



INTERNET ASSOCIATION POSITION PAPER ON

The Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

1. INTRODUCTION AND SUMMARY

The Internet Association (IA) submits this position paper alongside our response to the Commission's questionnaire on the Regulatory Environment for Platforms, Online, Data and Cloud Computing and the Collaborative Economy. The Internet Association is the unified voice of the Internet economy, representing the interests of leading Internet companies¹ and their global community of users. The IA is dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower users.

Included in our mission is the promotion of regulatory and legal frameworks that support not only our member companies but also the wider Internet ecosystem that has emerged in recent decades. That ecosystem includes the small and medium sized businesses in the EU who have leveraged the Internet to lower costs and expand into global markets in ways undreamt of even ten years ago; EU consumers who have benefitted and will continue to benefit from the consumer surplus the Internet has brought to their everyday lives; and investors who risk capital to fund startups in the EU.

The Internet Association commends the Commission for its outreach to stakeholders on the Digital Single Market (DSM) proposal. The DSM's vision of removing barriers between the 28 EU Member States in order to foster digital innovation and growth is consistent with our mission. IA members therefore stand ready to play their role in providing the tools and services that will allow EU businesses and consumers to embrace the estimated €415 billion per year and hundreds of thousands of new jobs the DSM will create.²

The Internet has already generated significant benefits for stakeholders in the DSM initiative. Copenhagen Economics estimates that the total value of goods and services purchased by EU private households and the public sector through online intermediaries was about €270 billion in 2014.³ Not

¹ The Internet Association's members include Airbnb, Amazon, auction.com, Coinbase, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Gilt, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Sidecar, Snapchat, SurveyMonkey, TripAdvisor, Twitter, Yahoo, Yelp, Uber, Zenefits, and Zynga.

² *A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen*, European Commission (May 5, 2015) http://europa.eu/rapid/press-release_IP-15-4919_en.htm

³ Katrine Ellersgaard Nielsen, Dr. Bruno Basalisco and Martin H. Thelle, *Online Intermediaries, Impact on the EU Economy*, Copenhagen Economics, (April 2013).



only has the Internet delivered these goods and services, in doing so it has generated a significant consumer surplus for EU consumers. This surplus is the product of lower search and transaction costs as well as the increased competition and choice the Internet brings to consumers' lives.⁴ The most recent example of this Internet enabled consumer surplus can be seen in the collaborative economy, which we highlight later on in this paper.

Significantly, these benefits have been brought to EU consumers' lives without undue regulatory intervention. For this reason, the Internet Association submits that radical changes to the existing EU framework controlling online intermediaries are not needed in order for the DSM to achieve its stated goals. Prior experience teaches us that regulatory intervention is warranted only when certain conditions are met: first, there is a risk to consumer welfare due to a market failure and second, less restrictive solutions are unavailable. In the case of online intermediaries, neither condition is met. With respect to the first condition, there is little evidence that consumer welfare is at risk due to market failure in the online ecosystem. Online markets are fast moving, entry barriers are low, and market power is fleeting in nature.⁵

Second, regulatory intervention is not warranted because less restrictive solutions are not only available but already exist in the digital realm. The existing EU laws governing online platforms, intermediary liability, data and cloud computing and the collaborative economy are robust and flexible and have proven fit for purpose over the years. Indeed, one study estimates the number of EU directives and regulations impacting online intermediaries to be "more than 40."⁶ Included in this number are the following regimes:

- The eCommerce Directive⁷ controlling intermediary liability;
- Consumer protection laws at the EU and national level, including the Data Protection Directive⁸ (soon to be replaced with the General Data Protection Regulation); the Directive on Consumer Rights⁹ and the Directive on Unfair Contract Terms;¹⁰
- Financial services regulation including the Payment Services Directive;¹¹ and
- EU and national competition authorities that engage in ex-post, targeted antitrust enforcement

⁴ *Economic Study of the Consumer Benefits of eBay*, Frontier Economics (September 2008), (finding the estimated cost savings to EU consumers shopping online in the form of lower prices to be 18 per cent when compared to similar products in retail stores).

⁶ Ellersgaard et al., *supra*.

⁷ Directive 2000/13/EC.

⁸ Directive 1995/46/EC.

⁹ Directive 2011/83/EC.

¹⁰ Directive 1993/11/EEC.

¹¹ Directive 2007/64/EC.



against Internet platforms (including several IA members).

Although the Internet Association does not see a need for radical changes to the existing EU regime controlling online intermediaries, it is important to bear in mind that radical changes, if made, would be most impactful on small and medium sized businesses, in particular EU startups. As evidenced by several economic studies, these startups will be less well equipped to meet increased regulatory burdens and are therefore less likely to receive needed funding than their more established competitors. At the Internet Association, we are witnessing this asymmetrical impact first hand in the context of the recent invalidation of the EU/U.S. Safe Harbor, the burden of which Commissioner Oettinger also recognizes has fallen primarily on smaller and medium sized businesses in the EU as well as in the U.S.¹²

2. Platform Regulation

In its consultation, the Commission requests stakeholder views on general ex-ante regulation of online platforms and asks whether new regulatory tools are needed in this context.¹³ At the same time, the Commission recognizes that online platforms will play an important and positive role in creating the Digital Single Market.¹⁴ The Internet Association commends the Commission for acknowledging the role played by our member companies in the EU economy but we are concerned that increased regulatory burdens will stymie their ability to do so in the future.

In summary, we submit that the following principles should be front-of-mind as the Commission considers how to proceed on this issue. These principles are consistent with the Commission's Better Regulation principles to design "EU policies and laws so that they achieve their objectives at minimum cost" and are "informed by the best available evidence."¹⁵

- First, the definition of online platforms is both over and under inclusive and would be challenging to administer in practice, both by the Commission itself as well as those it seeks to regulate.
- Second, in weighing the benefits and risks of online intermediaries, careful consideration should

¹² See e.g., *Safe Harbor judgment: Oettinger does not believe in privacy agreements with USA*, Der Spiegel, (October 9, 2015), (explaining remarks by Commissioner Oettinger that a renewed Safe Harbor is needed in particular "für viele mittelständische Unternehmen, die nun verunsichert sind und dringend Klarheit brauchen."). <http://www.spiegel.de/netzwelt/netzpolitik/guenther-oettinger-glaubt-nicht-an-datenschutz-abkommen-mit-usa-a-1057005.html>

¹³ *Commission Working Document: A Digital Single Market Strategy for Europe*, European Commission, Sec. 4.6 (June 6, 2015) <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52015SC0100>

¹⁴ *Id.* Sec. 2.1, 2.2.

¹⁵ Better Regulation, European Commission (December 2015) http://ec.europa.eu/smart-regulation/index_en.htm (stating that better regulation is about designing EU policies and laws so that they achieve their objectives at minimum cost. It ensures that policy is prepared, implemented and reviewed in an open, transparent manner, informed by the best available evidence and backed up by involving stakeholders.).



be given to the significant benefits they have delivered to the EU economy, both for small and medium sized businesses as well as for EU consumers.

- Third, to the extent that there are risks associated with online intermediaries, these risks fall within the scope of existing EU and member state liability regimes.

As a threshold matter, the Commission's working definition of online platforms poses significant challenges and will be difficult to administer in practice. This issue is important to address because a "leaky" definition of online platforms could create unintended consequences both for the Commission as well as for those it seeks to regulate. As academic economists have observed, a platform is at its core an economic actor connecting supply with demand, a concept that encompasses a wide variety of business models.¹⁶ Several MEPs recognize this challenge and have noted "it is impossible to coin a uniform definition for web platforms [] Platforms are extremely varied, and I don't think we can manage to have a definition that is all-embracing."¹⁷

There are few common threads to link such diverse businesses models as online marketplaces, collaborative or 'sharing' economy businesses, communication companies, social networks, search engines and specialised search tools, maps, news aggregators, music providers, video sharing sites, payment systems and app stores. This principle applies even when the inquiry is narrowed down to purely online actors who might be more clearly identified as a recognizable category. For example, even within the collaborative economy, there are significant differences that require bespoke regulatory approaches across different verticals. A collaborative economy business model in the financial services market will present very different regulatory challenges from a collaborative economy model in transportation.

A better starting point for the Commission might therefore be to focus on the goods and services offered by the various entities identified in the consultation and develop a 'layered' approach from this starting point. This was the approach taken in the eCommerce Directive, which crafted bespoke rules for network infrastructure, services, hosting or sharing sites or the application layer and the content layer. Each layer plays a fundamentally different role in the Internet ecosystem and each is handled differently from a regulatory standpoint.

Beyond this threshold definitional argument, the Internet Association submits that the benefits online intermediaries bring to the EU economy should be carefully weighed against any perceived risks associated with them. Online intermediaries are vectors for growth throughout the EU economy. Every day, they connect businesses large and small with EU consumers in other member states. Today, only an estimated 15 per cent of EU consumers are comfortable shopping online from

¹⁶ David S. Evans and Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, The National Bureau of Economics (September 2005).

¹⁷ MEPs Evelyn Gebhard, Kaja Kallas, Julia Reda and Michael Boni, December 1, 2015.



another member state, making it difficult for EU small businesses to trade cross border.¹⁸ Internet Association members have led the way in enabling this cross border trade. For example, Amazon makes it simple for sellers to offer their products across all Amazon's EU websites from a single account, reaching customers across the 28 EU member states and beyond. As a result, tens of thousands of small businesses across Europe sell their products directly to customers. In 2014, these small and medium-sized businesses generated intra-EU exports of €2.8bn through Amazon's websites.

Many of the remaining barriers inhibiting cross border trade will be tackled by the Commission's DSM initiative, including VAT and package delivery rates. But Internet Association member companies such as eBay, Etsy, and Amazon will also play an important role in enabling this trade by lowering entry barriers for small traders and creating trusted payment systems for consumers, just as they do today.

Beyond this direct and visible role, other IA members will play a significant role in creating affordable marketing and advertising tools for small EU businesses entering the DSM, allowing them to compete with the marketing budgets of their more established competitors. As the Commission's recent study of small businesses in 6 EU Member States found, 61 per cent of businesses surveyed made formal use of lower cost social media such as Facebook and Twitter in marketing to consumers.¹⁹ These numbers will grow as the DSM opportunity grows. Additionally, IA members such as Monster and LinkedIn will continue to play an important role in connecting DSM job seekers in economies impacted by long-term unemployment (e.g. Ireland) and youth unemployment (e.g. Spain). A McKinsey survey estimates that by 2025, online talent platforms could increase employment by 72 million full-time jobs by removing inefficiencies from labor markets, including in EU member states.²⁰

Beyond these benefits to small businesses and job seekers, Internet Association members play an important role in enhancing overall consumer welfare in the EU. Although less easy to quantify than the direct benefits described above, the consumer surplus created by the Internet in the EU is no less real. This consumer surplus is a function of the increased transparency, lower prices, and wider variety the Internet brings to consumers' day-to-day lives. Unsurprisingly, the most quantifiable of these benefits is price: one economic study conducted across EU markets found that the overall price savings to consumers from purchasing through online marketplaces compared to retail stores was in the order of 17 per cent.²¹

¹⁸ Miriam Shapiro, *Forging an EU Digital Single Market: Difficulties and Opportunities*, The Brookings Institution (September 22, 2015) <http://www.brookings.edu/blogs/up-front/posts/2015/09/22-european-union-digital-single-market-sapiro?cid=00900015020089101US0001-09241>.

¹⁹ Michail Batikas, René van Bavel, Aaron Martin, Ioannis Maghiros, *Use of Social Media by European SMEs*, European Commission, at 2 (May 2013) http://www.europski-fondovi.eu/sites/default/files/dokumenti/KK0113565ENN_002.pdf.

²⁰ James Manyika, Susan Lund, Kelsey Robinson, John Valentino and Richard Dobbs, *Connecting talent with opportunity in the digital age*, McKinsey & Company (June 2015) http://www.mckinsey.com/insights/employment_and_growth/connecting_talent_with_opportunity_in_the_digital_age.

²¹ *Economic Study of the Consumer Benefits of eBay*, Frontier Economics (September 2008).



While the benefits of online intermediaries to EU businesses and consumers can be supported empirically, it is unclear that the risks they pose are as clearly defined. At a minimum, there is little evidence supporting the need for heavy-handed regulatory intervention of the kind suggested in some quarters within the EU.²² Economic theory teaches us that regulation is needed in markets that exhibit a sustained lack of competition over time.²³ Evidence supporting regulatory intervention has included high entry barriers and little evidence of actual successful entry. Evidence of oligopolistic conduct between competitors and stable market shares is also relevant. Online markets typically exhibit few of these competitive conditions. These markets are dynamic, entry barriers are low, and market power is at best temporary in nature.²⁴ If these observations were untrue, then the merger between AOL and Time Warner would have resulted in an online behemoth (it did not) and MySpace would be the leading social media platform in the world today (it is not). However, one only needs to look to the Guardian newspaper headline from 2007 questioning whether MySpace will ever lose its monopoly to understand how dynamic online markets are in reality.²⁵

Beyond economic theory, several EU experts and regulators agree that online markets are not well suited to ex-ante regulation. In a report to the EU Parliament ITRE committee earlier this year, a group of academic experts agreed with characterization of online markets above and concluded, “it is unclear how dominant large digital platforms actually are. Markets are often contestable due to dynamic competition for the market.”²⁶ Similarly, the CEO of the UK Competition and Markets Authority in a recent speech in Bonn counseled against blanket regulation of online intermediaries since “the costs of premature, unmeritorious interventions are likely to be very high in this sector, given the positive impact of welfare-enhancing innovations.”²⁷

To be clear, arguing that online intermediaries should not be regulated is not the same as arguing that they should be immune from legal scrutiny. In fact, they are subject to legal scrutiny both at the EU and individual member state levels. At the time of writing, DG Comp has open investigations into several

²² Europe : la France et l’Allemagne veulent mieux réguler les GAFA, <http://www.silicon.fr/europe-france-allemande-reguler-gafa-102869.html>

²³ See generally, Alfred E. Kahn, *The Economics of Regulation*, (2008).

²⁴ Howard Shelanski, *Information, Innovation, and Competition Policy for the Internet*, University of Pennsylvania Law Review, at 1676-1685 (2013).

²⁵ Victor Keegan, *Will MySpace Ever Lose its Monopoly?* The Guardian (February 8, 2007) <http://www.theguardian.com/technology/2007/feb/08/business.comment>

²⁶ Nicolai Van Gorp, *Cross Competition Amongst Information (Digital) Platforms*, European Parliament Directorate General for Internal Policy Studies (January 20, 2015) [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542187/IPOL_STU\(2015\)542187_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542187/IPOL_STU(2015)542187_EN.pdf).

²⁷ CMA Chief Executive Alex Chisholm, Remarks at the Bundesnetzagentur Conference in Bonn, Germany (October 27, 2015) <https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-online-platform-regulation>.



online intermediaries under Articles 101 and 102 of the TEU. Separately, DG Comp has launched a broad investigation into the eCommerce sector. National EU data protection authorities regularly scrutinize online data protection practices. This targeted ex-post enforcement framework has proven fit for purpose over time and is better suited to the risks associated with online markets than “one size fits all” ex-ante regulation. As explained by the CEO of the UK competition authority, ex-post enforcement allows for “more evidence-based, and therefore more targeted and proportionate, enforcement. The digital platforms should be judged and treated according to how they behave, and how this affects consumers.”²⁸

3. Intermediary Liability

In its consultation, the Commission requests feedback on the reopening of the eCommerce Directive and implementing a new "duty of care" on Internet service providers. The Commission is considering "whether to ask intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and system [] so as to improve their resistance to the propagation of illegal content."²⁹ The Internet Association respectfully submits that changes to the existing intermediary liability regime would run counter to the political goals underpinning the DSM package to foster digital innovation and growth throughout the EU.

In evaluating this proposal, the Internet Association requests that the Commission keep the following principles front-of-mind:

- First, as the history of intermediary liability both in the U.S. and in the EU demonstrates, the need for safe harbors from liability is even greater today than in the past due to the exponential growth in online content since the Internet’s early days.
- Second, online intermediaries by no means operate in a legal vacuum with respect to both IP and non-IP liability. The current legal framework is supplemented by voluntary efforts, community policing and report systems that help stop the spread of harassment, hate speech, and other harmful content.
- Finally, it is important that the Commission exercise regulatory restraint in this area since heavy handed regulation would stymie incentives to invest in and grow EU startups to scale and this outcome would run counter to the DSM’s overarching political goal.

Intermediary liability safe harbors played a pivotal role in the growth of the Internet on both sides of the Atlantic. Several Internet Association member companies grew to maturity during the early to mid-1990s and can attest to this from direct experience. In the Internet’s early days, the legal status of startups was uncertain. However, both the United States Congress and the EC Commission responded to this vacuum in an enlightened way and courts in both systems have done a good job interpreting

²⁸ *Id.*

²⁹ *Commission Working Document: A Digital Single Market Strategy for Europe*, European Commission, (June 6, 2015) <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52015SC0100>



these legal frameworks in the intervening years.

In the United States, Congress passed Section 230 of the Communications Decency Act into law in 1996, which shielded Internet service providers from liability for a variety of actions that were committed by their users.³⁰ Although Section 230 did not include intellectual property infringement, Congress later passed the Digital Millennium Copyright Act in 1998, which shielded Internet providers from liability for their users' infringement provided they acted quickly to remove infringing content when notified. Both the CDA and the DMCA recognized that it was functionally impossible for Internet platforms to monitor all the content they serve or index. The intervening years have only strengthened the case for both safe harbors since the Internet of the 1990s was infinitely smaller in scale and scope than today's Internet.

The EU was also quick to recognize the challenges facing the early Internet. The eCommerce directive introduced a similar notice-and-takedown framework to the U.S. system for most content. Since it was a directive that needed to be interpreted by (eventually) 28 EU member states it has resulted in some inconsistency of application that provided somewhat less certainty to Internet companies than the more bright line U.S. safe harbors.³¹ Nevertheless, it has provided an important and necessary legal foundation for the Internet to grow and expand in Europe. The eCommerce Directive's liability regime has proven to be balanced, effective and proportionate and has promoted dynamic, competitive services in a technologically neutral way.

Internet Association members have played a leadership role in ensuring that the intermediary liability regime works on both sides of the Atlantic. Internet Association members take down a significant amount of content that infringes copyright. In addition, they respond to court orders and cooperate with law enforcement on issues like child sexual abuse. While there is no uniform solution to the problem of online abuse, our members have created effective community policing and report systems that help stop the spread of harassment, hate speech, and other harmful content. For example, anyone on YouTube can flag a video for review, and Google employees review those flagged videos for abuse 24 hours per day. In 2014, 14 million videos were removed from YouTube for violation of the site's Community Guidelines.³²

Importantly, the legal certainty flowing from intermediary safe harbors, while not flawless, has meant that websites relying on third party content have been able to attract investor funding both in the U.S. as well as in the EU. The ability of startups to attract investor funding pivots on several interdependent factors. However, one significant factor is the risk associated with intermediary liability in the startup's

³⁰ 47 U.S.C. § 230(c)(1) (1996) ("No provider or user of an interactive computer user shall be treated as a publisher or speaker of any information provided by another information content provider.").

³¹ *Copyright and defamation law is repelling investors*, The Irish Times (November 26, 2010) <http://www.irishtimes.com/business/copyright-and-defamation-law-is-repelling-investors-1.681806>.

³² Matthew La Merle, Raju Sarma, Tashfeen Ahmed and Christopher Pencavel, *The Impact of U.S. Internet Copyright Regulations on early Stage Investment: A Quantitative Study*, Booz & Co. (2011).



home country. This is because funding allocations and decisions must balance the resources necessary to operate and grow a business with the costs associated with legal risk. The equation is simple: the higher the legal risk, the lower the incentives to invest.

The relationship between intermediary liability risk and startup funding is evidenced by several quantitative studies examining the relationship between the two. For example, in 2011, the global consultancy Booz surveyed venture capitalists and found that 80 per cent of investors are uncomfortable investing in business models open to unpredictable intermediary liability regulations.³³ 81 per cent of investors said they would be more likely to invest in a digital content platform under a 'weak economy,' than in a strong economy where existing safe harbors are weakened. The results of a 2014 study conducted by Fifth Era and Engine Advocacy are remarkably consistent with the 2011 Booz results. This study focused on intellectual property intermediary liability in countries including France, the UK, Germany, Italy, and Spain and found that 85 per cent of early stage investors agreed or strongly agreed that the risk of high statutory damages in IP cases is a major factor that makes them uncomfortable about investing in media platforms. 78 per cent of investors overall - and 80 per cent of EU investors - responded that they would be deterred from investing in companies that involve user-generated content if new laws expose them to increased risk of secondary liability.³⁴

As EU startups seek to become household names, the Internet Association submits it is imperative that they be afforded the same legal protections and safe harbors that allowed our members to grow and achieve scale.³⁵ The data and studies show that from an investor's perspective, the imposition of increased legal liabilities – and most certainly a duty of care - on startups means that fewer new ideas will get funded due to the risks associated with them.

4. Collaborative Economy

The collaborative economy has emerged in thousands of local markets worldwide in the past several years. The Internet Association has witnessed first hand the often heavy-handed regulatory response to sharing economy entry in local markets throughout the United States and we are therefore well qualified to provide the Commission with valuable perspective on this issue. From this experience, we respectfully suggest that the Commission keeps the following principles front-of-mind as it considers regulatory responses to the collaborative economy:

- First, evidence demonstrating the benefits to EU consumers and microentrepreneurs of participation in the collaborative economy should be taken into account and weighed against any perceived risks.

³³ *Id.*

³⁴ Matthew Le Merle, Tallulah Le Merle and Evan Engstrom, *The Impact of Internet Regulation on Early Stage Investment*, Fifth Era and Engine (November 2014).

³⁵ In the same light, tying regulation to turnover thresholds will skew incentives for startups to grow beyond a certain size and compete globally.



- Second, in listening to complaints against collaborative economy entry, policymakers should assess whether these complaints capture genuine concerns or whether they are part of a long tradition in which incumbents seek to shield their businesses from increased competition which, in fact, benefits consumers.
- Third, that in assessing the effectiveness of regulation in the collaborative economy, weight should be given to the extent to which collaborative economy platforms *already* self-regulate through various mechanisms that are hardwired into the technology, such as two-way rating systems and secure payment mechanisms.

The welfare benefits of participation in the collaborative economy are clear and increasingly well evidenced. Price Waterhouse Coopers has calculated that, on a global basis, the sharing economy generated \$15 billion in global revenues in 2013. According to PwC, this figure is estimated to rise to \$335 billion by 2025.³⁶ This growth benefits not only collaborative economy platforms; it also benefits the small businesses and consumers on either side of these two-sided platforms.

On the supply side, evidence is mounting that participation in the collaborative economy is a net positive for the ‘microentrepreneurs’ who participate in it.³⁷ A recent report³⁸ commissioned by the UK Government cites to an Airbnb survey of British hosts, in which 63 per cent of hosts reported that Airbnb income helped them to pay bills they would otherwise struggle to pay, and that a typical Airbnb host in London earns around £2,822 by renting out for 33 nights per year.³⁹ Analysis done recently in Belgium is consistent with the UK data.⁴⁰ On the demand side, evidence of the benefits to consumers of increased participation in the sharing economy is also mounting. A recent industry survey of consumers in the United States, Canada and the United Kingdom suggested about one in four respondents had used one or more ‘collaborative economy’ marketplaces in the past year.⁴¹ This rapid growth rate suggests that consumers have themselves concluded that the sharing economy is beneficial to them.

³⁶ *The Sharing Economy: Sizing the Revenue Opportunity*, PwC, (2015) <http://www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy/the-sharing-economy-sizing-the-revenue-opportunity.jhtml>

³⁷ Debbie Woskow, *Unlocking the sharing economy: An independent review* (2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf.

³⁸ *Id.*

³⁹ *Airbnb Economic Impact*, (2015) <http://blog.airbnb.com/economic-impact-airbnb/> (this study also surveyed the economic impact of Airbnb in other major cities throughout the world. The results are reassuringly consistent).

⁴⁰ *An Overview of the Airbnb Community in Belgium*, (2015) <http://publicpolicy.airbnb.com/wp-content/uploads/2015/11/Belgium-V3.pdf>.

⁴¹ Jeremiah Owyang and Alexandra Samuel, *Sharing is the New Buying*, (March 2014) <http://www.web-strategist.com/blog/2014/03/03/report-sharing-is-the-new-buying-winning-in-the-collaborative-economy/>.



The Internet has since its inception lowered entry barriers for new entrants, search and transaction costs for consumers, and generally corrected information asymmetries in many markets. More recently, the collaborative economy has disrupted competition in two economic sectors in particular, namely transportation and accommodation. These sectors have existed “for ages”, but the “genius of the sharing economy [] was to harness new technologies – smart phones, GPS, payment systems, identification, feedback mechanisms – to allow almost *anyone* with the right assets to make those services available outside the formal hotel and taxi industry. In other words, new technologies significantly reduce the transaction costs of matching under-used assets to those willing to pay to employ those assets.”⁴²

The collaborative economy has brought competition in the form of lower prices and higher quality to many local markets throughout the EU in recent years. It has been welcomed with open arms in some markets, and encountered fierce opposition in others.⁴³ In many respects, today’s collaborative economy experience mirrors that of the early commercial Internet. Since its early years, the Internet has played its part in the ongoing process that the Austrian economist Schumpeter was the first to name “creative destruction” back in 1943.⁴⁴

Creative destruction and increased competition create anxiety on the part of market incumbents. As Schumpeter observed in the 1940s, “The resistance which comes from interests threatened by an innovation in the productive process is not likely to die out as long as the capitalist order persists.”⁴⁵ In 2015, EU market incumbents’ resistance to the collaborative economy therefore comes as no surprise. Consistent with previous experience, incumbents are unlikely ever to admit that they oppose competition from new entrants and so, as in the Internet’s early days, they will disguise their concerns as, for example, consumer protection issues. This is predictable behavior, but it ought not to dictate regulatory outcomes today, any more so than it has done in the past.

The Internet Association agrees that consumer protection law has an important role to play in the collaborative economy because trust in the platforms is an essential element in their success. However, this conclusion raises some important and timely questions: for example, what form should these consumer protections take? How should they be enforced? Does government have a role to play through ex-ante regulation or ex-post enforcement? Or is self-regulation more appropriate in this context?

⁴² Scott Wallsten, *The Competition Effects of the Sharing Economy: How is Uber Changing Taxis?* Technology Policy Institute, at 3 (June 2015) http://techpolicyinstitute.org/files/wallsten_the%20competitive%20effects%20of%20uber.pdf

⁴³ Eric Auchard and Christopher Steitz, *German court bans Uber’s unlicensed taxi service*, Reuters March 18, 2015, <http://www.reuters.com/article/2015/03/18/us-uber-germany-ban-idUSKBN0ME1L820150318#RsyhB5HLzQV0ioc.97>.

⁴⁴ Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, at 83 (1943).

⁴⁵ Schumpeter, *supra* at 132-3.



While not attempting to answer all these questions, some simple observations can be made. First, in most respects, the platforms powering the collaborative economy are identical to existing e-commerce and Internet businesses. And while the platforms may be facilitating new kinds of economic activity (and providing disruptive competition to established businesses), they are not necessarily entirely new kinds of businesses. Existing law applies relatively comfortably to the things that they do. These laws include the EU data protection, financial services, consumer protection, and the antitrust regimes.

Second, the Internet Association believes that self-regulation can - and does already - have an important role to play in the collaborative economy. Specifically, we submit that it is important for EU regulators to acknowledge the unprecedented ways in which technology has enabled the collaborative economy to self-regulate, such that “platforms can be viewed as part of the solution, rather than part of the problem, and [] should be included in key actors in a self-regulatory regime.”⁴⁶ At a workshop convened by the U.S. Federal Trade Commission earlier this year, panelists described how consumer protections are essentially hardwired into collaborative economy platforms - through branding, trust and payment mechanisms.⁴⁷ This is an important feature of the collaborative economy that should be borne in mind by the Commission and others as it considers how best to handle regulation in this growing sector.

5. Conclusion

The Internet Association firmly supports the Digital Single Market initiative and wishes the Commission success in eliminating barriers to trade and opportunity for EU small businesses that will ultimately foster competition and increase choice for consumers. There are many opportunities inherent in the DSM for our member companies but also, importantly, for the EU startups we hope to see join our ranks. However, these startups need to be placed on a level playing field in order to succeed. This playing field includes the intermediary liability safe harbors discussed above. Experience on both sides of the Atlantic has shown that these safe harbors were the key building blocks upon which our member companies were built. Many of them may never have received venture capital funding absent these safe harbors, let alone achieved the growth they needed to scale and become the successes they are today.

What EU startups *do not* need in order to grow and scale is ex-ante platform regulation. However, with a definition of online platform as inchoate as that posited by some EU stakeholders it is difficult to see how startups will not be impacted. Any schemes which would require rating or approvals for the change of business models or business practices in the highly dynamic online environment would be highly detrimental to EU startups and overall competitiveness. At a minimum, a careful impact assessment should be conducted before more red tape is put in place through additional regulation.

⁴⁶ Molly Cohen and Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, The University of Chicago Law Review Dialogue, at 119 (2015).

⁴⁷ Kate Cox, The Consumerist, *Nobody Really Knows What to Do About Regulating the Sharing Economy*, The Consumerist, (June 10, 2015) <http://consumerist.com/2015/06/10/nobody-really-knows-what-to-do-about-regulating-the-sharing-economy/>



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The good news is that the conditions needed to trigger ex-ante regulatory intervention are not met in dynamic digital markets. Furthermore, to the extent that there are issues and imperfections in the marketplace, existing EU legal regimes are well equipped to handle them.