

Comments of
Thomas M. Lenard, Ph.D., President and Senior Fellow
Technology Policy Institute
On Public Consultation
Regulatory Environment for Platforms,
Online Intermediaries, Data and Cloud Computing and the Collaborative Economy
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Today's digital economy may be relatively new, but the economic principles underlying it are not. First principles still matter. Thus, government should intervene in these dynamic markets only when markets fail and when proposed solutions are likely demonstrably to improve society's well-being.

This consultation is being undertaken as part of the implementation of the European Commission's Digital Single Market (DSM) strategy. However, while much of the DSM strategy is intended to lower regulatory barriers within the EU, this consultation appears to be aimed at developing new regulations for a broad swath of the internet economy encompassing a diverse array of platforms, business models and public policy issues. Indeed, it potentially implicates the entire internet economy in one way or another.

The potential reach of the new regulatory proposals is indicated by the concept of platform, which the Commission defines as “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...” This definition arguably includes almost every enterprise in the online world. Some economists would consider any retail operation to be a two-sided market. The only explicit exclusion from the definition is internet access providers, presumably not because they don’t fit the definition, but rather because they are regulated elsewhere. The definition, as written, includes such a heterogeneous set of enterprises, business models and potential issues that it is problematic for public policy. Assuring that the benefits of any new proposals exceed their costs across such a diverse group will be difficult.

Identifying benefits will be even more difficult considering that the Commission provides no evidence of market failures associated with platforms. The Commission’s background paper asserts “the growing role of platforms also poses challenges as regards consumer protection,” but provides no evidence to support that claim.

Some sections of the online survey, such as a series of questions on whether platforms provide sufficient transparency on a range of practices, seem designed to generate support for new regulatory requirements. Other aspects of the questionnaire, such as asking respondents how often they have experienced a detailed list of adverse business practices, seem designed to elicit complaints from businesses that use platforms. This methodology is likely to yield biased results that are not an accurate guide for policy. Moreover, complaints from business partners or competitors are not, by themselves, evidence of market failure or even wrongdoing. If acted on, they are likely to impede market efficiency.

Similarly, the consultation on illegal content and the liability of online intermediaries lacks coherence because it covers so many types of content and intermediaries. The consultation does not suggest an analytical framework capable of determining whether or how to modify rules affecting content that includes terrorist communications, child pornography, pirated recordings and movies, and content that is legal in some jurisdictions and illegal elsewhere. The preferred analytical framework from a consumer perspective is a benefit-cost framework. Thus, if the Commission considers changes in the

intermediary liability rules, it should carefully analyze the costs and benefits of those changes. It is likely the costs and benefits (and therefore the correct policy) will differ depending on the specific circumstances—the type of illegal activity and the nature of the intermediary.

The other issues addressed in the Commission’s consultation seem somewhat easier. The free flow of data furthers democratic values and is important economically in the same way that free trade generally promotes economic welfare. Measures that impede the flow of data, such as data localization requirements, can be expected to raise costs and reduce consumer welfare in the same way that barriers to trade do. Data is a valuable commodity in the information economy and public policy should assure the realization of that value by facilitating data’s use and reuse (once generated, the marginal cost of reusing data is very small), subject to legitimate privacy concerns.

Similarly, policy questions associated with the collaborative economy seem more straightforward. Companies like Uber, for example, provide new alternatives for consumers and workers. Policy makers should dismantle policies that primarily protect incumbents. If incumbents complain about lower regulatory requirements for new entrants, the appropriate response should generally be to lower the requirements for incumbents, rather than raising them for the new entrants.

If this consultation produces new regulatory proposals, the Commission should answer the following basic public policy questions for each:

- Does the proposal address a significant market failure?;
- If so, how does the market failure adversely affect consumers?;
- Can the failure be remedied by the proposed regulation?; and,
- Are the expected benefits of the regulation greater than the expected costs?

Because the consultation is looking at such a diverse set of platforms, business models, content etc., this analysis needs to be done in a granular manner, as the costs and benefits are likely to vary depending on the specific circumstances. However, such analysis is necessary if the Commission hopes to have a positive effect on innovation, the development of the internet economy and, most importantly, consumer welfare.