

Position Paper

UEAPME¹'s reply to the Public Consultation on Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy.

Introduction

UEAPME welcomes the European Commission's initiative to launch a public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and collaborative economy. We appreciate the possibility to share our views, in particular on the raising phenomenon of the collaborative economy, which is affecting enterprises and business models. However, we regret that such important topics for the Digital Single Market have been put all together in one single consultation although they each deserve their own space. Furthermore, UEAPME would like to remark that, in some cases, questions are rather biased, only taking into account one perspective, on collaborative economy especially. The questionnaire is also quite long and many questions entail and incorporate different demands, making it even more difficult and complicated to answer.

General Remarks

As a general remark, UEAPME would like to highlight that any regulation for digital businesses or digital economy should only be created in response to a real need. We agree that is necessary to identify an appropriate legal framework for digital businesses, in particular for online platforms and online intermediaries, but the European Commission should carefully observe that regulation does not create new obstacles for companies to benefit from digitalisation. According to one of the Commission's better regulation guidelines, i.e. before considering new initiatives, legislation already in force should be properly evaluated to see whether existing tools could be used for the job. It is important not to create unnecessary barriers that could hinder enabling new innovations, while ensuring a level playing field for all businesses. Any kind of regulation should be technology-neutral and the coverage should be defined in an open-ended way covering all kinds of digital content.

Online Platforms

Online Platforms such as social media, booking websites, online marketplaces, and search engines play a key role in the expansion of the digital economy. Online platforms are a common space where providers and users, supply and demand, can meet. Contrary to the collaborative platforms, they are not meant to share the costs but they can bring providers closer to some consumers, especially from remote areas. They can potentially benefit both consumers and traders. In fact, they can be a good opportunity for traders to enter a bigger marketplace, to use the service provided by the platform to sell their products online instead of setting up their own web shop and to reach people from the most remote areas, needing only a working internet connection. It is also a way to guarantee a wider choice to users. Platforms are becoming a way to also distribute cultural content, e.g. music or books. SMEs can therefore benefit from these kinds of platforms.

¹UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

However, it is important to guarantee transparency and ensure clear relationships among SMEs or traders in general and online platforms and intermediaries. Transparency should be one of the key principles in terms of the relation between the customer, trader and intermediary. Providers on platforms need specific support in their relation with the platform. Indeed, intermediaries are often big multinationals and SMEs are the weak parts in such contracts. These contracts with the intermediaries should not restrict traders to use other marketing and selling channels. Therefore, it would be appropriate to properly analyse possible problems related to the parity-clauses, non-transparent fees and exclusivity clauses. Moreover, platforms should not unilaterally modify the contractual terms without giving proper notification or without allowing the trader to terminate the contract. If de facto freedom of contract and bargaining position are very limited on the trader side, protection may be needed. Any existing dispute resolution mechanisms should be clear for both parties.

It is important that platforms provide the right and objective information about the providers, without favouring one more than another. This could have an important impact on the performance of traders and could not be considered as fair competition. Furthermore, UEAPME would like to express its view of the review system, which is the basis of these online platforms where users and consumers can directly comment and grade the service or good they purchased. While we believe this is a useful system that also enables the trader to hear reviews directly from its own customers and to adjust its offer to the needs and taste of the clients, we would like to raise the problem of fake reviews. As these can highly influence the behaviour of users, fake reviews meant to disadvantage a certain trader should be eliminated. To facilitate the protection of sites against manipulation and unfair evaluations, UEAPME fully supports the dialogue with sites by the elaboration of principles such as those developed by HOTREC².

Any new legislation should also avoid adding burdens to traders already obliged to follow strict consumer protection rules when selling online. The same rules, such as providing information on guarantee period and withdrawal period, should also apply to platforms. Any additional legal or transparency information required from consumers should be provided by the platforms.

Furthermore, it is also important to ensure platforms make proper use of personal and non-personal data collected. The tendency to trade data to other platforms and actors should be forbidden in absence of the express consent of the data owner. For traders, it is also important to ensure that non-personal data can be easily extracted and eventually moved to another platform. In addition, platforms should provide traders with all necessary data to ensure a good service to users.

Tackling illegal content online and the liability of online intermediaries

Regarding the legal obligations between the trader and the intermediary, the current regulation might be unclear. As an example, EU based consumer regulation require traders to fulfil several marketing and information related obligations when offering goods or services online. In our view, regulation should guarantee that the trader should not be liable if the intermediary did not fulfil these law based obligations.

When it comes to illegal content, providers are for the moment the only responsible while the platforms are not liable as they are intermediaries. It might be difficult to regulate and build up different notice-and-action procedures and requirements for the different categories of illegal content. This could lead into very detailed regulation and unnecessary bureaucracy. Rules should be as simple as possible and basically one notice-and-action procedure for every category should be sufficient.

Concerning the protection of property rights, it is also important to clearly establish who is liable if Intellectual Property Rights (IPR) are infringed. The functioning of the existing IPR Enforcement and Copyright Directives needs to be assessed to ensure that protection of copyright and clear indication of who is liable is sufficient. There is a general

²http://www.hotrec.eu/documents/document/20110908181541-d-1110-322-ml-revised_hotrec_working_paper_on_hotel_review_sites.pdf

need to improve the level of protection of online content through consistent implementation and compliance with conditions that allow online intermediaries to benefit from the exemption of liability. Another important point is whether to ask intermediaries to exert more control over what is forwarded/hosted/stored, in order to reduce the spread of illegal content, increase transparency and therefore the trust of the online users. To ensure the effective protection of copyright in the digital age, it is necessary to balance access to knowledge and information with the need, for authors and other right holders of intellectual property, to obtain legal protection and an appropriate remuneration from users. In some sectors, as can be for music, there is also a considerable gap between the remuneration of service providers (search engines, platforms, social networks) and content providers. The disproportion between the remuneration is also found at the same stage of the supply chain, to the detriment of smaller operators. The primary objective should be to seek solutions capable of ensuring, in the current context, appropriate remuneration to all operators in the cultural industries.

Data and cloud in digital ecosystems

Concerning the issue of personal or other data collected by the trader, in addition to what is already stated above, it is important to consider the prospective changes in the EU data protection regulation (GDPR) and of the developments of the proposal on digital contracts. Due to the GDPR, rules concerning data protection and privacy will already be regulated in a very detailed manner.

UEAPME warmly welcomes the announced European Cloud initiative. This initiative should build on the findings and tools provided by the CloudingSMEs project (www.cloudingsmes.eu). The project has also shown that intermediary organisations need to be correctly informed of the barriers and opportunities of cloud computing. Additionally, these organisations have the same concerns as SMEs in general. If one wants to accelerate the adoption of cloud computing by SMEs, capacity building activities have to be developed and awareness has to be raised also among representative SME organisations and other intermediaries.

Entrepreneurs are more and more confronted with “digital natives”: young people raised in an environment with internet and electronic communication. There is a need for a certain adjustment. Digital technology has become an essential part of the entrepreneurial world and should be part of an entrepreneur’s curriculum. Taking into account the growing digitalisation of our society, it will of course be important to develop the e-skills of owner/managers as well as of employees.

Any initiative aimed at increasing the SME use of cloud solutions must actively involve the advisory community, if a critical mass is going to be reached.

Raising awareness activities should take into account not only the sector of targeted SMEs but also size, profile and lifecycle of the enterprise (start-up, established enterprise, etc.). CloudingSMEs has discovered that SMEs in different sectors exhibit radically different levels of awareness about cloud computing.

Another key finding is the need among SMEs for neutral and objective information and assessments about the cloud providers’ services in the broad sense (different services, technical possibilities, content of the SLAs).

The most important points SMEs are concerned with in cloud computing contracts are quality of services in general, followed by physical and network security and support or management incidents. The top areas where SMEs need support are technical knowledge, security and data privacy issues, ROI Analysis, understanding and negotiating SLAs and contract issues, and on how to find the right provider.

An SME needs, first off, expert answers to their general ICT/Cloud computing questions. This should be offered through first-line advice in their own language. An SME owner needs careful consideration of the kind of services the enterprise is able to buy, the interoperability of these with the current software, the pricing of bolt-on services, the differences between providers, and the risk attached to each option. This audit should give the entrepreneur a clear picture of the ICT needs.

It is essential to ensure that SMEs are able to make informed choices and have access to objective, comparable and relevant information when choosing services and providers. The big players should be encouraged to install an information line for customers having questions on the effective cost calculation. The cost calculation provided by the suppliers could then be checked against the rules of unfair competition and misleading publicity. If this does not function in the short term, one should think about the introduction at European level of a real information obligation for the big players towards the business clients, to allow the customer to make the choice he/she really wants to make. It is now common knowledge that SMEs suffer from a lack of transparency on the part of Cloud service providers regarding the conditions for provision of the services, particularly in terms of security and knowing whether their data are transferred abroad, and more precisely to which country.

In addition, cloud computing generates new risks not known by SMEs.

SMEs need support and accompaniment in understanding security, privacy and data protection risks in cloud computing along with related solutions. In order to provide legal certainty towards SMEs, the public authorities at national level should provide SMEs with clear, easily understandable guidelines and tools to assess the risks of cloud computing in the field of data protection and privacy and on how to manage data.

This should be accompanied by awareness raising activities in cooperation with the representative SME organisations. While there is already an urgent need for this, these actions will also need to be carried out at the upcoming adoption of the new Regulation on Data Protection.

Balanced and SME friendly contract terms have to be ensured at European level. Conflicts between a provider and an SME should be dealt with quickly and efficiently through an ADR system. National bankruptcy legislations should ensure that cloud customers have guaranteed access to their data in case of bankruptcy of the cloud provider.

The collaborative economy

Collaborative or sharing economy is a very important and complex topic for businesses.

First of all, UEAPME would like to make some remarks on the terminology and definitions used. The definition of collaborative economy given by the consultation is rather wide. In our view, it would be more exact to call “collaborative” only the economy aimed at sharing certain costs; examples of this approach are platforms like Blablacar, Taxishop, Couchsurfing, Homelink. The platforms which are probably in the mind of the Commission in this consultation, most of the time provide services against payments and hence concern an economic/commercial activity (i.e. Airbnb, Uber).

Furthermore, the consultation defines a traditional provider as “*individuals or legal persons who provide their services mainly through other channels, without an extensive involvement of online platforms*”. However, traditional providers cannot be isolated from ‘online/platform economy’ as many traders, for example SMEs in the tourism sector, are present in online platforms as well and use their advantages. For example, many “traditional hotels” also offer rooms through Booking.com, which is not collaborative but is a platform, or even through Airbnb.

According to UEAPME, the key factor is the frequency with which collaborative platforms are used for commercial practices. UEAPME is not against the possibility for private persons to occasionally provide services, hospitality, and transport throughout the use of platforms. However, when this activity becomes usual and a source of regular income, it should be considered as a commercial entity and therefore all regulation should apply (i.e. registration of the business, payment of social contribution, VAT rules, income taxes, specific licenses and health and safety requirements).

The regulation framework is already in place and should be respected by all commercial providers, meaning entities that provide services against payment on a regular basis. The Court of Justice also provides jurisdiction on the notion of “providing services against payment on a regular basis” and on what is a commercial activity. If legislation is not

enforced, a new parallel black economy will arise. Furthermore, it is important to enforce this legislation in order to protect employment and social rights and also health and safety standards. It is probable that individuals using collaborative platforms in a commercial mean are not even aware of the requirements they should fulfil according to European and state law, such as license, registration of business, insurance coverage, and compliance with health and safety requirements and consumer protection. Platforms could for example inform providers on the regulatory framework that has to be complied with, when offering such services.

On the one hand, collaborative economy has already changed traditional business practices and introduced new business models. SMEs especially are introducing more and more new business practices based on digital solutions and sharing economy. On the other hand, when legislators allow and even encourage these new business models and innovative ways to do business, a fair level playing field needs to be ensured, meaning same opportunities and rules, between enterprises which operate under the current regulation (i.e. traditional providers) and the sharing economy based business models. At the moment, this is not the case. It cannot be considered fair that traditional providers are heavily regulated and at the same time sharing economy based providers are running their (sometimes unofficial) businesses under remarkably lighter regulation and administrative burden. In order to ensure a level playing field and achieve a fair balance between the traditional businesses and the providers in the sharing economy, it is crucial to find a well-weighted solution. The current situation cannot be long-standing.

Controls and enforcements on all providers of platforms have to be organised in an efficient way to ensure a level playing field. This means that persons performing the activity on an ad hoc basis have to comply with rules that apply to all citizens (e.g. having a car insurance and driving licence, etc.) and persons performing the activity as an economic activity have to comply with the general regulatory framework applicable by all other entrepreneurs. Otherwise it would be necessary to reduce the regulatory framework for all entrepreneurs to the level applicable to providers on platforms and collaborative economy platforms. The necessary (legal) initiatives have to be taken to ensure that platforms provide all necessary information to the authorities on the providers using their platform to deliver services and at which frequency they use them.

Brussels, 18th December 2015

For further information on this position paper, please contact:

Chiara Aprea
 Advisor
c.aprea@ueapme.com