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Orange position paper to the European Commission’s consultation on the “Regulatory Environment for platforms, online intermediaries, data and cloud computing and the collaborative economy”

In connection with the European Commission’s consultation on the “Regulatory Environment for platforms, online intermediaries, data and cloud computing and the collaborative economy”, Orange would like to make some specific remarks to the topics of online platforms, liability of intermediaries and big data.

The question of whether specific rules should be adopted to regulate online platforms is fairly new, and it is suitable to take one step back and analyse the factors that have enabled current platforms to obtain such a big success and what can be done to facilitate similar success stories in Europe. Views presented by Orange reflect a work in progress and may evolve over time as our analysis of online platforms matures.

The current regime for liability of intermediaries as specified in the E-Commerce Directive has ensured a propagation of services and continues to play an important role in the protection of the freedom of speech in Europe. In this regard, Orange does not consider that there is a need to re-draft the Directive, but rather to clarify how new areas of services fit with the different categories of intermediaries.

Orange considers Big Data and related activities to carry a high potential for growth and productivity gains; existing players will improve and enrich their service-offerings, and new players will enter the market by making use of the availability of data. In this regard, the regulatory framework in Europe should work to ensure that European businesses are able to compete on a global scale, while ensuring that consumers are kept appropriately protected.

Online platforms

The role of online platforms in the digital economy is significant and pervasive. They provide search facilities, social and sharing networks, and presentation of goods and services in an organised way, and are responsible for digitising a number of services otherwise provided by brick-and-mortar businesses. As such, they play an important role in the proliferation of digital skills in Europe.

Orange does not believe that a definition of online platforms is necessary. Orange doubts if it is possible to create future-proof definitions as new entities may emerge, offering as-yet unknown types of services and ways of conducting business. In such a highly dynamic market, a definition would quickly be rendered obsolete and irrelevant.

Although, Orange believes that the proposed definition by the EC reflects part of reality, Orange also finds that it has shortcomings; the proposed definition does not question whether a “platform” is a “service” or an “infrastructure”, or something else (e.g. software, IPR). The definition proposed by the EC assumes that an online platform is a “service”, which is by no means obvious, and will not cover every case.

Also, the definition proposed by the EC seems to cover only services with indirect network effects such as that of two- or multi-sided markets (i.e. mutual interests of two or several categories of users joining the same platform) but seems to forget services with direct network effects (i.e. growing interest of the platform for each user accruing with the number of users).

As a preliminary idea, it may be useful to distinguish between platforms with a single service and platforms with a broad portfolio on the basis that competition and regulatory issues may be different as developed in the study “Challenges for Competition Policy in a Digitalised Economy” published in July 2015 for the European Parliament¹.

The analysis of the EC also disregards the fact that European consumer law, today, remains fragmented. There are a number of directives which could potentially apply to digital content today; the Consumer Rights Directive, the Directive on Consumer Sales and Guarantees, the E-Commerce Directive and the Directive on Unfair Contract Terms. Each of these Directives has been implemented by Member States within the allowed leeway creating an inconsistent patchwork of rules for the industry.

Moreover, introducing a definition of a platform, which is additional to already existing definitions of European Communication Services, Information Society Services or Internet Access Services would increase an already complicated regulatory environment in the digital sector. Therefore, Orange proposes not to define online platforms and use the Telecommunication Framework Review to simplify the rules and to focus on services.

For this consultation and the recently closed consultation on the Telecommunications Framework, Orange advocates for the future legal framework to be applicable to “all digital services” regardless of the way such services are provided, the main activity of their providers or of their eventual EU or non-EU based location². To improve the coherence of consumer protection and safety, the principle of “same services, same rules” should be strictly applied, together with careful assessment of the eventual limitations of the new rules to the “freedom of contract” principle which is granted by the civil law.

The assessment of whether any regulation, besides competition law, is required is a subject which should be analysed not only from the very relevant point of view of consumer welfare, but also from the no less relevant point of view of social welfare in Europe and of European economic development. The

¹ <http://www.europarl.europa.eu/studies>

² <http://www.orange.com/fr/content/download/33782/1093926/version/1/file/2015+12+01+ORANGE+answer+TFR.pdf>

fact that a very large proportion of on-line platform activities are operated outside of Europe does not imply by itself social welfare harm for Europe. The classical theory of the benefits of international trade suggests that the European economy may benefit from efficient inputs from outside. But Europe's economy and industrial future depends on its capacity to be a frontrunner in the production (and not only consumption) of digital goods. All relevant empirical studies prove that territories and populations are unable to convert the usage of innovative digital inputs into growth and wealth, unless they have themselves expertise in the production of digital services and goods. Conversely, producing digital goods and services generates spill-over effects, which improve the global digital capital of the economy and its ability to generate growth by incorporating digital innovation. Therefore one of the key objectives of any European policy regarding online platforms should be to ensure that Europe has a framework, which supports the development of European platforms and leads Europe to be among the leading producers of digital services.

Liability of intermediaries

It is the view of Orange that current rules contained in Recitals 43-45 and Art. 12-15 of the E-Commerce Directive still remain relevant to their purpose in that online platforms cannot claim to be exempt under the E-Commerce Directive, where the provider has editorial responsibilities for instance when promoting the content, and where the hosting platform is informed of an alleged illegal activity. As such, Orange believes that opening the rules on liability of intermediaries could indeed have an adverse effect hampering innovation and growth.

The exemptions for liability of intermediaries contained in the E-Commerce Directive are core principles for the functioning of the information society and for the provision of innovative services. They guarantee the confidentiality of communications for users providing legal certainty to ISPs and providers in order for them to exercise their activities. As such, the EC should ensure that these core principles are maintained. Orange could however, see a need for the EC to provide a clarification in terms of how the exemptions apply or do not apply to new digital business models.

Big Data

Big Data and related activities carry a high potential for growth and productivity gains; existing players will improve and enrich their service-offerings, and new players will enter the market by making use of the availability of data. Orange considers Big Data to be closely linked to the development of Internet of Things-activities; the ability to aggregate data (IoT), to process it (big fast data) and to make it accessible through cloud computing, and to allow interaction (augmented reality). Big Data also allows for monitoring of consumer behaviour and thus enables businesses to provide their consumers with better tailored offers. In this respect, access to consumer data is crucial and this explains why there is a development of data markets.



In this regard, access to data is a competitive parameter and if access to data sets is concentrated in the hands of a few large players outside of Europe, businesses in Europe risk falling behind. A digital single market is important for European providers to achieve scale and a competitive level with a guarantee that privacy and consumer rights are complied with. Orange believes that the free data flow initiative announced by the EC under the DSM Strategy could be a useful way to test the implications of free data flows within Europe. Furthermore, in order to ensure the credibility of free data flows, it will be important that the same regulatory rules apply to all players for equivalent services to EU citizens.

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