

AIM contribution to the European Commission  
consultation on

**REGULATORY ENVIRONMENT FOR  
PLATFORMS, ONLINE INTERMEDIARIES,  
DATA AND CLOUD COMPUTING AND  
THE COLLABORATIVE ECONOMY**

DECEMBER 2015

## Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy

Fields marked with \* are mandatory.

### Objectives and General Information

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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.

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

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

- An individual citizen
- An association or trade organization representing consumers
- An association or trade organization representing businesses
- An association or trade organization representing civil society
- An online platform
- A business, including suppliers using an online platform to provide services
- A public authority
- A research institution or Think tank
- Other

\* 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

AIM is the European Brands Association ([link](#) to our website). AIM's membership comprises corporate members and national associations. Altogether, we represent directly or indirectly some 1,800 companies

ranging from SMEs to multinationals. Our Members are united in their purpose to build strong, evocative brands and as such place the consumer at the heart of what they do.

AIM adopted in April 2015 a Memorandum on *Consumer Brands for a Trusted Digital Market Place*. It highlights principles that AIM members follow in the digital environment, opportunities and challenges connected with the digital market place ([link](#)). Online platforms stand at the crossroad of opportunities and challenges. On the one hand, they are a useful tool to connect brands with their consumers. On the other hand, AIM members consider that there is a need to clarify their rights and duties to restore consumer trust in the digital environment and create legal certainty for European companies engaged online.

## Online platforms

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### SOCIAL AND ECONOMIC ROLE OF ONLINE PLATFORMS

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.

Yes

No

\*Please explain how you would change the definition

*1000 character(s) maximum*

AIM welcomes that the European Commission attempts to define online platforms. Numerous online service providers currently benefit from the provisions of article 14 and 15 of the E-commerce Directive, while they are not acting as mere hosting services providers or data storage providers. Therefore, they should have a duty of care like other traders. AIM would support an horizontal definition, encompassing different kind of business models, as the one suggested by the European Commission. AIM also agrees that the criterion of generating value for the users is an important common denominator, which would help distinguish online platforms from mere hosting services providers. However, AIM does not consider that the definition suggested by the European Commission allows reaching the optimal balance as such.

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
- X others:

\*Please specify:

100 character(s) maximum

AIM appreciates the role of online platforms in the development of the digital environment.

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.

X Yes

No

I don't know

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

3000 character(s) maximum

Brands strive to preserve the distinctive features of their brands, which should remain beacons of trust for consumers when shopping online. Brand manufacturers recognize the role of platforms in the development of e-commerce. However, during the Consumer Summits organised by the EC in 2014 and 2015, enforcers raised the issues faced by consumers buying on platforms. The rapporteur of the workshop "*effective enforcement online*" highlighted as one of the main causes identified by participants ([link](#)) "*a complex legal and technical architecture leading to unclear responsibilities and liabilities of different stakeholders reducing their willingness to act*". Therefore, as an overarching guiding principle, we believe that there is a need to adapt the regulatory framework so that the offline and online worlds receive an equivalent treatment and protection. The strongest concerns seem to be:

- **Counterfeiting:** Many consumers continue to be misled or injured by sellers providing counterfeit and fake goods. Studies have shown that four out of ten consumers purchasing counterfeited products online were not aware of it (Source: Unifab, "Les Français et les dangers de la contrefaçon", September 2012). This illegal activity finances organized crime but has also a very damaging effect on consumer trust and brands' reputation. In addition, it often endangers the safety of products. The Commission's new action plan *towards a renewed consensus on the enforcement of Intellectual Property Rights*, states that "one

Member State has estimated that 81% of IP infringing products are associated with organised crime” ([link](#)). The problem is that online platforms have no obligation to ensure the traceability of the trader who put the counterfeited good on its platform, nor are they liable for the selling of illicit goods on their platform.

- **Dependency on online platforms for online marketing and advertising:** Many stakeholders claim that search engines have been gradually altering their search results by allocating up to 80 percent of their pages to “sponsored results”/AdWords and diminishing the visibility of the “organic” (non-paid) results. Brands that have invested substantial amounts of money to protect with trade marks their products are forced in order to have any visibility online to bid and pay for their own trade marks in order to appear at the top of the search results page and outbid disassociated advertisers, including counterfeiters and “free-riding”/unauthorized sellers
- **Misleading and unfair commercial practices:** During the workshop on unfair commercial practices organised by the European Commission on 9 September 2015, several consumer associations and authorities complained about misleading practices by platforms quoting the case UFC-Que-Choisir vs Groupon ([link](#)) and TripAdvisor fined by the Italian Antitrust Authority ([link](#)). In both cases these platforms had tried to hide behind the non-liability status offered by the e-commerce directive. AIM has participated in the multistakeholder dialogue on comparison tools (CTs) to make sure that platforms do not provide inaccurate or misleading information to their consumers. Indeed, the study commissioned by DG JUST on comparison tools ([link](#)) showed that 65% of consumers had experienced a problem with a CT.
- **Misleading advertising practices:** Platforms, especially when acting as e-tailers, often advertise certain products on the website of other products offered on that platform by third party sellers. In practice this can for example be an advertising banner appearing somewhere on the platform page of one product pointing out the “top” products of the same category. Mostly, platforms use as a reference the customer reviews. Often, however, the products advertised as “top” products within a certain category are products from suppliers with whom the platform has a special agreement and makes the most financial gain. Such practices, however, worsen consumer’s perception of these exact products long-term.
- **Unfair trading practices:** An article in the Harvard Business Review in October 2015 highlighted a new problem online that brands used to face only offline: the abuse of the retailer’s dual role. While offline a retailer would use sensitive information provided by the brand on an innovation to launch its own competing private label, online platforms allegedly “*let people innovate and compete with one another and then cherry pick the best products for themselves and capture the value*”. For example, etailers can choose to sell branded products on an online platform either directly as third party sellers or via the online platform, which will act as etailer for them. As it is more interesting for the platform to sell on behalf of other etailers, it can be tempted to promote better its branded products (positioning) than the same products sold by third party sellers. In addition, the platforms has all data on the branded products sold by third party sellers and can adapt its offerings (e.g. price) accordingly.
- **Compliance risks:** Brands are concerned by a new retailers’ practice, which buy branded products from a supplier to sell in an EU Member State and then put the product on their online shop on an online platform in a different country without informing the brand manufacturer and without adapting the labelling. The risk is that the labelling is not compliant with local rules, could mislead the consumers and that the manufacturer does not own the trade mark in the country. This could have very negative impact for the reputation of the brand in case of problem.

How could these problems be best addressed?

- market dynamics
- regulatory measures
- self-regulatory measures
- a combination of the above

## TRANSPARENCY OF ONLINE PLATFORMS

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.

- Yes
- No
- I don't know

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

Yes

- No
- I don't know

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

Yes

- No
- I don't know

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

Yes

- No
- I don't know

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

*500 character(s) maximum*

AIM believes that traders selling on online platforms have an obligation to provide all necessary information about the product they are selling to the consumer so that he can make an informed purchasing decision. The information should be easily accessible, accurate, unbiased, identifiable and reliable.

In addition, online platforms should also put in place measures to ensure the traceability of the traders who sell on their websites (namely their identity and the reliability of the information they provide) in order to enable consumers and right holders to identify the trader in case of misleading practices, consumer right and intellectual property right infringements. All online platforms should of course display their own contact details, including a physical address and telephone number.

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
- No
- I don't know

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

- Yes
- No

\* 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.

*1500 character(s) maximum*

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

- Yes
- No
- I don't know

\* Please explain how the transparency of reputation systems and other trust mechanisms could be improved?

*1500 character(s) maximum*

AIM recognizes the value of reputation systems when operators are responsible as they can increase transparency and confidence for consumers and businesses. However, when operators do not take any responsibility for the authenticity of the reviews/ratings or do not put any monitoring systems in place, for example to check that the products reviewed are genuine, then the system is flawed and does not generate trust.

Brand manufacturers engaged early with the European Commission to ensure that reviews on comparison tools do not mislead consumers or create confusion about branded products. Indeed, some negative reviews can, for example, relate to counterfeit products. AIM welcomed the creation of a multi-stakeholder dialogue on the issue and supported the report presented at the Consumer Summit in March 2013. The report made recommendations to provide consumers with transparent and reliable information. For example, it points out that comparison tools should be impartial and transparent about their methodologies and business models.

Since then, the European Commission has published a study on the coverage, functioning and consumer use of comparison tools and third-party verification schemes. AIM participated in several meetings of the multi-stakeholder dialogue to find the best ways to implement its recommendations. AIM trusts that the new guidelines on the unfair commercial practices directive to be published in 2016 will address the concerns raised by non-transparent and biased comparison tools. The fine imposed by the Italian enforcement authority on TripAdvisor made clear that platforms must put the right monitoring/enforcement systems in place before making claims about the quality of their reputation schemes. Finally, reputation systems should, however, not be (mis)used by platforms to exclusively advertise the products of those suppliers that the platform has favourable agreements with or makes the most financial gain of (dual role of platforms as platform and etailer at the same time).

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.

*1500 character(s) maximum*

In the case of counterfeiting online, they constitute an additional tool to “name and shame” the bad traders while promoting those that are good. However, it is far from being sufficient, since the authenticity of the information provided often proves difficult to verify.

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

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

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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.

- individual user
- content provider
- notice provider
- intermediary
- none of the above

\*Please explain

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?

- Yes
- No

\*Please describe the situation.

*3000 character(s) maximum*

One of the main goals of the E-Commerce Directive is to harmonise and coordinate national regulatory measures adopted in relation to the activity of online service providers within the EU. However, as the Commission acknowledged in the 2012 Commission Staff Working Document on Online Services, the E-Commerce Directive was followed by the adoption of a myriad of national regulations affecting the operation of online services (including their own legal specificities). This has led to national courts delivering divergent and contradictory rulings in cases concerning equivalent situations, bringing about legal uncertainty to the EU-wide operation of online services. The rules concerning the duties and liability of online service providers regarding the information hosted by them have not been an exception to this general trend.

In the preamble of the E-Commerce Directive, Recital 40 indicates that online service providers have a “duty to act, under certain circumstances, with a view to preventing or stopping illegal activities”. Moreover, Recital 48 declares that Member States may require online service providers to apply “duties of care” that can reasonably be expected from them in order to detect and prevent certain types of illegal activities. The lack of a uniform interpretation of the concept of “duty of care” as well as the potential national fragmentation of its application can be particularly burdensome once applied to the e-commerce environment which is cross-border by nature.

In addition, the interaction of the “duty of care” with the concept of “actual knowledge” or “awareness” (Article 14) and the absence of a “general obligation to monitor” (Article 15) is far from straightforward. Last but not least, nowhere in the E-Commerce Directive is the term “intermediary service provider” defined. In addition, the E-commerce Directive never uses the term “online platforms”, neither does it define it. Online platforms are therefore benefiting from a legal exemption that is not explicitly intended for them and which no longer reflects the real nature of their activities. In the meantime, recent court cases have concluded that there were limits to the exemption of liability of online platforms for third part content. When they act as traders and not hosting service providers, they have the same professional diligence obligations as other traders. The European Commission will mention these court cases in the new guidance document for the Unfair Commercial Practices Directive.

As mentioned above, enforcers have repeatedly identified unclear responsibilities along the digital supply

chain as the cause for the unwillingness of online intermediaries to take all appropriate and proportional measures to protect the fundamental rights of others. CCIA Europe, the association of online platforms, in its manifesto and AIM in its Memorandum have both called on the European Commission to provide clarity and legal certainty regarding the responsibilities of online platforms across the single market, while our two associations have diverging views on how these responsibilities should be defined. This shows broad consensus on the need to provide clear rules or guidelines in this area.

AIM considers that a uniform and EU-wide principle of “duty of care” based on proportionality should as a minimum apply to online platforms as regards intellectual property right infringements.

The duty of care principle can be defined as the obligation for online platforms to act with diligence by taking any proactive reasonable and appropriate measures in order to protect consumers, traders against infringing practices. On counterfeiting, it would mean for example an obligation to act with diligence by taking any proactive reasonable and appropriate measures in order to protect consumers and intellectual property right holders against the promotion, marketing and distribution of counterfeit products.

The duty of care principle is not new. It is a central principle that governs the internal market in both European and national legislation (unfair commercial practices directive, misleading and comparative advertising directive, article 1383 of the French civil code, Article 2043 of the Italian Civil Code...etc.). In the physical world, the duty of care principle applies to all economic operators in the value chain, from the producer to the consumer.

A “duty of care” for online platforms would also be most consistent with the principle of administrative economy and efficiency. Instead of causing the multiplication of lengthy administrative and court proceedings across the EU, which impose on right holders the burden of searching and providing notice of infringers, it would be more efficient for the problem to be tackled by the party closest to the technical information and better positioned to control and manage it: the online platform. This does not preclude cooperation from right holders in order to increase the efficient operation of the precautionary measures established by the online service provider in the context of its “duty of care”.

This obligation provides a future-proof solution, since this will allow for the taking into account of the rapidly-evolving role and activities of online platforms. Furthermore, it will encourage online platforms, consumers, right holders and other stakeholders to cooperate and collaborate on how to determine “appropriate and reasonable” measures and on how to strike the right balance. The European Commission could support these efforts by setting up a multi-stakeholder dialogue, such as the one created on online comparison tools.

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  
 No  
 I don't know

Please explain your answer.

*1500 character(s) maximum*

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?

Yes

No

Please provide examples

*1500 character(s) maximum*

Rather than creating new categories, AIM considers that existing categories should be clarified. Certain categories of intermediaries should not have a duty of care as they are a mere conduit or do pure data storage. However, all operators who qualify as "online platforms" as defined earlier in this consultation should have an obligation to act with diligence by taking any proactive, reasonable and appropriate measures in order to protect consumers and traders against infringing practices. It will be then for the courts (national and CJEU), in case of litigation, to interpret this obligation and determine whether all appropriate and reasonable measures have been taken by the online platform, depending on the role it plays, to fulfil its obligations.

### On the "notice"

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?

Yes

No

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

- Illegal offer of goods and services (e.g. illegal arms, fake medicines, dangerous products, unauthorised gambling services etc.)
- Illegal promotion of goods and services
- Content facilitating phishing, pharming or hacking
- Infringements of intellectual property rights (e.g. copyright and related rights, trademarks)
- Infringement of consumer protection rules, such as fraudulent or misleading offers
- Infringement of safety and security requirements
- Racist and xenophobic speech
- Homophobic and other kinds of hate speech
- Child abuse content
- Terrorism-related content (e.g. content inciting the commitment of terrorist offences and training material)
- Defamation
- Other:

\*Please specify.

500 character(s) maximum

No. Consumers and companies would benefit from having a uniform approach to create legal certainty and a high level of protection. Obviously, the gravity of some of the above-mentioned infringements is higher than others. But one should not underestimate the links between such infringements: for example online counterfeiting has become one of the main financiers of organised crime. What matters is the efficiency of the action: all types of illicit content and goods should be taken down swiftly. Once taken down, it should be for judicial authorities to adapt the sanction to the gravity of the crime.

The solution has also already been promoted by the European Commission, which supported the signature of a Memorandum of Understanding between IP right holders and platforms on the sale of counterfeit goods over the internet. But even if the benefits of such charters are real - enabling strengthened collaboration and enhanced trust between these actors (training of internet players on the specificities of authentic products subject to copy, mutual exchanges of information, etc.) -, they have also shown their limits. The latter mainly stem from the non-binding nature of these charters. Indeed, while some virtuous actors have deployed important efforts, others won't take effective action as long as nothing is imposed on them by the law.

Please explain what approach you would see fit for the relevant category.

1000 character(s) maximum

### On the "action"

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 character(s) maximum

Yes. The content provider should have an obligation to provide such views within a reasonable time period. In addition, until the content provider has sent the additional required information to determine whether the content/good is genuine, the host service provider should take all proactive, appropriate and reasonable measures to prevent consumers from being harmed (which mean that the good should be taken down until proved to be legal).

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

1500 character(s) maximum

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

Yes

No

Please explain

Nowadays, most online platforms do not proactively put in place measures to ensure that counterfeited goods that have been taken down “stay down” because it would impose upon them an obligation to monitor their platforms to prevent repeating infringements.

In line with the introduction of a duty of care principle to all online platforms, AIM believes online platform should have this obligation. Namely, online platforms should take all appropriate and reasonable measures to prevent repeating infringements of intellectual property rights online.

**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".

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

- Yes
- No

\*Please describe them.

*1500 character(s) maximum*

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

*1500 character(s) maximum*

Could you outline the considerations that have prevented you from putting in place voluntary measures?

*1500 character(s) maximum*

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

- Yes
- No
- I don't know

Please specify for which categories of content you would establish such an obligation.

*1500 character(s) maximum*

The duty of care should be a horizontal principle. It should apply to all categories and all online platforms.

Please specify for which categories of intermediary you would establish such an obligation

*1500 character(s) maximum*

The duty of care should apply to all online platforms. In practice the introduction of a duty of care does not as such impose direct liability upon online platforms, but only an obligation to take all effective measures at their disposal to avoid reaching a situation where they could be held liable. This solution is future-proof because it would allow taking into account the evolving role and activities of online platforms.

AIM is convinced that consumers and investors will ultimately reward online platforms that apply a duty of care, protect rights and hence generate trust. E-commerce websites that do not accept counterfeiting or fakes are very successful online – e.g. [YOOX](#) and [FARFETCH](#) or [Sarenza](#).

Please specify what types of actions could be covered by such an obligation

*1500 character(s) maximum*

AIM does not believe that the law should specify which measures online platforms should adopt. With the rapid evolution of technology, measures that are known today as the “best solutions to date” will be considered obsolete in a few years.

Therefore, online platforms should determine which kind of “proactive, reasonable and appropriate measures” they should put in place. Then, the national and European courts, in case of litigation, will evaluate whether the measures adopted by the online platform, depending on its role and the nature of its activities, are sufficient.

Appropriate measures could be:

- Preventive: such as the identity verification of users and tracking of re-offenders re-registered under another identity/another selling account.
- Reactive: measures exist to ensure the swift removal of the illicit content or good e.g. setting up an efficient notification system with simple usage rules concerning the types of documents to produce in order to file a complaint or allowing notice per category rather than per listing (if a brand does not make perfumes in xx cl bottles, it means that they are all fakes)

As far as counterfeiting is concerned, the European Commission has focused for the moment its actions on the adoption of ex post measures, such as for example notice and action procedures or the “follow the money” approach. These measures are useful but intervene after the infringement has taken place, which means that at that stage, both consumers and companies have already been harmed.

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)?

Yes

No

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

Yes

No

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?

Yes

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

Yes

No

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

*5000 character(s) maximum*

Over the past 20 years, the Internet has developed to become a central part of the way people interact, the way they inform themselves, and the way they do business. It created unprecedented opportunities for businesses to develop their activities at the national, regional, and worldwide levels.

Brands are in a unique position to use the latest technologies and bring alive online the quality associated with branded consumer goods. They enable the essential trust that is required for the digital economy to thrive, simply because consumers feel more confident trading online when they recognize what they buy.

Through offering innovative products, services and communication in the digital environment, brands are already a major digital stakeholder and content provider. This role played by the branded goods industry for innovation is essential not only for individual consumers but also for the broader economy.

Over the past two years, the Office for the Harmonisation of the Internal Market has published studies showing that the value of IP intensive industries for jobs and growth in Europe compared to other industries. It notes for example that companies that own IPRs tend to have almost 6 times more employees than companies that do not and their revenue per employee is 29% higher on average.

Unfortunately, the internet also created a number of challenges both for consumers and companies which, if not addressed, will hinder Europe's ability to fully grasp the opportunities created by the Digital Single Market.

Online counterfeiting is one of them. It is in constant geographical expansion and its scope is now comparable to the strongest European industrial sectors. The latest figures published by Business Action to Stop Counterfeiting and Piracy (BASCAP), based on OECD studies, only confirm its exponential growth rate: the traffic of counterfeited goods grew from \$250 billion in 2008 to \$1.7 trillion in 2015<sup>1</sup>.

Today, the proliferation of online counterfeiting constitutes a major threat to the achievement of the European Digital Single Market, as it leads to

- 1) Decreasing consumer trust online
- 2) Loss of revenue for IPR-intensive industries and for governments
- 3) Loss of employment in Europe
- 4) Concerns over the conformity and safety of products: for example for counterfeited medicines, car parts, electronic devices, toys, or cosmetic products<sup>2</sup>.

<sup>1</sup> BASCAP, « Roles and responsibilities of intermediaries: fighting counterfeiting and piracy in the supply chain », March 2015, p. 5.

<sup>2</sup> Counterfeited cosmetics escapes any type of certification, norms and quality checks, and hence create security and even public health concerns for European consumers, who apply these products directly to the skin.

5) Threat to public security: in today's geopolitical and security context, one should not ignore the fact that counterfeiting has become one of the main financiers of terrorism and organised crime<sup>3</sup>.

The e-commerce value chain is complex and the rules governing the digital market place are not yet mature. In this context, brand manufacturers cannot solve the issues faced by their consumers alone. Instead, we believe that among the fundamental requirements for growth online there is a need to clarify the rights and duties of all actors of the digital value chain through the application of a duty of care principle.

Therefore, brand owners propose that duty of care provisions are based on the following four key principles:

1. We respect and value the access to information and freedom of speech in the digital environment.
2. A general duty of care must apply to all online platforms.
3. A general duty of care must be based on minimum standards applicable to all but on top specificities must be assessed on a case-by- case basis, as it depends of the nature of the activity performed by the online platform
4. The reasonable measures expected from online platforms will depend on the level of cooperation and information provided by other stakeholders (traders, consumers and IP rights owners).

## Data and cloud in digital ecosystems

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### FREE FLOW OF DATA

#### ON DATA ACCESS AND TRANSFER

Do you think that the existing contract law framework and current contractual practices are fit for purpose to facilitate a free flow of data including sufficient and fair access to and use of data in the EU, while safeguarding fundamental interests of parties involved?

Yes

No

\*Please explain your position

*3000 character(s) maximum*

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:

Necessary

Not necessary

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?

<sup>3</sup> In one of its reports, the United Nations' Office on Drugs and Crime emphasised the close links between counterfeiting and terrorism, which have been confirmed by several national, regional and international authorities (Interpol, Europol, or other states such as the UK).

Yes

No

\*Which of the following aspects would merit measures?

*between 1 and 4 choices*

- Obligation to inform the user or operator of the device that generates the data
- Attribution of the exploitation rights of the generated data to an entity (for example the person/organisation that is owner of that device)
- In case the device is embedded in a larger system or product, the obligation to share the generated data with providers of other parts of that system or with the owner / user / holder of the entire system
- Other aspects:

\*Please specify

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

*5000 character(s) maximum*

## ON DATA MARKETS

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

*3000 character(s) maximum*

## ON ACCESS TO OPEN DATA

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

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]
- Licensing of 'Open Data': help persons/ organisations wishing to re-use public sector information (e.g., Standard European License)
- Further expanding the scope of the Directive (e.g. to include public service broadcasters, public undertakings);
- Improving interoperability (e.g., common data formats);
- Further limiting the possibility to charge for re-use of public sector information

Remedies available to potential re-users against unfavourable decisions

Other aspects?

\*Please specify

Do you think that there is a case for the opening up of data held by private entities to promote its re-use by public and/or private sector, while respecting the existing provisions on data protection?  Yes  
 No

\* Under what conditions?

- in case it is in the public interest
- for non-commercial purposes (e.g. research)
- other conditions

\* Please explain

*3000 character(s) maximum*

Data has become a very valuable intangible asset of companies and an integral part of their competitive advantage. Sharing data held by private entities would deter the incentive to innovate because the data could be reused by their competitors. In addition, if the confidential data and proprietary data held by companies could be reused, this would raise competition concerns.

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

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

- Yes
- No

\* Why not? What do you think could be done to make data generated by research more effectively re-usable?

*3000 character(s) maximum*

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

Yes

No

\*Why not?

*3000 character(s) maximum*