



To: European Commission
DG Communication Networks,
Content & Technology
Unit F1 - Digital Single Market
Avenue de Beaulieu 25
B-1049 Brussels - Belgium

Brussels, 22/12/2015

egta – the European association of television and radio sales houses

Transparency register: 1977807375-62

NACE Code: M73.1.2

Answer to the public consultation on online platforms, cloud & data, liability of intermediaries, collaborative economy

Explanatory statement: egta answered the consultation online as required by the public consultation process. However, certain questions could not be fully answered online either because the online questionnaire did not provide enough space to do so (characters restriction) or because some questions that appeared in the PDF/word versions of the consultation were not accessible online (despite their relevance to egta as a trade body).

Therefore, we kindly ask the European Commission to take into account this written answer to the public consultation as complementary to our online answer. Please note that the parts in bold are missing from egta's online answer.

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

Media convergence has resulted in online platforms offering an ever-growing amount of audiovisual content in a large variety of formats. Operators like YouTube, Netflix, Facebook, are direct competitors not only to on-demand video services but also to linear television broadcasters: a recent report from Ofcom (Children & Parents: Media Use and Attitudes Report) shows that young UK teens are more likely to watch YouTube videos than TV programmes.

Despite this, online platforms fall under varying regulatory regimes, leading to divergent rules that egta members believe can be addressed. For instance, while liability

exemptions provided by the e-commerce Directive are still relevant today for some information society service providers, it becomes increasingly evident that other online platforms have evolved from *mere technical, automatic and passive* operators to active content providers. This is visible in their activities: not only do they store video content online, but they organise and curate this content, provide personalised interfaces to users, monetise audiovisual material through content-related advertising and suggest other video programmes in relation with the programme viewed.

This situation creates certain issues: for example, a lack of consistency around protection of viewers, in particular exposure to content harmful for minors (e.g. ban on advertising of tobacco) and the labelling of advertising/funded content along with other asymmetries such as ad-insertion rules hamper European broadcasters in competing effectively with global enterprises.

egta's position is that the protection of minors and consumers must be ensured across all audiovisual content regardless of how it is accessed. This could be established via a core set of principles such as those set out in article 9 of the Audiovisual Media Services Directive, complemented through self- and co- regulatory frameworks, as they have proven especially flexible in keeping pace with technological and market developments.

In addition to this, in order to avoid any competitive distortion, all unnecessary rules should be removed or relaxed for audiovisual commercial communications, and active content providers should bear a reasonable degree of liability when it comes to illegal content.

Introducing flexibility to the commercial communications framework as well as ensuring the protection of broadcasters' content would be beneficial not only to broadcasters but to the whole creative sector, ensuring revenue and funding for European content.

Besides, the emergence of connected devices raises issues with regard to signal integrity, especially for commercial communications.

An example of the challenging nature of regulating commercial communications in an evolving market is the possibility for a third party to overlay advertising on a connected TV service without the knowledge of a broadcaster, producer or even the brand itself. Such practices create a significant and unparalleled challenge to the regulatory system, given that the construction of European and national media regulation is based on the operator accepting, in a broadcasting licence, responsibility for what appears on screen. This technical evolution carries the risk of significant audiovisual rules being circumvented by third parties (e.g. children's and new programmes). Therefore if this editorial responsibility can no longer be guaranteed, then the question of what is regulated and how this is done needs to be raised.

egta therefore recommends that signal integrity should be ensured by the regulatory framework.

- How could these problems be best addressed?

Through a combination of regulatory and self regulatory measures.

- 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 suppliers, main characteristics of the products, etc.): N/A
 - b) Information in response to a search query by the user, in particular if the displayed results are sponsored or not: YES
 - c) Information on who the actual supplier is, offering products or services on the platform: YES
 - d) Information to discourage misleading marketing by professional suppliers (traders), including fake reviews: YES
- 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. Targeted advertising is an innovative way to provide users with more relevant and engaging commercial communications.

egta actively promotes a responsible use of data in advertising online through its participation in the European Interactive Digital Advertising Alliance ([EDAA](#)), which provides a robust self-regulatory system for online behavioural advertising.

The EDAA was launched in October 2012 by leading media and marketing trade bodies with the aim to provide information directly to consumers about online behavioural advertising (OBA) and to empower Internet users across Europe by enabling an operational mechanism that provides real transparency, choice and control.

The EDAA does this by licensing the 'OBA Icon' to companies involved in OBA: by clicking on the Icon, internet users are taken to www.youronlinechoices.eu where they can find easy-to-understand information on the practice of OBA, as well as mechanisms for controlling targeted advertisements they wish to receive. The programme has been actively welcomed and supported by the European Commission.

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

Some egta members highlighted a lack of transparency over which personal data are collected by platforms providers and transferred to third parties; this information is provided neither to platform users nor to business or cooperation partners. The use of

confidence/quality seals based on independent audits may be a first step towards better transparency.

A lack of transparency is also noticeable with regard to dynamic price adjustment tools. Complete transparency on how these tools operate is necessary in order to build true confidence in the online ecosystem.

Furthermore, article 5 of the Ecommerce Directive embodies the essential principle that service providers should clearly indicate their identity. Unfortunately, illegitimate service providers routinely hide their identities, undermining the rule of law in fields such as consumer protection, privacy, amongst others (e.g. copyright, taxation) and enabling online criminal activity. Such platforms also expose consumers to malware and fraud. The ability to operate anonymously online corrodes the consumer experience and consumer trust for online platforms generally. In view of the interests harmed by non-compliance with Article 5, including those of customers and their business partners, egta would ask that the Commission explore how to more meaningfully apply this existing requirement.

Finally, it appears that some search engines discriminate content by favouring their own/affiliated services and content over competitors'. When promoted or sponsored results are not properly identified to the consumer, this becomes even more problematic.

- *If you are aware of other contractual clauses or experience other potentially problematic practices, please mention them here. .Please briefly describe the situation*

The internet ecosystem favours scalability, which in some cases drives online platforms to grow to the point of approaching a monopolistic position in their defined market (e.g. online search).

This may lead to online platforms, such as video sharing operators, being able to act as gatekeepers and unduly restrict traders' access to end-users data due to their power of negotiation. At the same time, they are able to freely monetise traffic driven to their platform by traders' content. This situation would endanger traders' revenue streams from traffic generated by their own content and hinder the development of a European data-driven economy.

Indeed, through the use of data, advertising can get much smarter and better targeted and thus much more valuable, effective and user-friendly. In the future, online advertising revenues will be drawn to companies offering the best targeted services. **Companies controlling data streams will then be able to out-perform competition in this field, which is a major source of revenue for online companies.**

- *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?*

Several egta members have faced restrictive interpretations of competition law in the EU that negatively affected the development of their online platforms.

Many national competition authorities still often consider national markets to be relevant when evaluating the existence of a dominant position in the online world.

This in turn prevents European companies from scaling up and reaching a critical size in order to compete with US and global competitors online.

One would expect European competition authorities to consider at least the EU level, or even the global level when applying antitrust and concentration rules.

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

- a) unexpectedly changing conditions of accessing the services of the platforms: yes
- b) unexpectedly changing conditions of accessing the Application Programming Interface of the platform: yes
- c) unexpectedly changing conditions of accessing the data you shared with or stored on the platform: yes
- d) discriminatory treatment in accessing data on the platform: yes

- *Please share your general comments or ideas regarding access to data on online platforms*

As explained above, a risk exists that gatekeepers (big online platforms, aggregators, video sharing operators) will become monopolistic operators in the data market because of their competitive position, which could in turn endanger the development of a European data-driven economy.

- *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?*

It becomes increasingly evident that some online platforms have evolved from *mere technical, automatic and passive* information society service operators to active content providers. This is visible in the activities of online video platforms: not only do they store video content online, but they organise and curate this content, provide personalised

interfaces to users, monetise audiovisual material through content-related advertising and suggest other video programmes in relation with the programme viewed.

It is therefore no longer relevant to award these particular services, which provide both passive and active services, with the liability exemptions provided by the e-commerce Directive. These kinds of services should bear a reasonable degree of liability, as other audiovisual media service providers, especially when it comes to illegal content.

Additionally, it must be noted that right holders bear the financial and administrative burden of monitoring/controlling sharing video platforms' content to fight against unauthorised commercial use of copyright-protected audiovisual material. It takes a lot of efforts for a right holder to initiate a take down from a filehoster or platform, whereas those platforms monetise this content as long as it is on their website.