

6 January 2016

DSM Platform Consultation  
Facebook Responses – Final pdf. Version

DG Connect Case Id: 5fb1b6db-6a27-46f6-a151-f37af5de51ef

*Please indicate your role for the purpose of this consultation*

An online platform

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

Facebook is best known for its social networking service by the same name, which is available on the web ([www.facebook.com](http://www.facebook.com)) and as a free mobile application. More than 1.5 billion people use Facebook each month in 80 languages around the globe.

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*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*

Founded in 2004, Facebook gives people the power to share and make the world more open and connected. People use Facebook to stay connected with friends and family, to discover what's going on in the world, to build online communities and disseminate ideas and information, and to share and express what matters to them.

The functionality offered by Facebook and other similar services is constantly evolving, but includes a number of common elements that collectively enable users to engage and interact with each other around shared content, views, interests, etc. To this end, Facebook's service enables people to share their opinions, ideas, photos, activities, and videos. Facebook also provides an environment for developers to offer social and network-rich enhancements to online and mobile apps and websites as well as an attractive platform for public figures to engage with a large and diverse constituency and for businesses including advertisers to reach potential customers and raise awareness of their products and services.

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*Are you a SME or micro enterprise?*

No

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*Please indicate your country of residence*  
Ireland

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

Name: \_ Facebook Ireland

Address: \_4 Grand Canal Square, Dublin 2, D02 X525

E-mail: thomask@fb.com

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*Is your organisation registered in the Transparency Register of the European Commission and the European Parliament? Please indicate your organisation's registration number in the Transparency Register*

Yes; 28666427835-74

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*If you are an economic operator, please enter the NACE code.*

J-63: Information service activities

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*I object to the publication of my personal data*

No

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

No

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

The breadth of this definition is concerning because, as the wide-ranging examples included in the question illustrate, it has essentially no limiting principles and will catch an ever-increasing range of business activity.

The proposed definition of online platforms covers business activities that have only one thing in common: they enable interaction between two or more groups of users through digital networks. Virtually every Internet-based activity enables interactions between "two or more distinct but interdependent groups of users." As a result, the proposed definition gives the mistaken impression that online platforms have many common and unifying features. They do not. Business activity in the online world is as heterogeneous as offline business activity and is rapidly evolving. The definition is also highly generic and fails to identify any features of online platforms that would assist the Commission in understanding the role of online platforms in the Internet economy, including the dynamic nature of the Internet ecosystem in which platforms operate. It also leads one to question whether there could ever be a single, static definition of online platform. The proposed definition also suggests that online and offline activity can be clearly distinguished which is not necessarily the case. The Internet is a means to connect people and businesses. There may be little material difference between a certain service or product offered online or offline. Broad definitions and

labels invariably fail to capture the complexities of today's economy and therefore should not serve as a basis for making policy decisions.

Given the sweeping and problematic definition of platforms undergirding this consultation, any "one size fits all" approach that arises from it could harm innovation and Europe's growing digital economy. Further, we note that although various questions in this consultation call for answers on every "online platform," our answers pertain to the Facebook service alone, unless noted otherwise.

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

*Online platforms... SELECT ALL*

*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:*

Given the expansive definition of the term "online platform" used in this consultation, this question amounts to asking about the value of almost every Internet service. In our response to how we would change the definition of "online platform" as defined by the Commission,, we have explained why this definition is overbroad. Our response here will be limited to the value Facebook provides to our users.

Our company's mission is to create a more connected and open world. We believe that we are doing that by enabling public figures and organisations to reach people and by enabling our users to stay connected with each other and share topics of interest to them. This can run the gamut from allowing users to share their birthdays with their friends to providing real-time information about events in the world. Facebook has also emerged as an important platform for political speech and a key arena for government officials, NGOs and individuals to disseminate ideas and opinions of public interest and to engage around those ideas.

Facebook also helps users discover new products and services from local and global businesses and thereby serves as a catalyst for economic activity that connects small and medium-sized enterprises (SMEs) beyond their local area and borders. For example, our Pages, social plug-ins (such as "Like" and "Share") and advertising products reduce barriers to marketing by helping, e.g., SMEs more easily raise awareness of their brands and find people who are interested in their products and services. Facebook also gives content creators new avenues for making their creative content available. By way of illustration, movie and TV studios frequently use the service for promotional or other purposes. In addition, "Instant Articles" enables publishers to provide a fast and interactive experience that drives more traffic to their sites. The same is true for Facebook's social plug-ins. Sharing accelerates dissemination of content and awareness of publishers' products. For businesses of all sizes, Facebook is a tool to help them reach new customers, build their brands and grow their business. According to a recent study by Deloitte, in Europe

alone, Facebook's marketing tools have enabled \$51 billion of economic impact and supported over 780,000 jobs. Our development tools have also encouraged the creation of new services and apps, enabling \$10.5 billion of economic impact and 198,000 jobs in Europe alone.

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.*

Yes

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

Facebook's mission is to give people the power to share and make the world more open and connected. We strive to provide the best experiences for all those who use Facebook, including every day users, developers and advertisers. As one illustration of our efforts to provide all those who use Facebook with a safe, secure, and respectful environment conducive to sharing, we have adopted a set of "Community Standards". These Community Standards help users understand what type of sharing is allowed on Facebook, and what type of content may be reported to us and removed. The conversations that happen on Facebook reflect the diversity of our large community. At the same time, we want users to feel safe when using Facebook, including by curbing illegal and offensive content (see also response to Q.59 below). This objective is also promoted by our "Real Name" policy. Users must provide the name that they use in real life because, inter alia, it contributes to the integrity of our service. However, with a community of over 1.5 billion users and with the high volume of content posted to Facebook every minute, we recognise that no system to enforce these high standards will be perfect. We are constantly working to improve our efforts to make our users feel safe and respond to user needs; we know that if people do not trust us to do that, they will stop using our service.

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5. *How could these problems be best addressed?*

Market dynamics

## TRANSPARENCY OF ONLINE PLATFORMS

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

Yes

12. *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)*

One of the key benefits of the Internet is the ability of users to share views and experiences. The views and experiences of others help users make more informed choices, reducing hesitations to try new products and services, and boosting competition between businesses offering products and services.

Reputation systems also allow businesses to solicit and respond to their customers' feedback in a timely manner.

In particular for SMEs (that do not have large marketing budgets), such trust mechanisms can be a very effective way to reach consumers and create awareness of their products and services. It is difficult to exaggerate the importance of online intermediaries such as Facebook as a means for SMEs and new entrants to reach consumers and communities.

Among other features, Facebook users have the option to "Like" posts, Pages, and other types of content on the service. A user may "like" content on Facebook for many different reasons, such as simply acknowledging that the user has read the content or, on the other hand, indicating approval of or interest in the content. The value proposition of these "likes" is that users can see what their friends on Facebook have liked, and such likes may carry more influence than a similar action taken by a stranger. The same is true for other aspects of Facebook's service, such as user reviews that can be left for restaurants and other businesses. Seeing that a friend has been to a restaurant and given that restaurant a good review on Facebook can be powerful for someone who may consider visiting that restaurant as well. In other words, while online reviews in general provide useful information for consumers, there is added value when those reviews come from users that are known as friends, family, or colleagues.

In general, the quality of trust mechanisms online is highly correlated to policies requiring use of an authentic identity. Academic researchers have observed that platforms, like Facebook, requiring use of authentic names and identities lead to higher quality and more integrious review content and feedback content and allow others to make informed decisions about the source of online feedback.

#### *USE OF INFORMATION BY ONLINE PLATFORMS*

13. *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?*

User data is an integral part of the Facebook service and the user experience that it provides. Our service is built on the personal profiles and the information that users provide and post. Moreover, like many other online platforms, the Facebook service is free to the user and funded by advertising. As part of this value exchange we provide the most relevant ads to users matching their interests with the ads that advertisers choose to display on Facebook.

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

Yes

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

It is not possible to speak resolutely about the privacy policies and practices of the sweeping variety of services provided by “online platforms” as defined in this consultation. That said, transparency and choice are central principles for Facebook: Protecting people’s information and providing clear and understandable notice along with meaningful privacy controls are at the core of everything we do. Our users have justifiably high expectations regarding the protection of their privacy and safeguarding of their information, and we are acutely aware that people and customers will not continue to use our services if they do not trust how we are handling user data. Facebook takes very seriously its responsibility to protect the information users share, act responsibly and be truly transparent about how it collects and uses that information.

To that end, our data policy, which we provide via a link on our website (<https://www.facebook.com/policy.php>), specifies in clear and accessible terms the categories of information we collect from people who use our service and how that information is used and shared. Facebook invested considerably in re-working this central notice in January 2015 to be as user-friendly as is possible, revising everything from the phraseology to the design look and feel to ensure that users are encouraged to read and reflect upon the way in which Facebook will process their personal data to ensure that we achieve transparency and fairness for our users. Facebook also provides a wealth of additional details on these topics through in-context, in-product notices and in its Help Centre, in an easily searchable format. For instance, there is a “privacy shortcuts” tab on the user’s page that provides a link to Facebook’s privacy policy and a clear overview of the privacy tools and settings available to users.

In addition to providing clear disclosures in its policy, Facebook – unlike some services that do not provide people control over who can see their information, or require people to make an all-or-nothing privacy choice – has built a range of privacy controls into the fabric of its products. We have designed our service to give our users the ability to choose precisely who will see the information they choose to share on a per-object basis. We make it easy for our users to make this choice by providing an audience control “in-line” or “in-context”, meaning that it appears at the point at which the user is choosing to add a particular piece of information to Facebook. Facebook implements such customised, per-object privacy controls for billions of pieces of content shared on its services every day.

We recognise that privacy is contextual and personal and that each person will have different preferences about what he or she wants to share, and with whom, so we have designed in-context, granular controls to enable each user to make the choices that are right for him or her. For instance, by virtue of these easy-to-use tools, a person can choose to post a link to a website and share it publicly, and then in another interaction with Facebook add a personal photo and share it only with friends. A user who does not wish to make these granular choices each time they use Facebook can simply choose “friends” as a default audience and have this choice apply going forward to all subsequent posts.

Facebook also offers a number of in-product controls that allow people to control the types of information Facebook collects about them and how such information is used. For example, before Facebook may access information about the location of a user’s device, the user must affirmatively grant this permission to Facebook in an in-product interaction which is accompanied by an in-context explanation of what that choice will mean for the user. Additionally, Facebook offers controls that determine how Facebook uses and stores such location information. For example, when Facebook launched online behavioral advertising,

it launched Ad Preferences, a tool accessible from every ad on Facebook that explains why someone is seeing a specific ad and lets them add or remove preferences used to show them ads. Facebook also allows users to opt out of such advertising through an opt out available on Facebook, by using the opt out offered by the Digital Advertising Alliance (or European Digital Advertising Alliance), or by using the controls on their mobile device settings..

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

Receiving and analysing data has always been a core operational business activity regardless of industry and whether they are online or offline. Data analysis helps businesses understand how individual functions work independently and together, allowing businesses to operate more efficiently and create better products and services. None of these benefits are new or unique to digital businesses or Internet platforms.

For all online services, including the Facebook service, data is important to further understanding and improving products and services and to the monetisation that supports these products and service. Data enables Facebook to learn how users are using its products and what features or services are not working well or need to be added or improved. Data is also the engine of Facebook's ability to deliver customised information and content to people algorithmically, such that each user's Newsfeed or Messenger feed, for example, features the content and information that is most relevant to that user. Likewise, data allows Facebook to identify and serve ads that are tailored to their interests, generating benefits for users and advertisers alike. For example, just as data allows Facebook's algorithms to deliver e.g. articles about a user's favourite sports club in her or his Newsfeed, it allows Facebook to target advertising regarding merchandise, special events and tickets for that sports club to the user as well, rather than serving generic advertising that would be of no utility for the user and simply clutter the user experience. Restricting the use of data would seriously risk undermining the core of these products and the business models that drive online activity and the numerous benefits that it delivers to users.

Given the importance to users of data protection, service providers have strong commercial as well as regulatory incentives to manage and use data responsibly. Facebook seeks to provide an advertising experience for both marketers and users that avoids engendering tension between fulfilling advertisers goals and safeguarding the privacy of our users. To achieve this, Facebook enables advertisers to target ads by selecting the kinds of people that they would wish to reach, and then Facebook connects the campaign with such users, ensuring that the user's identity is not shared with the advertiser. Alternatively, Facebook allows advertisers to use contact information they have already collected in compliance with the law to reach those individuals via our platform in a secure and safe manner. In both instances, Facebook is then able to provide advertising partners with information about the reach and effectiveness of their advertising campaigns on its platform without providing information that personally identifies people.

RELATIONS BETWEEN PLATFORMS AND SUPPLIERS/TRADERS/APPLICATION DEVELOPERS OR HOLDERS OF RIGHTS IN DIGITAL CONTENT

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

No

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25. *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?*

Facebook fully supports the Commission's efforts to create a Digital Single Market (DSM) that allows individuals and businesses to seamlessly access and exercise online activities irrespective of their nationality or place of establishment. One of the main barriers to greater and more sustainable growth of Europe's digital economy is fragmentation that could be addressed by establishing a true DSM. At the moment, many rules governing online services are decided at the Member State level, at times creating a patchwork of 28 different rulebooks across Europe. SMEs and startups want to reach users and consumers across Europe, and it can be a real challenge to provide and constantly develop an attractive and competitive unified user experience while having to comply with numerous distinct regulators and regulatory frameworks. Facebook encounters the same challenges since our services are available across Europe. Indeed, the EU's regulatory complexity, fragmented oversight/enforcement, and lack of regulatory predictability are major constraints for all Internet services, from the two-person start-up to larger companies. While we have significant concerns about some of the specific measures that the Commission might consider in the context of the DSM initiative (including those discussed in response to this consultation), we hope the Commission's efforts to create a truly integrated DSM will address the present complexity and fragmentation of the EU's internal market that are hampering the delivery of its full potential.

We note that the EU has already taken helpful steps to make the regulatory environment more favourable for online services delivered across borders. A core component of the existing regime is the E-Commerce Directive, whereby, e.g., copyright and trademark holders can report content on platforms that may infringe their rights. In turn, upon receipt of a valid notice under the E-Commerce Directive, the platforms are obligated to remove the reported content in order to obtain the protections of the Directive's safe harbour. Facebook has established a robust notice-and-takedown program consistent with the E-Commerce Directive and has a global team in place that processes submitted reports. Upon receipt of a valid report, Facebook promptly removes or blocks access to the reported content, informs the reported user of the removal, warns the user that further removals could result in termination of the user's account, and informs the rights holder of the action taken. Among other measures, Facebook also has implemented a repeat infringer policy, pursuant to which the accounts of repeat infringers are removed in appropriate circumstances. This legal regime has worked well and spurred growth and opportunity. Additional regulation that would impose greater burdens on online platforms could constrain development of online activity and should be avoided. In particular, platforms currently have the flexibility to determine which tools may be most effective for given circumstances. This flexibility is essential because it enables platforms to work with other constituencies – such as rights holders – to develop new tools and improve upon existing ones; such cooperation is particularly valuable since these interested stakeholders are best equipped to identify enforcement challenges and devise appropriate solutions. An illustration of how these circumstances have played out is Facebook's recent enhancements to its copyright management tools, including the launch of new video-matching technology, along with a "Suggested Videos" product pursuant to which Facebook shares revenues with participating content providers. Both of these programs are in early stages, but demonstrate the types of features that can be developed through cooperation within a flexible regulatory framework.

By contrast, the increasingly fragmented approach to data protection regulation in the EU is impeding Facebook's and other cross-border service providers' ability to provide unified and consistent services



across Europe. In 2011, Facebook took the step to establish an international headquarters in Dublin, vesting control over data collection and processing for EU users in Facebook Ireland Limited ('Facebook Ireland'). In doing so, Facebook Ireland has been subject to regulatory oversight by the Irish Data Protection Commissioner ('DPC') and has undergone extensive audits and consultations with the Irish DPC resulting in numerous changes to its service to ensure full compliance with Irish law and the expectations of the DPC. More recently, a number of other Member State data protection authorities have initiated investigations and enforcement actions against Facebook, seeking to apply disparate national standards (either in law or regulatory perception of the standard for compliance) to Facebook Ireland or Facebook Inc.'s data practices which would result in highly fragmented and inconsistent experiences for users across the EU.

Even with the recent approval of the General Data Protection Regulation by the European Parliament's Civil Liberties, Justice and Home Affairs committee, which contemplates a form of one-stop shop approach to data protection, other national data protection authorities have indicated that they will continue to pursue the current fragmented approach to regulation of data protection, at least as to Facebook Ireland. This presents significant barriers to Facebook's ability to develop a user experience that can be offered consistently and securely across the EU.

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26. *How do you ensure that suppliers of your platform are treated fairly?*

We deal with this issue through clear and transparent rules applicable to our users and customers. Our terms and policies, including those that govern our relationships with developers and advertisers, are available from a link on every page on Facebook and collected here: [www.Facebook.com/terms](http://www.Facebook.com/terms) and here: <https://developers.facebook.com/policy/>. Our developers are important to us and vital to our service – we work very hard to ensure our relationship with them is based on trust and equitable terms.

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

31. *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

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

No

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

Mobility of consumers between platforms is greatly facilitated by the ubiquity of smartphones and other mobile devices and the prevalence of multi-homing. Multi-homing is one of the key features of the Internet economy. It creates a dynamic environment where users move between services based on their individual needs and the attractiveness of the user experience that a given service offers. For instance, when

assessing Facebook's acquisition of WhatsApp, the Commission found that the majority of users used more than one consumer communications app on a daily basis.

Multi-homing is facilitated by the fact that users have easy access to apps (e.g., through app stores) and that smartphones and tablets enable users to tap into a number of shared resources regardless of the app used. For instance, the address book, photos and videos stored on the device can be used with any platform or service. Thus, in many instances nothing needs to be ported. Since multi-homing is easy and very common, users can and do choose the service that works best for them in a given setting. Facebook users multi-home all the time when engaging with family and friends. Choices may be influenced by the type of content that is shared (videos, photos, news, etc.) or the person with whom a user is sharing.

Facebook facilitates multi-homing by enabling users to download and port their data and content. Facebook provides users with the "Download Your Information" tool. Using this easily accessible tool available in the settings menu, users can retrieve and download essentially all the information that is uploaded or registered: <https://www.facebook.com/help/131112897028467/> (see also our general comments or ideas regarding data access, ownership and use). For instance, users can download posts shared on Facebook, along with comments and other interactions from people. Users can also retrieve and download message and chat conversations, photos and videos that they have added or been tagged in. Furthermore, Facebook offers 'Facebook Connect', which enables users to register with other apps using their Facebook ID and port their Facebook profile information, friends and privacy preferences. Thus, users have several tools available to port the content posted on Facebook.

Given all these market-based developments and the fact that the upcoming General Data Protection Regulation will include provisions for data portability, it appears unnecessary to adopt regulatory measures specifically addressing the ability of consumers and traders to move from one platform to another.

## ACCESS TO DATA

### Tackling illegal content online and the liability of online intermediaries

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

Intermediary

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39. *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

40. *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.*

The provisions of the E-Commerce Directive, as interpreted in the CJEU case law, remain appropriate and fit for purpose in relation to information society service providers. This includes the concept of a “mere technical, automatic and passive nature” of information transmission, as well as the liability regime included in Section IV of the E-Commerce Directive. In particular, services covered by the E-Commerce Directive (whether social networking services, video sharing services, or other types of online platforms) have as a common feature that content offered via those services was created at least in substantial part by third parties. These services have existed for many years, and there is no need to change policy approaches based on whether a service is, e.g., a social network or instead a video sharing website. The E-Commerce Directive has worked well for all such services. In addition, purely because some content may, e.g., be subject to financial arrangements (as may be the case with some video sharing services and other intermediaries) should not affect the application of the E-Commerce Directive. Indeed, this result would have perverse consequences, as content creators are seeking ways to earn additional compensation (including from intermediaries), while intermediaries would be facing greater liability by providing such compensation. There also appears to be a disconnect in this consultation between, on the one hand, considering the imposition of increased obligations on intermediaries to be more involved in content distributed via their services (including through proactive filters), while on the other hand contemplating that intermediaries should not qualify for safe harbours due to perceived increased involvement in content distribution.

In sum, there is no compelling reason to change the E-Commerce Directive to account for what are well-established business models such as video sharing services. The E-Commerce Directive already covers these services, which have operated now for many years, and provides legal certainty by imposing on them and other intermediaries notice-and-takedown obligations in order to obtain the protections of the Directive’s safe harbour. A number of services have also voluntarily exceeded these obligations by creating additional tools, such as Facebook’s recently announced copyright matching tool.

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41. *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

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*On the “notice”*

42. *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

*On the "action"*

45. *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

*Please explain your answer*

Facebook strives to enable a more connected and open world in which people are able to express their views in ways that are respectful of other people. To that end, we seek to strike a careful balance between being as open and transparent as possible, and ensuring the efficacy of the methodologies we deploy to keep people safe on Facebook. In so doing, we avoid a "one size fits all" approach to developing the Community Standards that we apply. Flexibility should thus be a guiding principle in relation to notice-and-action procedures, including the content of the notice and the opportunity for content providers to give their views on the alleged illegality of the content being reported. For example, service providers should be able to, and – as in the case of Facebook – may indeed choose to, apply different policies for content that is inherently unlawful in all circumstances (such as child exploitation images) versus content that is generally lawful but being used in an unlawful manner (such as copyright and trademark infringements). The notice may therefore need to be different depending on the type of content being reported (though this approach should be left to the industry participants to decide, rather than be legislatively mandated). For example, while all reports should identify the specific content at issue, it would make no sense for a notice to ask about a reporting party's intellectual property rights if the targeted content is child exploitation images. Similarly, there would generally be no need to provide an opportunity to give views in relation to reported child exploitation images. But in the intellectual property setting, it often can prove valuable, and in many cases is absolutely necessary, to receive the views of the rights owner regarding why reported content may be infringing the owner's rights.

By way of illustrating different (but voluntary) policy approaches to notice, governments also sometimes ask Facebook to remove content that violates local laws, but does not violate our Community Standards. If, after review, we find that the content may be illegal under local law, then we may make it unavailable only in the relevant country or territory. Depending on the content of the notice, our review and application of local law may vary. In such cases, we currently do not provide an opportunity for content providers to contest illegality, though we are continually reviewing our procedures and may wish to make modifications in the future.

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46. *If you consider that this should only apply for some kinds of illegal content, please indicate which one(s)*

As noted, Facebook's practices regarding notice-and-action procedures may differ based on the content and potential violations at issue. As a result, depending on the nature of the report (e.g., child exploitation images, spam, intellectual property, or numerous other reasons), different procedures may be followed and additional information regarding alleged illegality may be helpful. For example, for intellectual property matters, Facebook makes available webforms to report potentially infringing content. These webforms contain various fields to be completed that are typically more extensive than reports that do not implicate intellectual property, and these fields include the rights owner's basis for the rights, the specific content being reported, and an explanation as to why the reported content is infringing. Upon receiving a valid

intellectual property report, Facebook's global notice-and-takedown team takes appropriate action, which generally consists of removing or blocking access to the reported content, informing the reported user of the removal, warning the user that further removals could result in termination of the user's account, and informing the rights holder of the action taken.

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

No

*Please explain*

Facebook believes that the "take down and stay down" principle would result in an overall poorer experience for Facebook's users, and also would be legally and technologically unworkable. At the broadest level, it would result in potentially large amounts of content being blocked from users even when that content may in fact be perfectly permissible in the given context. Indeed, with respect to copyright and trademark infringements that may occur on online platforms, the illegality does not arise from the particular content that is posted but instead from the particular use of that content. In other words, a user's upload of copyrighted content may be an unlawful infringement in one instance, but perfectly lawful in other instance due to fair dealing, a licensing arrangement, or a host of other reasons. To impose a stay down obligation on intermediaries would automatically eliminate consideration of all these other reasons. As a result, it would result in lowered accessibility to content and significantly impede free expression, to the detriment of the broader public. This is not to say that rights holders are without recourse. Services like Facebook have robust notice-and-takedown programs in place, pursuant to which reported content is promptly removed. In addition, Facebook has implemented various voluntary measures, such as Audible Magic, which blocks users' uploads of audio-visual content that matches content in the Audible Magic database (subject to various criteria, including the user's right to appeal). But to impose a legal requirement that content must stay down would be very harmful to users and would be a significant departure from the current regime. In addition, even for sophisticated services like Facebook, technologically it is impossible to completely ensure that the same or similar content, once reported, will be able to stay down indefinitely. Slight variations in the content could result in its reappearance, and users intent on gaming the systems could likely find workarounds. Imposing liability under these circumstances could be ruinous, and indeed could be a complete impediment to new start-ups. Given these concerns, we believe a better approach is to maintain the current legal regime (including Article 15 of the E-Commerce Directive, which states that intermediaries have no general obligation to monitor) and instead rely on voluntary measures based on collaboration, such as Audible Magic and other tools, to continue to address infringing content. We also note that comparisons to child exploitation images are generally inapt. Such images are always unlawful, and national governments have extensive databases of such images, making it much more technologically feasible to block such content. The same cannot be said when considering content that may be infringing copyright or trademarks.

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".

48. *(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.*

With respect to intellectual property matters, Facebook for many years has made use of Audible Magic, which is a third-party service that maintains a database of audio and audio-visual content owned by content creators. This includes, for example, songs, movies, and television shows. When a Facebook user attempts to upload a video that matches content in the Audible Magic database, the content is blocked from being uploaded (subject to certain criteria, including the right of the user to appeal the block if the user has the rights or is otherwise entitled to upload the content). Recently Facebook also announced its own copyright matching technology, which is currently in a beta test with selected partners. These partners can provide Facebook with reference files of their videos, and when users upload videos matching those files, the partners can choose to report the videos for removal. Facebook's ability to explore all of these measures has been greatly enhanced by the flexibility of the current legal regime. In other words, if Facebook were legally required to undertake proactive measures (with the concomitant prospect of liability for failure to adhere to the precise legal prescripts), then there would be less appetite to experiment with new tools which may or may not work. The voluntary nature of the current regime allows for this flexibility and cooperation with rights holders to continue to explore new solutions.

Moreover, Facebook's Community Standards serve to help people understand what is acceptable to share on Facebook. These standards are designed to create an environment where people feel motivated and empowered to treat each other with empathy and respect. We review millions of reports that come in from the Facebook community each week, alerting us to potential violations of our standards. In response to these reports, Facebook removes content that violates its Community Standards. Although we largely rely on the Facebook community to inform us about violating content, in some instances we go further. For instance, we use tools to stop the uploading of child exploitation imagery on Facebook. When we become aware of terrorism related content on Facebook, in addition to removing such content, we will also fan out to remove associated violating content and accounts. There are also times when we may have to remove or restrict access to content because it violates the law in a particular country, even though it does not violate our Community Standards. We report the number of government requests to restrict content for contravening local law in our Global Government Requests Report. We challenge requests that appear to be unreasonable or overbroad. And if a country requests that we remove content because it is illegal in that country, we will not necessarily remove it from Facebook entirely, but may restrict access to it in the country where it is illegal.

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49. *Could you estimate the financial costs to your undertaking of putting in place and running this system?*

We have not estimated the costs of our systems to remove illegal content from the service, but we take these commitments very seriously and invest heavily in the people and products needed to take the proactive measures outlined throughout this section of the response. Our notice-and-takedown program,

for instance, is staffed by multiple teams internally supplemented by external legal and translation resources to ensure we reach the right outcome on reported content.

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

No

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55. *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

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

Facebook incorporates in the response to this question its responses to the prior questions in this section of the consultation. More generally, Facebook believes that the existing rights and responsibilities, as set forth in the E-Commerce Directive, have broadly achieved a balance that has (1) allowed the digital economy to grow by allowing intermediaries to flexibly conduct their business, (2) enabled rights holders and others to tackle infringing or otherwise illegal content including by reporting content to intermediaries and working with intermediaries on additional voluntary measures, and (3) protected the public's freedom of expression and access to information. Fifteen years of case law and interpretation have informed that balance, and we caution against regulatory intervention that creates new uncertainty regarding that balance.

Indeed, the limited liability provisions in the E-commerce Directive remain key to promoting innovative online services in the EU. The 2007 study prepared for the Commission on the economic impact of the Directive notes that "several intermediary service providers suggested that this provision is the single most important one in the directive for intermediaries, because it so clearly provides certainty in a crucial area where there was uncertainty before." This remains true today. The Directive's approach works, and there is no need to re-open it. Moreover, the approach enshrined in Directive reflects the fact that it is not possible for online intermediaries to control ex ante the information that is transmitted by their users. But the Directive also makes clear that the intermediary must act diligently in terms of removing access to illegal information. In fact, this is in the platforms' own self-interest: Platforms such as Facebook have no interest in serving as conduits for illegal or offensive content.

Facebook has adopted an elaborate set of Community Standards to ensure that users understand what content may be reported and removed. These standards cover information involving threats and harassment, dangerous organisations, criminal activity, fraud, sexual violence and exploitation, etc. Facebook has dedicated teams working around the world to review and act upon user reports, and Facebook also acts diligently on government requests to remove content that violates local laws. Each such request that we receive is checked for legal sufficiency, and we reject or require greater specificity on requests that are overly broad or vague. We also want to share information about the requests we receive from governments around the world and our approach to handling them and we make this available here: <https://govtrequests.facebook.com/>.

In sum, Facebook's approach, which is fully in line with the letter and spirit of the E-commerce Directive, provides a flexible and effective response to users' posting of illegal and offensive content. Unlike regulation, it can be adapted quickly to new kinds of practices that require a response.

*Data and cloud in digital ecosystems*

*FREE FLOW OF DATA*

*ON DATA LOCATION RESTRICTIONS*

60. *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

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61. *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

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

No

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*ON DATA ACCESS AND TRANSFER*

64. *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*

In the context of the DSM agenda and as also reflected in this question, the Commission is asking whether further regulation is needed to promote the free flow of data and to frame contractual practices. In Facebook's view, it is imperative that any and all initiatives that seek to create frameworks aimed at framing data practices within Europe support the flow of data between organisations and across borders, and an innovation-friendly environment that reflects the dynamic nature of the industry and the fact that online service providers deal with very large numbers of users and business partners.

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65. *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



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66. *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

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

Facebook believes that the Commission should focus on supporting innovation and fair competition and removing the regulatory fragmentation that creates barriers to digital trade and threaten the integrity of the DSM. In a dynamic and vibrant market place, service providers have every incentive to provide an attractive user experience that – as Facebook’s approach illustrates – includes ownership of, access to and portability of data. Many existing digital services are encouraging their users to take a more active role, and to exercise choice over their data at increasingly granular levels about what they share and how it can be used, and how to shape the services they use to best meet their interests.

Facebook provides its users with the Download Your Information tool that provides data access to its users. This includes much of the same information available to users in their account and activity log, including their Timeline information, posts they have shared, messages, photos and more. Additionally, it includes information that is not available simply by logging into a user account, such as the ads users have clicked on, the IP addresses that are logged when they log into or out of Facebook. Users can easily download their information, and provide this data set to other services they wish to use (see also the response to the question regarding the movement of consumers and traders above).

The digital goods and services currently available to individuals provides constant access to sophisticated technology and the data this generates about them. Users are becoming increasingly knowledgeable about how to use their data – the growth of social media and mobile technology devices is opening up new opportunities for people to collect, use and share other types of data for their own purposes. In this way, individuals are becoming active communicators and managers of rich and increasingly structured information data sets amongst themselves, organisations and with their peers through the Internet and collaborative economy.

A strong and successful data-driven economy comprises a diverse ecosystem of services, solutions and business models. Facebook believes that trust is a necessary underpinning for all of them; only if the ecosystem remains healthy will its constituents prosper in a sustainable way.

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## *ON DATA MARKETS*

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

In Facebook’s view, there are as such no “data markets”. Data is generated by and contributes to an increasing array of human activity across all sectors of the economy, online and offline. Virtually every market sector generates, receives, analyses and shares data, making the concept of a “data market” so all-encompassing as to be meaningless. Indeed, collecting, sharing and analysing data is an inherent part of all commercial activity. Even when data is aggregated and sold by a service provider, defining “data markets” is unlikely to be helpful. The real issue is understanding the nature of the data and the role it

plays in commercial activity. In practice, the main challenge is not access to data but making sense of the large amounts of data that is available. Data analytics tools are continuously improving, and data and data analytics help businesses create better products and services and work more efficiently. None of these benefits are unique to digital businesses or Internet platforms. Member State rules requiring data to be stored on the national territory are an obvious example of an obstacle to such activity. In fact, the main problem in this area is the lack of a common legal framework at European level that promotes the cross-border use of data, while respecting fundamental rights of individuals, where applicable.

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#### ON OPEN SERVICE PLATFORMS

82. *What are in your opinion the socio-economic and innovation advantages of open versus closed service platforms and what regulatory or other policy initiatives do you propose to accelerate the emergence and take-up of open service platforms?*

The market place for online services is dynamic. Market participants make choices regarding inter alia openness and compete on that basis. Thus, the individual provider of the online service chooses whether to make the platform accessible to third parties. The choice reflects perceived benefits of a given model and the assessment may change over time. A platform that was initially closed to third parties may become assessable and vice versa. In the vast majority of cases this choice does not raise issues. In the rare case where a refusal to provide access harms competition and consumers, EU competition law provides an adequate and proportionate answer.