

BILETA Response to the EU Consultation on Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy

(<https://ec.europa.eu/eusurvey/runner/Platforms/>)

This is a submission on behalf of the British and Irish Law, Education and Technology Association (BILETA). It has been prepared by Dr Dinusha Mendis (Bournemouth University), Dr Joseph Savirimuthu (Liverpool University) and Dr Catherine Easton (Lancaster University).

The submission has been approved by the Executive of BILETA and is therefore submitted on behalf of BILETA.

In addition, this response is submitted by the following individuals:

Dr Felipe Romero Moreno, University of Hertfordshire

Abhilash Nair, University of Strathclyde

BILETA RESPONSE

(Responses have been provided in italics in the text below)

Objectives and General Information

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

You are invited to read the privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with. This public consultation will close on 30 December 2015 (12 weeks from the day when all language versions have been made available).

Tackling illegal content online and the liability of online intermediaries

3 ° ° 1 ~ # 1 1 ~ ° ~ # 1 1 ° # 1 1 ° ~ # 1 # ° ~ # 1 1 ~ ° ~ # 1 # ° # 1 # ~ # 1 # ° ~ 1 # 1 1 #

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 X

*

Please explain

These questions are being answered in the role of an academic commentator on the current state of the regulatory framework

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 X

No

Please describe the situation.

The notion of the diligent operator is difficult to uphold in relation to intermediaries who process large numbers of transactions. The expansion of Art 14 in cases such as L'Oréal SA and Others v eBay International AG and Others (C-324/09) needs further clarification in relation to the point at which the reasonable duty arises.

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 X

I don't know

Please explain your answer

This provision would benefit from some clarity particularly in relation to the interaction of Articles 12, 13 and 14. Currently protection for intermediaries is provided under Article 14 in a manner that does not require a purely passive role. Given the changing nature of the activities undertaken by operators there needs to be clarification of the approach taken to the knowledge that providers have of the activities undertaken on their sites.

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 X

No

Please provide example

As with the answer above, the categories in the Directive should be retained but further clarity should be given in relation to the issues raised in the L'Oreal case. A more nuanced approach to the notion of knowledge needs to be developed.

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 X

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.

Although the categories are diverse, the imposition of specific regimes for certain activities will only lead to further confusion and a lack of clarity. Imposing mandated approaches on intermediaries in specific circumstances will be unworkable and will run the risk of leading providers to use the process more frequently.

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

One general response outlining the issue, the need for action and giving links to further sources of information would suffice for all.

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 X

No

*

Please explain your answer

Following the need for due process, content providers should be given an opportunity to respond to any notice of alleged illegality. To make these responses easier to collate and manage for hosting services providers an online response form should be developed. This should apply across all categories.

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

Yes

No X

Dependent upon the response taken to the action, the content taken should not stay down over time. Content providers should be able to revisit the relevant content, leading to any original notice lapsing in relation to the action taken.

Collaborative Economy

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

Terms used for the purposes of this consultation:

"Collaborative economy"

For the purposes of this consultation the collaborative economy links individuals and/or legal persons through online platforms (collaborative economy platforms) allowing them to provide services and/or exchange assets, resources, time, skills, or capital, sometimes for a temporary period and without transferring ownership rights. Typical examples are transport services including the use of domestic vehicles for passenger transport and ride-sharing, accommodation or professional services.

"Traditional provider"

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

"Provider in the collaborative economy"

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

"User in the collaborative economy"

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

Please indicate your role in the collaborative economy

- Provider or association representing providers
- Traditional provider or association representing traditional providers
- Platform or association representing platforms
- Public authority
- User or consumer association**

Which are the main risks and challenges associated with the growth of the collaborative economy and what are the obstacles, which could hamper its growth and accessibility? Please rate from 1 to 5 according to their importance (1 – not important; 5 – very important).

- Not sufficiently adapted regulatory framework

1

2

3

4

5

- Uncertainty for providers on their rights and obligations

1

2

3

4

5

- Uncertainty for users about their rights and obligations

1

2

3

4

5

- Weakening of employment and social rights for employees/workers

1

2

3

4

5

- Non-compliance with health and safety standards and regulations

1

2

3

4

5

- Rise in undeclared work and the black economy

1

2

3

4

5

- Opposition from traditional providers

1

2

3

4

5

- Uncertainty related to the protection of personal data

1

2

3

4

5

- Insufficient funding for start-ups

1

2

3

4

5

- Other, please explain

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

Positively across sectors

Varies depending on the sector

Varies depending on each case

Varies according to the national employment laws

Negatively across sectors

Other

Do you see any obstacle to the development and scaling-up of collaborative economy across borders in Europe and/or to the emergence of European market leaders?

Yes

No

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

Yes

No

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

- No change is required
- New rules for the collaborative economy are required
- More guidance and better information on the application of the existing rules is required
- I don't know what is the current regulatory environment

UNDER OTHER –

I would suggest that we highlight specific aspects

- 1. How “trust” is embedded in platforms. This aspect needs to be explicitly addressed.*
- 2. Strategies for scaling and achieving critical mass. It is worth noting that without trust, it will be extremely difficult to achieve the critical mass needed to ensure that platforms are sustainable and achieve a critical mass of users.*
- 3. We need to think critically about how the collaborative economy “fits” into the existing retail, financing, hotel, transport/travel sectors.*
- 4. The definitions provided in the Consultation are too linear and needs to be reviewed. Here are some thoughts to help produce an organic approach.*
 - a. From the “user”/” “consumer” perspective we need to ensure that we have a clear sense of the relationship/interaction between the “collaborative economy” and the “traditional” economy.*
 - b. Consumers have a wide range of motivations – and these are underpinned by technological and social developments. For example, the emergence of Uber and Airbnb it is clear that in certain sectors, consumers value experience and access. This is not necessarily the case when we consider book rental or music streaming.*
 - c. The collaborative economy cannot be understood with reference to the current trends. I would be particularly careful about technological fetishism. PwC have identified 4 megatrends that must be integrated into the way we approach governance challenges and develop strategic choices.*

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

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

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
- 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.

Dealing with online platforms when purchasing products means that it is not possible to see the physical product prior to purchase. This could lead to the 'wrong' product being delivered or not being delivered at all. There are laws, which deal with such situations

including the Consumer Contracts Regulations 2013 and the Consumer Rights Act 2015, which however does not stop consumers having problems on online platforms.

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?

Online platforms which allow individuals to upload content for purposes of sharing (digital content such as music, games, design files) should put in place steps to disallow such activity if the uploaded content contravenes copyright and intellectual property laws.

On the other hand, online platforms that engage in such activities should provide clearer guidance on licences about the protection and exploitation in relation to the digital content.

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.

As mentioned above information about licenses will be useful especially for online platforms involved in providing a sharing service. In doing so, the licenses and terms and conditions should be set out in a user-friendly manner.

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?

Online platforms generally process reputational information and make it available to users in (1) an identified format, (2) an anonymous format, and (3) a hidden format. The third option – hidden formats – bar users from viewing their reputational information, which not only raises privacy concerns but also leads to an opaque system.

The accuracy and reliability of online reputation comments is an area which has given cause for concern. A solution put forward by Airbnb has been to implement reviews as a sort of “double blind submission” where neither party in the exchange can access their reviews until both have submitted.

See also, Dambrine B., Jerome J., & Ambrose A., User Reputation: Building Trust and Addressing Privacy Issues in the Sharing Economy (June 2015).

USE OF INFORMATION BY ONLINE PLATFORMS

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

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

- Yes
- No
- I don't know

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

- Yes
- No
- I don't know

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

- Yes
- No
- I don't know

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

- Yes
 No

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

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

- Yes
 No

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

- Yes
 No

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

- Yes
 No

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

- Yes
 No