

EU Digital Single Market Strategy

House of Lords Inquiry into Online Platforms

Throughout October 2015, the House of Lords EU Internal Market Sub-Committee has been hearing oral evidence submitted to its Inquiry into the regulation of online platforms in the EU. The Committee is investigating whether there is a case for additional regulation by reference to a range of issues identified by the European Commission as part of its Digital Single Market Strategy.¹ The Committee has heard from a number of interested parties, including the Competition and Markets Authority (“CMA”), BEUC (the European Consumer Organization), the Information Commissioner’s Office, and the Internet Advertising Bureau (“IAB”). It has also received submissions from firms operating in these markets.

The Committee will continue hearing oral evidence until December 2015 and plans to publish a report of its findings in Spring 2016. The report will be debated in the House of Lords and the UK government has undertaken to respond to any recommendations included in the report within two months of its publication. The European Commission will also respond to the report.²

I. BACKGROUND

The House of Lords Inquiry takes place against the backdrop of the European Commission’s Digital Single Market Strategy, launched in May 2015. The aim of the Commission’s Strategy is to improve the digital economy as a driver for growth and to realize a single digital market in which citizens and businesses can “seamlessly” access and exercise online activities under conditions of fair competition across the EU.

As part of its Single Market Strategy, the European Commission is also carrying out a Sector Inquiry into e-commerce, which was also launched in May 2015, and a public consultation on the regulatory environment for online platforms, which was launched on September 24, 2015. The aim of the Sector Inquiry is to gather data on the functioning of e-commerce markets, to identify possible competition concerns, focusing on “*potential barriers erected by companies to cross-border trade in goods and services.*”³ The consultation seeks to give the European Commission a better understanding of

¹ Please see Cleary Gottlieb, “European Commission’s Digital Single Market Strategy, May 7, 2015,” available [here](#).

² <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-internal-market-subcommittee/role/>

³ http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

“the social and economic role of platforms, market trends, the dynamics of platform-development and the various business models underpinning platforms.”⁴

Against this background, the House of Lords Inquiry is aimed at allowing the Committee to investigate concerns over the growing influence of online platforms in aspects of daily life that have been highlighted by Strategy. In particular, the Committee is seeking to contribute to the wider debate as to whether there really is a need to adopt new regulations for online platforms.

The concept of an online platform has not been precisely defined by the Commission, but for the purposes of its Inquiry, the House of Lords Committee is using a description contained within the Strategy’s supporting documentation, which describes “online platforms” as “*software-based facilities offering two- or even multisided markets where providers and users of content, goods and services can meet.*”⁵ This description is extremely broad and the call for evidence highlights platforms as diverse as marketplaces (*e.g.*, Amazon, eBay), sharing platforms (*e.g.*, Airbnb, Uber) and social media platforms (*e.g.*, Facebook, Twitter).

The House of Lords Committee has highlighted the following issues (which have also been prioritised by the Commission):

- Transparency (*e.g.*, how personal data is used, what rights consumers have in the event of non-performance by another party);
- Regulation of how platforms use the information/data they acquire;
- Relations between platforms and suppliers (*e.g.*, asymmetries in bargaining power and the fairness of terms and conditions); and
- Constraints on individuals’ and businesses’ ability to switch from one platform to another.

II. REGULATORY LANDSCAPE AND EVIDENCE HEARD

Respondents have noted the difficulty in conceiving regulation suitable for online platforms generally. The Committee has heard that some issues are common to many online platforms, including the capture and monetization of personal data, although not all platforms collect such information, and certain platforms compete for attention and advertising opportunities rather than data. Even so, doubts remain whether any regulation could be effective, given the divergent business models used by different platforms.

⁴ <http://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>

⁵ European Commission, [A Digital Single Market Strategy for Europe - Analysis and Evidence](#), COM(2015) 192, p 52

For example, Nelson Jung, Director of Mergers Group at the CMA, speaking in light of the Inquiry, noted that “*unless and until there is clear evidence of harm arising from business models*” caught within the definition of online platforms regulators should “*err on the side of caution in considering further interventions.*”⁶ It is also instructive to note that the online platform area is characterized by a fast pace of innovation and the constant entry of new technologies and competitors. Given this market dynamic, ex-ante regulation seeking to achieve specific goals could quickly become out of date and restrict competition and innovation. Moreover, Alex Chisholm, Chief Executive of the CMA, has also noted that the “*risks of getting it wrong suggests that we need to begin to shift from broad-brush ex ante regulation to ex post antitrust enforcement, which is better adapted to responding to the rapidly changing innovative markets online platforms operate in.*”⁷

In the course of oral evidence given to the Committee about the capture and subsequent use of personal data, regulatory bodies have stressed that much commercial and consumer protection regulation already exists to address the protection of personal data and that new legislation, in the form of the European data protection regulation, will soon be introduced. Civil rights organizations have suggested that possible regulatory reform, including granting online platforms the ability to process data for research and statistical purposes, will undermine key pillars of consumer protection. The IAB, the trade association for online and mobile advertising in the UK, has highlighted the use of industry standards coupled with independent certification in helping to give consumers more control of their data.

III. ENGAGEMENT FROM INTERESTED PARTIES

Oral hearings for the Inquiry will take place until mid-December 2015. The Committee has noted that it would value any additional evidence received in writing, particularly from those who have already given oral evidence.

There is also the opportunity to engage with the European Commission’s investigations, including its [survey](#) into online platforms. The European Commission’s public consultation seeks third party views on the definition of online platforms and on strategies for tackling illegal content. Additionally, businesses who have not been sent a request for information in the context of the Sector Inquiry may request a questionnaire if they wish to submit views.

If you have any questions, please feel free to contact [Maurits Dolmans](#) or [Paul Gilbert](#) in London, [Thomas Graf](#) or [Francisco Enrique González-Díaz](#) in Brussels or any of your regular contacts at the firm or any of the partners or counsel listed under “[Antitrust and Competition](#)” in the “Practices” section of our website at <http://www.clearygottlieb.com>.

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⁶ http://www.ibclegal.com/blog/cartel-risks-and-compliance-conference/post/id/7666_In-House-CounselRegulator-of-the-Month-Nelson-Jung-Competition-and-Markets-Authority-CMA

⁷ <https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-online-platform-regulation>

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