

Brussels, 23 December 2015

Orgalime response to the ‘Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy’ - Digital Single Market Strategy follow up assessment

1. INTRODUCTION

Orgalime welcomes the opportunity to provide its comments on the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy.

We are answering the public consultation through a position paper since we would like to provide input only on the issues that directly affect our industry. Moreover, the online consultation only allows giving input on certain topics depending on the previous yes/no answer, therefore limiting the possibility to express certain points of view.

The **Digital Single Market** will be a key driver for European economies in the coming years, and is also very relevant for the digitalisation of industry, also referred to as “Industry of the future”, “Industry 4.0” or the “Industrial Internet of Things”. Digital will be at the core of Europe’s future growth and jobs provided it is based on Europe’s core strength – manufacturing and physical assets.

The digitisation of industry is an ongoing process which might develop into different scenarios. It will take time until both the opportunities and the barriers become apparent. In the meantime, companies need flexibility to explore new technologies and business models. On the other hand, legal certainty and a reliable framework are also important. Policymakers should refrain from preliminary regulatory

Orgalime, the European Engineering Industries Association, speaks for 42 trade federations representing the mechanical, electrical, electronic, metalworking & metal articles industries of 24 European countries. The industry employs some 10.3 million people in the EU and in 2014 accounted for more than €1,800 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.

action. Rather, a careful analysis and strategic, long-term dialogue between industry, policymakers and the relevant scientific bodies is needed.

According to the European Commission's '**better regulation**' principle, legislation should be adopted at European level only when it is needed and should in any case avoid creating red tape for companies. Orgalime strongly supports this principle. **Our prominent message for the purposes of this consultation is that we do not support introducing any new regulation before it is made clear that there actually is an issue that cannot be dealt with under the current regime or by contractual means.**

2. DEFINITION OF PLATFORMS

The European Commission suggests a definition for the term "Platform" at the beginning of the questionnaire. With regard to the definition we submit the following observations.

The word "platform" as used today is often vague. It is often used in multiple contexts whether in engineering for physical manufacturing, virtual design or digital manufacturing platforms, or, as in the Digital Single Market Communication, for search engines, social media, e-commerce platforms, app stores and price comparison websites.

Orgalime does not believe that a single "fits all" solution applicable for all these types of platforms is possible.

Orgalime welcomes the European Commission's attempt at defining online platforms. Nonetheless, Orgalime cannot agree with the proposed definition as platforms are not an undertaking, nor a separate industry sector, but merely a business model that can be formed by any type of entity. Therefore, the proposed definition should not be used as a basis for any future proposed regulation.

Further, as platforms are a business model, they should not be the object of *ad-hoc* regulation. We do not support regulating platforms until it is clear that there are some issues that cannot be dealt with under the current legislation or by contractual means. The fragmentation of the market through specific regulation should be avoided.

3. COMPETITION – ENFORCEMENT OF EXISTING RULES

The development of B2B or B2C search, sales or intermediation platforms is in its early stages and it needs to be ensured that emerging innovative business models are not unduly hindered. Particularly with regard to the questionnaire queries regarding cloud interoperability and problems faced by suppliers when dealing with online platforms, Orgalime finds that competition rules need to be thoroughly applied and enforced since an abuse of a dominant position has negative effects on the entire value chain. The dominant player may use its position as a sales channel in different fields of the economy and push competitors in those fields out of the market. Furthermore, dominant players may hamper the development of new business models in an unfair manner and discriminate offers on their platform without due reason.

Orgalime is keen to avoid the creation of *de facto* monopolies regardless of the sector. Competition law should ensure fair competition on the market. It is therefore key that the current existing competition rules are enforced in a consistent way.

We believe that the current legal framework is sufficient to maintain fair competition, which is the cornerstone of a well-functioning internal market as, when companies compete to provide goods and services, prices go down, quality tends to improve and customers get more choice. Moreover, competition also helps technological innovation to flourish.

In addition, regarding competition issues, Orgalime strongly supports the 'better regulation' principle according to which no superfluous legislation should be drafted. The focus should be on enforcing the current regulation.

Furthermore, given the global nature of online platforms, additional regulation in Europe needs to be measured against global implications of further regulation and be mindful of not creating competitive disadvantages for the ones operating in Europe *vis-à-vis* the ones operating elsewhere.

4. THE IMPORTANCE OF FREEDOM OF CONTRACT

As regards fundamental issues raised by the questionnaire such as data access, ownership, transfer, rights of use, and liability, the principle of freedom of contract, a fundamental rule of Contract Law in all European legal systems, applies to transactions between businesses, and we believe that this principle should always apply in B2B relations. In business relations there is generally no need to especially protect one party, unlike the case in consumer law. Therefore, in relation to platforms, a clear distinction needs to be made between sales law in B2B transactions and in consumer law.

In B2B contracts, the parties, at the outset, are always assumed to negotiate under equal information, terms and preferences. As such, contractual terms and conditions and liability issues can perfectly well be addressed by contracts freely negotiated by the two parties.

5. DATA ACCESS AND TRANSFER, SCIENTIFIC DATA, LIABILITY

Further to the above, Orgalime stresses that a company's data is the lifeblood of its business. Customer data, financial and legal records, sales figures, as well as the day-to-day correspondence – constitute vital information required to run a company successfully. Orgalime believes that there should be a differentiation in the scope of regulating different stakeholders, whether it is, for example, a public research institution transferring data, or a company that keeps the information safe and ensures compliance with relevant data protection rules and legislation.

With regard to the questionnaire's query regarding data localisation, cross-border data flows are essential for European industry and consumers, both for international trade and for companies' daily operations. Our companies work in global value chains and, therefore, a purely national or

regional solution would not be adequate. Hence, we cannot support the idea of general data localisation requirements.

As regards the questions on data portability and the possibility to change platform provider, they are a pre-condition for a smooth functioning of the market. Businesses need to be free to make choices about quality, performance and, in particular, security and know-how-protection features. The protection of intellectual property, know-how and investments of both suppliers/customers and platform owners must be respected.

The principle of freedom of contract ensures self-regulation, for example through confidentiality agreements and cooperation contracts. This will probably cover most scenarios arising in the context of the digitalised industry. However, in some areas, a thorough analysis of potential issues might be necessary. In particular, the question of data ownership and fair exchange and trade of data in an industrial context should be subject to a careful analysis and intensive dialogue between industry and policymakers. In any case, a political quick fix for these complex issues could have unintended long-term consequences and should be avoided.

The digitisation of industry requires that companies trust that the business and the know-how they hold is protected – in day-to-day business with their suppliers and customers, and also when dealing with Internet, cloud and platform providers. This should be protected against unauthorised or criminal access. 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. Data sharing enables new and efficient business potential but it is crucial that R&D developments and intellectual property are respected – and the balance between these two aspects should be ensured.

Open access regimes in public-funded research

Publicly funded research in the area of collaborative applied research involves private entities contributing with their background knowledge to the results and co-financing the projects with a substantial budget share. A default open-access scheme would inappropriately expose the intellectual property and knowledge of companies and would result in a much lower industrial participation. The use of data generated in collaborative research should be handled on a *case-by-case-basis* in the consortium and grant agreement, aiming at a balance between public and confidential results.

Liability

As to the question of liability of online intermediaries, Articles 12 to 15 of the e-commerce Directive (2000/31/EC) already regulate liability of Internet service providers. Therefore there is no need for specific provisions for platforms. The e-commerce directive liability limitations for third party content have been instrumental in the development of online services in Europe and its principles have allowed the development of Internet in Europe, as the Digital Single Market Communication recognises. The liability limitations for third party content provided by the e-commerce directive have also been essential to ensure and protect freedom of expression in Europe. Intermediaries should not be required to monitor and remove content proactively as part of an intermediary liability regime without a judicial decision.

As to the question of whether recital 42 of the e-commerce directive should be broadened beyond the wording 'mere technical, automatic and passive nature' used to describe platforms, the development of new online platforms providing access to content does not mean that such platforms produce or upload content. In line with recital 42, platforms merely provide a service and do not have the knowledge of what is being transmitted. Recital 42 is clear enough, as it is implied that intermediaries should have no knowledge of the content being uploaded.

Concerning legal requirements for access to data, Orgalime finds that there are already legal guarantees in place governing this particular issue, e.g. data protection, competition law, unfair practices regimes, consumers' rights. As for the query in the questionnaire regarding a "future proof" legal framework, it is possible to conceive one for the future Internet of Things (IoT) - innovations that potentially challenge existing legal regimes. Policymakers should maintain a watchful eye with respect to how such technology develops. Forward-thinking responses may be needed to deal with the product liability issues associated with such IoT applications. Issues arise around the distinction between a "product" and a "service", and some clarification in that area may be needed to avoid uncertainty. However, these are not new issues in themselves, and do not give rise to insurmountable challenges within the existing regime.

It is key to the development of IoT to strike a balance between ensuring consumer safety and promoting innovation. In the same vein, it is equally important to make sure that the development of regulatory policy is sufficiently flexible to accommodate the needs of a constantly evolving industry.

6. BIG DATA

Manufacturing and engineering technologies in particular are the key drivers of the digitalisation of industry and of the economy as a whole. Big data is already playing a central role in this and will increasingly do so. In the industrial manufacturing and energy areas, big data has significant potential.

Our companies are developing and providing more and more sensor-equipped machinery, smart production systems and intelligent products, which will make the manufacturing process and its products the biggest source of data and one of the most promising areas for data analytics. For our industry and for our customers, the benefits of capturing and analysing relevant data are already today offering considerable savings through production and resource efficiency, thereby contributing to the EU's resource efficiency agenda and to the improvement of working conditions.

7. PHYSICAL INFRASTRUCTURES MUST BE READY FOR THE DATA-DRIVEN ECONOMY

The overdue roll-out of broadband networks is a precondition to make infrastructure apt for a data-driven economy, supporting cloud computing, the Internet of Things, digital industrialisation and e-infrastructures.

Reliable high-performance communication infrastructures are also a precondition for effective M2M communication and, most essentially, for providing SMEs and mid-cap-companies with equal starting conditions in the digital economy. Taking up the advantages offered by the development of the digital economy is a core issue for the economic recovery of Europe on which our network is working extensively.

The development of high-speed broadband infrastructures will become even more important as estimates consider that the number of connected devices (such as sensors, machines, etc. will far outweigh the number of persons connected, namely, we expect by 2020, by a factor of 50:1.

8. CLOUD COMPUTING

Cloud computing is one of the fundamental tools for the digital economy, especially for SMEs, to which it will deliver cost savings and improved efficiency.

Orgalime strongly recommends that the Commission ensures a future-proof implementation of its cloud strategy without prescribing, dictating or promoting a specific business model. It is important to set out the principles and objectives, leaving it up to markets to develop adequate and competitive solutions.

The Cloud Code of Conduct currently being developed by industry together with the Commission is a voluntary instrument that will help to restore trust and confidence in these services and harmonise their quality and availability throughout the EU. It is important, as this develops, that different kinds of cloud services – infrastructure, but also software as a service – remain available.

9. COLLABORATIVE ECONOMY

A level playing field for both traditional providers and the collaborative economy has to be ensured. In general, one has to analyse whether it makes sense to distinguish between the “traditional” and the “collaborative economy”. Often, business models combine elements of both or have parallel approaches. In particular, in an industrial context, the boundaries are rather blurring. A fragmentation of markets by applying different regimes for the “collaborative economy” has to be avoided and a holistic view needs to be embraced.

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