

Istituto Bruno Leoni's contribution to the Consultation regarding the "Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy"

Please explain how you would change the definition

Such a definition of "online platform" is far too encompassing. It builds on notions from the economics of multi-sided market, but it applies them in a fairly liberal way, as the examples that follow show. The real question, however, is not whether "online platforms" have been defined in a precise and satisfactory way, but whether the category as a whole qualify as the basis for any regulatory interventions. What differentiates online platforms from offline platforms and online non-platforms operating in the same markets? And what keeps them together, when they employ different business models, different practices, different targets, different value propositions? When some feature network effects and some do not? When some work as intermediaries and some as resellers? Targeting online platforms just because they share a few vaguely-defined features is akin to regulating all businesses that sit on the left side of the street.

Please list the problems you encountered, or you are aware of, in the order of importance and provide additional explanation where possible.

For the reasons we highlighted in our answer to the previous question, questions referring to online platforms as a whole are difficult to answer with some specificity. In broad terms, however, we would like to point out that most of the problems encountered by either consumers or suppliers seem to revolve around a few basic and well-known issues: (alleged) market power, user data, intermediary liability, consumer protection. (Competitors denounce different problems, too, but those aren't of concern to consumers or suppliers.) EU law provides for all such problems already, regardless of whether they are raised by platforms or non-platforms. Of course, the enforcement of these rules take place on a case-by-case basis. For matters outside the scope of existing rules (or rather, for practices that are deemed to be licit under existing rules), user complaints are part of a bargaining process which is always going on in the market place. Whether or not user demands will be addressed depend on many things, including of course the role of competition. To mention just an example, surge pricing (provided that it's applied in a transparent and non-deceptive way) can be justified from an economic perspective and should not be banned. But is it good business? That depends on the users' willingness to "reta-

liate” (and on their economic literacy), as well as on the actual availability of competitors which do not apply it or even offer to refund consumers of the surge fees incurred by using another service. Price parity clauses would be another example. The bottom line is this: successful platforms (and other businesses) produce value for their customers and for themselves, but the best way to divide it up is always going to be debated. This doesn't imply any need for regulation and we should be very careful not to conflate this on-going bargaining process with evidence of abuse.

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.

The main benefit is that they allow consumers to draw on the experience of their peers and gather better information on available options. In so doing, they produce strong incentives for traders to provide the best goods or services they can and, at least as importantly, the best user experience they can. However, as platforms evolve and especially with the rise of the sharing economy (for lack of a better term), the distinction between consumers and producers or providers gets more blurry. Accordingly, feedback-based reputation systems now tend to work in both ways. (This is something we've seen before, with platforms such as eBay, but it's becoming a wider phenomenon.) This encourages both sides of an exchange to behave decently and it ultimately enhances the level of trust, enabling more transactions to happen. One possible drawback is that unfaithful participants in the platform may be tempted to cheat the system through fake reviews. Online platforms are well aware of such risk and they realize their own reputation is at stake; thus we don't see the need for regulation on this front.

Please explain your choice and share any best practices that you are aware of.

EU data protection law provides sufficient safeguards with regard to issues a) and b). As to dynamic pricing, we don't think much information is provided, but we don't see why it should, as the only price that matters is the one actually required, not the price that would have been imposed under a different and hypothetical state of the market. Dynamic pricing is a sophisticated form of price discrimination. More accurately, it enables complete (or first degree) discrimination, or the practice of charging each user exactly what he's willing to pay. While this may be detrimental to some individual users, it unequivocally enhances overall efficiency by increasing the volume of transactions (and it has progressive effects, as it can bring into the market buyers who would otherwise be priced out).

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

Information is what fuels the digital economy. Despite many claims to the contrary, digital users are generally aware of the implicit exchange going on on several platforms, where personal and non-personal data get traded for better and cheaper services. The analysis

of users' revealed preferences clearly show this, with data-hungry players catering to a vast majority of the customers; more privacy-friendly providers, on the other hand, while available and growing, tend to only gain favor with a minority. Again, it is crucial to submit the trade-off between strong data protection and innovation to rigorous cost-benefit analysis, rooted in the observation of market behavior, rather than rely on stated preferences and misleading rhetoric.

Platforms (including hosting service providers and content aggregators) or any other interested party are invited to express their positions with regard to relations of platforms with holders of rights in digital content.

EU copyright law affords generous protection to copyright holders and will continue to do so. In fact, it could be argued that its provisions should be relaxed to make it better-suited for the internet age. The eCommerce directive, on the other hand, provides a fair and balanced framework for dealing with online infringement, which should be preserved to avoid hindering the growth of Europe's digital economy.

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

EU data protection law grants the right to data portability, but only for personal data that are processed in a structured and commonly used format. Other kinds of data may be harder to port. Lock-ins are a nuisance for many users. We would all enjoy the ability to move from platform to platform at will, knowing that our data stand to follow us wherever we eventually turn out to settle. However, lock-ins also play a useful function: they grant some level of commitment from customers, which makes it easier for providers to assume that they are going to stick around for a while. This, in turn, allows for investment that would not otherwise be feasible, especially when we talk about heavily subsidized services based on advertising or some form of delayed remuneration. This is not a unique feature of the digital economy, of course.

What's more, the idea that users should under all circumstances be able to export their data from a service and import it into another one would imply that standards be put in place, which requires time, labor, and resources. The benefits in most cases don't outweigh the costs. In general terms, individual users are in a better position to make sure that their data remain accessible according to their needs, at a lower cost. One thing to take into account is that digital users tend to multi-home, instead of relying on one single service for all or most of their needs.

Finally, the idea that we should be able to carry all our data with us whenever we move from a service to another one relies on the assumption that we live in a world of perfectly interchangeable services, which is of course not the case. There would be little point, say, in getting our Facebook posts into our Twitter account. Interoperability is an important principle for some basic areas of the digital world, but the dream of ubiquitous interoperability and absolute freedom to maintain control of all our data is a rather costly one.

Nevertheless, several platforms at this stage provide tools to export (and import) data generated through their services. It is important that they do so in light of cost-benefit analysis and entrepreneurial judgment, rather than because of one-size-fits-all regulation.

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

The framework for intermediary liability established more than fifteen years ago under the eCommerce directive is still perfectly adequate to deal with the complexities of the digital economy. They strike the right balance between the interests of all parties involved and ensures a convenient degree of flexibility to adapt to different business models and practices. Expanding the scope of intermediary liability or even charging providers with specific monitoring duties on their users' content would stifle innovation and impose an unnecessary burden on online on some market players.

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

The free flow of data (within the EU and between the EU and other jurisdictions) is of paramount importance to the flourishing of the digital economy. Accordingly, exceptions to this principle should be severely limited and strictly justified. In particular, several member states are inclined to impose location requirements on cloud service providers, under the pretense that they serve national security interests. The recent CJEU decision on the Safe Harbor agreement goes in the same direction, though for different reasons. This is a very dangerous trend, particularly when one considers that, far from being a US specialty, surveillance is alive and well in several European countries. This wave of data protectionism will hardly reduce cybersecurity risks, but will likely harm European consumers and businesses, by limiting their access to services and technologies.

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?

Regulatory uncertainty is the main obstacle to the growth of the collaborative economy, particularly in a cross-border perspective. As regards potential European market leaders we do not think that should be a relevant policy goal. Regulation in this area should aim to promote a vibrant digital economy for the benefit of all consumers and businesses, regardless of their nationality.

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?

There is no need for any specific promotion measure, but the EU should take the lead to make sure that outdated regulations at the member state level don't stifle innovation.

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?

Much depends on the role of the courts and especially the CJEU. One instance is the pending Uber case. Should the CJEU define it as an information service, it would clear the way for many collaborative economy players. Should it define it as a transportation service, then a broader discussion should begin over how to ensure that the Services Directive be updated to take into account the transport industry (and similar sectors).