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Orgalime comments on the upcoming European Commission initiative on “Building the EU Data Economy”

EXECUTIVE SUMMARY

A functional digital single market depends on an innovation-friendly framework for the flow of non-personal data within the European Union. An innovation-friendly framework for the flow of non-personal data is also a prerequisite for making the EU a competitive location for new data-based business models.

The principle of freedom of contract is a fundamental rule of contract law in all European legal systems. It applies to business-to-business transactions and is the foundation of a free market economy. Orgalime believes that freedom of contract should naturally be the basis of B2B relations concerning data exchange and flow of data overall.

Intellectual property rights, trade secrets, the right of companies to protect their know-how and the remaining legal framework should be fully respected in the digital world as well as in research activities (for example in H2020 EU-financed research projects).

1. INTRODUCTION

Orgalime welcomes the opportunity to provide comments on the upcoming European Commission’s initiative on “Building the EU data Economy” which is likely to include a proposal for a new framework for the free flow of non-personal data.

Orgalime, the European Engineering Industries Association, speaks for 41 trade federations representing the mechanical, electrical, electronic, metalworking & metal articles industries of 24 European countries. The industry employs some 10.9 million people in the EU and in 2015 accounted for more than €1,900 billion of annual output. The industry accounts for over a quarter of manufacturing output and a third of the manufactured exports of the European Union.

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The European Commission, in its Digital Single Market strategy, is striving to maximize the growth potential of the European digital economy. The overarching idea is to stimulate growth and create jobs in the EU through promoting innovation and permeating industry and society with advanced technology, services and data usage possibilities. In this context, the European Commission has launched or announced several initiatives and legislative proposals. From a B2B standpoint, a very important topic is aiming at an industry-friendly framework for the flow of data, discussing data ownership, data liability and “open” data.

2. DATA “OWNERSHIP”

For our industry and its future competitiveness in the face of increasingly harsh global competition, it is important to address the debate on **data ownership**: Orgalime welcomes the European Commission approach of clarifying the issues first before proposing any possible legislation. Indeed, from a legal standpoint, the concept of data ownership would be very difficult to apply as, in European legal systems, the concept of ownership was developed with regard to physical objects. In the field of intellectual property, there is the EU Directive on protection of databases (96/9/EC). Orgalime believes that this legislation may be sufficient to protect arrangements of data, and encourages investigating if adjustments are needed to Directive 96/9/EC to better address a database consisting of big data as an individual *sui generis* object. Under the Database Directive, it is not clear what would constitute a *substantial investment* or an *individually accessible element*. Orgalime’s request for investigation is, however, made without prejudice to freedom of contract, which is that a creator of a database should be free to determine by contract the conditions of use of his/her database.

The principle of **freedom of contract** is a fundamental rule of contract law in all European legal systems. Orgalime believes that this principle should always be applied in B2B relations where there is no specific need for regulation, for example, to protect one party. So far, EU legislation has concentrated on personal data protection, which has become increasingly relevant for the B2C environment. In B2B relations, data mainly consist of technical data. B2B relations are largely ruled by contracts between individual companies. This has so far proven to be more than sufficient, providing the necessary flexibility between supplier and buyer, leading to efficiency, mutual benefits and healthy competition. Laws on intellectual property, contracts, protection of trade secrets, unfair business practices, competition, consumer protection and personal data protection, in our view, render a potential special data ownership legislation redundant. Additional regulation would create legal uncertainty and lead to excessive legal and transaction costs, especially for SMEs. Orgalime believes that these effects would be detrimental to competition and the single market objectives.

The most suitable way of promoting a data-driven economy would be to leave it up to companies to find appropriate agreements on data handling, to minimise risks and transaction costs to engage in data-related business. Orgalime is exploring possibilities to contribute to this debate by creating a publication with recommendations on contract terms for the manufacturing industry relating to big data and the Internet of Things.

The digitisation of industry requires that companies trust that their know-how is protected – both in the offline world in day-to-day business with their suppliers and customers, and in the online world when dealing with Internet, cloud and platform services. Their know-how should be protected against unauthorised or criminal access, with the newly approved trade secrets Directive (Directive 2016/943) playing an important role. The aim is to create a framework in which business and process data can be exchanged in a fair and secure manner, in line with business interests. It is crucial that R&D investments and intellectual property are respected, and that companies have recourse in the event that their rights are infringed in the digital realm.

While intellectual property protection plays a crucial role in the modern digital environment, it is also important to avoid overly wide interpretation of the scope of intellectual property protection in order not to hinder the possibilities of the data-driven economy. Intellectual property protection, particularly copyright, should not be expanded to affect possibilities to conduct text and data mining.

With regards to industrial non-personal data, there is a need to foster the free circulation of data and to **remove localisation requirements** imposed by national legislation. The flow of industrial data is one of the preconditions for a digitised and connected industry which must not be hampered by unnecessary legal barriers and burdens. In an industrial context, data are not just raw material but representations of real-world business cases. The implications are manifold: industrial data may contain trade secrets, may be relevant for the operational safety of machines or be linked to personal data of employees and customers. Orgalime warmly welcomes the newly approved framework for trade secrets, as a mean to protect companies' know-how in this context.

Given that we are operating in a B2B context, Orgalime is aiming to develop guidance on typical contractual arrangements to allow the implementation and enforcement of legitimate data rights online. An in-depth study regarding the Database Directive in relation to big data is needed, analysing the current technical situation and capacity to ensure that the data collectors have the right to use and manage their data while providing the necessary protection of trade secrets, and providing a fertile environment where new business models can be developed. The debate on data ownership and rules for the fair exchange and trade of data in an industrial context should be subject to a careful analysis and intensive dialogue between the industry and policy makers. A political quick fix for these

complex issues should be avoided as it could certainly stifle innovation and have other unintended long-term consequences on the business environment and the economy. Orgalime suggests that such a study should be carried out in cooperation with industry stakeholders, and is ready to contribute.

3. "OPEN" DATA

Orgalime is deeply worried by the proposal to open up "by default" as of 2017 all scientific data produced by future projects under Horizon 2020, as set out in the Communication on the European Cloud Initiative, accompanying the "Digitising European industry Communication. The distinction between 'ideas' and 'knowledge' proposed by the European Commission is not enough as long as a company participating in a project is not allowed to protect what it considers as being an idea.

We are pleased to read that the existing **opt-out options** will be maintained. However, the opt-out mechanism should not be mentioned in a simple "footnote"; it should be easy to use and should guarantee that companies can decide to protect the ideas and knowledge that they create. Finally, we strongly caution against the possibility that universities needing Horizon 2020 research results from companies could bypass the opt-out mechanism and ask for data for the general purpose of their research. Industrial leadership and the competitiveness of Europe's industry is crucial for growth and jobs. The EU should therefore not be naïve: it must not offer on a plate research results arising from the collaboration between companies investing in such research and research providers and its resulting IP to global competitors.

Using regulation or Horizon 2020 conditions to "open" scientific data by force is bound to discourage collaboration between the private sector and scientific research on one hand and international cooperation of European researchers with researchers elsewhere on the other. Excessive openness requirements thus would hurt the competitiveness of European industry and research.

In any case, outside the domain of pre-competitive research, policy makers must refrain from obliging enterprises to grant access to data from their business context. In industrial value networks, enterprises must be able to decide and to negotiate to what extent and under which conditions they share data. The intervention of legislators might interfere with already growing data ecosystems, expose sensitive trade secrets and undermine the legal certainty and trust needed for investment in connected factories and data-driven business models.

Data-driven business is already here and the importance of data in all industries will only increase. The EU regulatory framework must seek to provide a competitive environment to ensure that European businesses and consumers will be able to reap the benefits of the new industrial revolution here in Europe, thereby generating high value added jobs and growth in the EU

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