time, skills and capital.

85. Please indicate your role in the collaborative economy

☐

Provider or association representing providers

86. Which are the main risks and challenges associated with the growth of the collaborative economy and what are the obstacles which could hamper its growth and accessibility?

Please rate from 1 to 5 according to their importance.

☐ 1

a. Not sufficiently adapted regulatory framework

☐ 1

b. - Uncertainty for providers on their rights and obligations

☐ 1

c. Uncertainty for users about their rights and obligations

☐ 2

d. - Weakening of employment and social rights for employees/workers

☐ 3

e. - Non-compliance with health and safety standards and regulations

f. - Rise in undeclared work and the black economy

☐ 3

g. - Opposition from traditional providers

☐ 2

h. - Uncertainty related to the protection of personal data

☐ 5

i. - Insufficient funding for start-ups

☐ 4

87. How do you consider the surge of the collaborative economy will impact on the different forms of employment (self-employment, free lancers, shared workers, economically dependent workers, tele-workers etc) and the creation of jobs?

☐ **Varies depending on each case** (unable to fill in blank with this choice)

Please explain

As with the Commission's definition of online platforms, the scope of the "collaborative economy" is extremely broad, and it is impossible to suggest a single impact that this range of business models will have on jobs and employment in every sector.

Some collaborative platforms are providing people with the ability to generate additional money to supplement other sources of income they may have. They may share their home on a platform like Airbnb when they are away on business or holiday. They might rent their driveway to someone who needs a parking spot for their car. This kind of additional income is different from "employment". Likewise, other collaborative platforms provide more efficient marketplaces for existing forms of self-employment (such as cleaning, "handyman" services, accountancy, and private hire drivers). These may be providing self-employed people with larger potential markets for their services, making them more productive as a result.

In short, it is difficult to say how the growth of these marketplaces will affect the wider market for labour in the EU.

88. 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?

☐ **Yes**

Please explain

In most respects, the platforms powering the collaborative economy are identical to existing e-commerce and internet businesses.

While these platforms may be facilitating new kinds of economic activity (and providing “disruptive” competition to established businesses), they are not necessarily entirely new kinds of businesses. Online marketplaces are already commonplace, and – as noted elsewhere in this response – existing laws applies relatively comfortably to the things that they do.

The same concerns about fragmentation and a lack of harmonisation across the EU are felt by collaborative economy platforms in the same way as other kinds of online intermediary. More consistent application of existing regulatory frameworks would benefit all marketplaces, including those in the collaborative economy.

In relation to providers in the collaborative economy, they face even more fragmentation given the existence of national, regional and local laws that are ill-suited to peer-to-peer service provision. For example, people in Catalonia face tough restrictions on their ability to rent a spare room to a paying guest. An equivalent person in Paris does not. A person providing an apartment for rent in Brussels is subject to detailed regulations concerning the amenities they must offer to their guests (including specifying the furniture that must be available in each room). The equivalent person in London is not. While not all of this fragmentation is possible for the EU to solve – since it lacks competence over many of the applicable frameworks – instruments such as the Services Directive could be more rigorously policed by the EU, to ensure that unnecessary and disproportionate regulation – especially that which restricts cross-border provision of services – is challenged.

89. Do you see a need for action at European Union level specifically to promote the collaborative economy, and to foster innovation and entrepreneurship in its context?

☒ Yes

Please indicate the sector/action

While the European Union may lack competence over many of the policy areas that relate to the collaborative economy, it has the ability to bring together best practices and insights from across all Member States, and to examine the ways in which existing laws and regulations are already adequately protecting consumers in the collaborative economy. As noted above, the EU should also be vigorously challenging member states to remove burdensome and unjustified restrictions on European citizens’ ability to participate in peer-to-peer marketplaces.

90. What action is necessary regarding the current regulatory environment at the level of the EU, including the Services Directive, the E-commerce Directive and the EU legislation on consumer protection law?

☐ No change is required

☒ More guidance and better information on the application of the existing rules is required