A NORWEGIAN APPROACH TO THE COMMISSIONS CONSULTATION REGARDING THE ROLE OF DIGITAL PLATFORMS

Content

1. INTRODUCTION

The Norwegian Government refers to the Commission's consultation on platforms, as part of the Commission's action in respect to DSM Strategy.

The consultation addresses many themes which are handled under a number of different ministries, which makes it challenging to respond to it. We have been forced to formulate our position outside the template that the Commission initially provided, however we hope that our feedback can still be viewed as a constructive contribution.

2. EXECUTIVE SUMMARY

1. Online platforms have created several new markets for sales of goods and services. Although some of these markets are still in a nascent phase there are several challenges associated with the platforms. Norway supports the

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Commission's initiative to take a closer look into the roles of online platforms and wishes to contribute to the ongoing work.

2. The Norwegian main approach is to be careful not to draw conclusions on regulating online platforms at this time. Online platforms vary widely with regard to the business model they are based on, and what products and services they offer. It makes it difficult to say anything specific about how they should be regulated on a general basis. We therefor believe that an assessment on how current regulations are suitable for various platforms should be performed, before taking initiatives towards new, specific regulations.

3. We believe it would be an advantage if online platforms become more transparent. Users must have the opportunity to know all significant aspects of the purchases they make on the internet. This applies particularly when platforms are operating as purveyors of services, or use subcontractors.

4. We recommend to the Commission that consideration be given whether to develop guidelines or regulations that ensure interoperability between platforms. This will ensure greater freedom of choice among users, and may also enhance competition between different service providers. Many users are currently reluctant to move from one platform provider to another because of disadvantages in adapting the new service to their own personal preferences.

5. Our input clearly states that responsibility for illegal content from third parties should not be placed on the platform providers. This is because of the possible risk of unnecessary censorship if platform providers have a wider responsibility for third party content accessible through their service.

6. We point to the importance of harmonised regulations for data flow, including where data can be stored and access to data. Norway believes in facilitating the free flow of data across Europe, but in a way that ensures access to data and safeguards privacy. Free flow of data must also be seen in conjunction with the work on the use of public sector information. Norway would endorse a European Cloud Initiative. Common European standards and certifications will contribute to making cloud services a more accessible and effective alternative for both private and public sectors.

7. We believe that it is important to carefully assess the phenomenon described as the collaborative economy. We would argue that there is not necessarily one collaborative economy, but that one has to take into account the diversity of services provided within that concept. We would suggest that a good starting point would be to observe and map the different collaborative economies and their diverse characteristics and properties. At this point, we surmise that a regulatory initiative could have a significant chilling effect on innovation and growth that these services are creating.

3. DEFINITION

We basically share the Commissions definition of platforms.

Given the broad scope of the definition, the Norwegian government believes that the Commission should refrain from ex-ante regulation on a general basis. As the platforms are very diverse, a single regulatory instrument will not be sufficiently precise. As the platforms are still in the early stages of development, we know little about what the future holds for services that would fall within what we here define as platforms. It is essential that ex ante regulation does not add unnecessary obstacles to continued innovation and continued development of the digital economy.

Many of the challenges here fall in under competition law, given the potential market power which individual platforms may acquire. Abuse of such power can prove detrimental to both the market and end-users. We therefore are of the opinion that some of the issues that can arise around the platforms, are better solved by effective enforcement of existing / updated competition rules, including appropriate supervision.

In addition to competition regulation, we believe that some of the challenges could also be addressed through increased transparency, content portability and interoperability.

4. ONLINE PLATFORMS

Online platforms are widely accepted and used in Norway, and constitute important digital services, in terms of trade, communication and fundamental democratic rights. Norway believes that we will see more and more online platforms in the time to come – it is only a couple of years since Uber and Airbnb were start-ups, and Facebook has just had its 10 year anniversary.

At the same time many online platforms have matured, and it is due time to discuss some of the issues concerning the use of online platforms.

First, there is still uncertainty of what responsibility online platforms that connect consumers and suppliers have. It is essential that online platforms are trustworthy, and that any conflicts arising when dealing through such an online platform should be resolved by and through the platform, unless otherwise is clearly stated. This applies particularly to online platforms that are intermediary service providers (e.g. Hotels.com).

When it comes to online platforms that provide services directly to users, we believe there is still a potential in making these platforms more transparent. Such platforms are often based on highly professional businesses on one side, and consumers on

the other side. Accordingly, the risk of unfair user agreements is high. In particular, social media platforms offer little or no room for modification of their terms and conditions.

Second, transparency issues also apply when discussing both privacy and ownership to copyright-protected content that users upload to online platforms.

When it comes to privacy, most online platforms require the user to register personal data. In this regard, the platform should as a minimum give information on where the data is stored, for which purpose the data is stored and for how long the data will be stored. If such information is not easily accessible, the user of the platform will in many cases not be fully aware of the role of the platform, and under what conditions the user has to agree to use the platform.

5. TRANSPARENCY OF ONLINE PLATFORMS

Platforms often operate as intermediaries for services and products delivered through the platform . This could lead to blurred lines of responsibility, and uncertainty about who the actual provider is and who the end user may seek redress from. An example would be a travel service, which aggregates quotes from other suppliers. It is then difficult for the consumer to know whom he or she has booked a service from.

To ensure sufficient confidence in the digital marketplace, it is important to recognize that end users relate to platforms through vital actions, such as ordering and payment. Any confusion as to the platforms responsibility for e.g. subcontractors, could lead to a most unwanted trust-deficit.
Before beginning on the long trail of regulation, solutions may be identified for increased transparency with regard to who the platforms subcontractors are, for example? Through stronger enforcement of legal requirements as set up in the eCommerce Directive on transparency and information requirements for online service providers, Article 5.

6. RELATIONS BETWEEN PLATFORMS AND SUPPLIERS/TRADERS/APPLICATION DEVELOPERS OR HOLDERS OF RIGHTS IN DIGITAL CONTENT

During the Commission' s public consultation on copyright held in 2013/2014, platforms depending on licensed copyrighted material, intermediaries, distributors and other service providers have expressed challenges in regard to copyrights' territorial nature. These stakeholders also point to the lack of information on content such as who represents particular rights and for which territories, as a major problem for the clearance of rights and licensing in the single market. They also uphold that

fragmentation of repertoire in the music sector, the need to contract with multiple licensors and the inefficiency of CMOs are obstacles to launching new services.

On the other hand, authors and performers generally consider that the deficit of cross-border accessibility of content does not result from the fact that copyright is territorial, or problems in licensing.

There seem to be widely differing opinions among stakeholders on a very important issue, namely possible barriers for starting innovative cross-border services based on digital content that are protected by copyright. In our opinion, this discrepancy in experience expressed through the consultation should be followed up, along with other similar issues that are cross-border related deriving from the report on the responses to the public consultation on the review of the EU copyright rules, with a goal to reach an objective description of the legal and factual realities on which to build a future regulatory framework.

7. CONSTRAINTS ON THE ABILITY OF CONSUMERS AND TRADERS TO MOVE FROM ONE PLATFORM TO ANOTHER

Norway sees potential in making online platforms more interoperable. Users of online platforms will often spend a lot of time on customizing and personalizing their profile in regard to what content they want to use. However, if the users do not have the possibility to move the content they have customized over to a another platform, they may feel reluctant to switch or try new platforms, that perhaps are more suitable for their needs. In this regard, guidelines and/or regulations could be proposed for making platforms interoperable, so that online content be made portable between different platforms. This may also strengthen competition amongst online platforms.

8. TACKLING ILLEGAL CONTENT ONLINE AND THE LIABILITY OF ONLINE INTERMEDIARIES

Regarding the provisions of the Electronic Commerce Directive which regulates liability for online intermediaries, it is important to emphasize that the existing rules balance various considerations: On the one hand, considerations for freedom of expression and freedom of information, would indicate a less strict liability for online intermediaries and illegal content on-line. On the other hand, consideration should be given to combatting crime so that it is possible to ascribe online intermediaries more duties and make them accountable when necessary.

If online intermediaries in general be assigned a greater liability for illegal content on the Internet, then it will be necessary for them to monitor and control more of user content, which would be quite invasive. This would also be a very discretionary, complicated and problematic task. We do not wish that ISPs become "cyber police".

An overly strict liability for online intermediaries could lead to excessive censorship of online content, which could result in major consequences for the freedom of expression.

The Norwegian implementation of existing rules is a compromise between a number of considerations and it functions satisfactorily. Initiating a change of the rules of the E-Commerce Directive will re-ignite a confrontational and difficult debate. Norway generally holds that the rules on liability in the E-Commerce Directive should continue as they are.

9. ON DATA LOCATION RESTRICTIONS

Have restrictions on the location of data affected your strategy in doing business (e.g. limiting your choice regarding the use of certain digital technologies and services?)

Our view is that regulating the transfer of data, location of data and access to data is highly important when it comes to free flow of data in Europe. In general, we want to promote both easy transfer and access to data, however in such way that the free flow of data is subject to certain requirements that ensure privacy and access to data.

Norway is currently working on establishing a national Cloud Computing strategy. The goals of the strategy are:

a) Remove insecurities based in legislative barriers or unclear legislation related to the use of public cloud
b) Present a set of principles for the use of cloud computing in the public sector (in particular with regards to public cloud)
c) Make it simpler for public organizations to consider cloud services as an option, through the development of guidelines, check lists and best practices

As part of this work we have identified laws and regulations that provide barriers to the use of public cloud, and in each case considered whether to propose changes to the legislation to make it easier for both the public sector and businesses to understand and relate to the legislation.

The most important barriers that were identified are:

a) The Archiving act, which states that archive material should not leave Norway. The Norwegian ministry of Culture is currently considering changes to this regulation
b) The Bookkeeping act. This act only presents a minor barrier, as it requires that accounts are backed up to Norway within 7 months after new year to ensure its availability to the tax authorities.
c) Organizations that use cloud computing may be subject to the scrutiny of several different supervisory authorities, such as the data protection authority, the financial supervisory authority, the national archives etc. We have discovered that various authorities interpret the regulations regarding

public cloud and storage outside of Norway differently. How they handle third party security audits is an example of this.

When it comes to personal data, our current legislation does not constitute a barriers to the use of cloud computing, as long as the data is stored and processed in compliance with the Personal Data Protection Act. In practice this sets some geographical requirements. Personal data can be stored in any EEA member state. Personal data can also be stored in so-called third party countries, if the transfer of data is based on the EU standard contracts.

A number of Norwegian companies and international companies have been affected by ECJ judgement in C-362/14, that invalidates the Safe Harbor principles. On this matter The Norwegian Data Protection Authority has recommended that companies that transfer personal data to the US, use the Commission's standard contracts, in accordance with the recommendations from the Article 29 working group, until a new agreement is drafted and finalized.

Hence, a prerequisite for free flow of data in Europe is easy access to data. This applies particularly to open data, see below chapter 4.

When it comes to non-personal data, it is our view that there should not be imposed specific regulations on such data. Companies that store, process or have any commercial use of non-personal data must, however, be aware of the risks of reidentification of persons. As more and more datasets become publicly available, combined with more powerful technology for analytics, the risk of reidenfitication is increasing.

10. ON DATA ACCESS AND TRANSFER

The free flow of data is often more culturally determined. Content is usually created in the language of its country of origin. Consequently, many important and useful datasets will have limited value because of language barriers.

11. ON DATA MARKETS

We do not believe that regulatory constraints necessarily are the main factor that is holding back the development of data markets in Europe. We rather believe that cultural issues have a bigger impact on the development of these markets. Data is content, and much of the content sought after by users is often found only in a given language. When the user does not understand the content, they have less trust in it.

We would therefor urge the Commission to make sure that the MT@EC machine translation system is being fully implemented, thus possibly removing one of the major factors blocking the further development of the European data markets.

12. ON ACCESS TO OPEN DATA

Reuse of public sector information is a priority for Norway. Open government data provide a basis for innovation, efficiency and democratization. However there remains a huge, untapped potential in the datasets we know that exist, but have not yet been made available. Through the implementation of the PSI Directive in Norway we introduce, among other, requirements for machine readable formats and transparency for all charges (the general rule in Freedom of Information Act is that data should be free of cost). The law stipulates, however, no requirement for when data should be made available. We are concerned that a requirement of open by default may lead to an administrative burden greater than the potential benefits of making all datasets available. Decisions should be based on the societal value and economic potential against the costs of releasing the data, which also needs to be maintained. The Norwegian Government Circular on Digitization stipulates that all new or updated digital services shall be designed, so as to facilitate secondary use of data stored in the systems. Thus, we endorse an "open-ready by default" - principle.

Regarding the expansion of scope in the PSI Directive to include private data: On the one hand it goes beyond the scope of our Freedom of Information Act, however, on the other hand it is something that will possibly encourage the private sector to open up. In Norway today we already see good examples, such as the Consumer Council portals and the travel industry sharing of data with different platforms. We recognize the challenges regarding neutral and non-discriminatory access to the data, but we do not experience that this problem is big enough in Norway to necessitate a drastic expansion of the legal basis of the Freedom of Information Act.

13. ON ACCESS AND REUSE OF (NON-PERSONAL) SCIENTIFIC DATA

Better access to research data strengthens the quality of research, both because results can be validated and tested more easily, and because it can be used in new ways and in combination with other data. Open access to research data leads to less duplication, better use of resources, and may facilitate more interdisciplinary research.

According to a report conducted by Damwad commissioned by the Research Council of Norway, most Norwegian researchers do not see many problems with research data being made available for use by other researchers. Nearly three out of four scientists would like to share data, and eight out of ten believe open research data strengthens research.

The Research Council's policy for open access to publicly funded research data should help make research data available for relevant users, on equal terms, at the lowest cost. The guidelines in the policy apply to all data in projects funded by the Research Council - with some exceptions.

14. EUROPEAN CLOUD INITIATIVE

It is our opinion that standards, certification schemes etc. can play an important role in making cloud computing acceptable as an alternative for the public sector. Standards and certification schemes have the added benefit of serving as information and guarantee for citizens and businesses as well. This lowers the threshold for choosing cloud.

We should, however, make sure that we don't create systems that are barriers to entry for smaller businesses by having too many competing schemes. A common approach across the EEA would ensure that it is easier both for the customer side to review compliance, and for the vendor side to obtain the necessary certifications for the services they offer. For the infrastructure providers, it is essential that they can document the level of security for the storage and transfer of data.

Both businesses and public sector customers would benefit from a list of standard demands that service providers should comply with. These should as far as possible be based on internationally recognized standards. Use of standards, and requirements for interoperability and portability would also contribute to reduced risk for the customer, as it would contribute to prevent lock in, and high exit costs for the customer.

The use of cloud computing in the public sector in Norway – and in particular the use of public cloud – is most advanced in the municipalities. In particular in the primary schools use of SaaS such as Google Classroom and Google Apps, Office 365, e-mail and "box"-services are widely used. Surveys also show that many municipalities that have not yet started using cloud services plan to do so in the future

In terms of contracts, it is widely accepted that most cloud computing contracts are standard, and that customers that want specific contracts to a much lesser extent will be able to reap the benefits of scale that we associate with cloud computing. Despite this we have examples from the Norwegian public sector of quite small municipalities that have successfully managed to make big cloud providers adapt their standard terms and data processing agreements. These municipalities were typically among the first to start using these services, and the Data protection authority therefore took a particular interest in the process. A more coordinated approach from the EU to provides guidelines to the cloud providers as to how standard contracts should be drafted to ensure compliance with European public sector needs, would probably be welcomed both by the cloud industry looking to get a foothold in the public sector,

and by the public sector organizations that want to make sure that their IT purchases are in compliance with national and EU regulations.

15. THE COLLABORATIVE ECONOMY

Norway sees the collaborative economy as both innovative and sustainable.

Currently, Norway favours ex post regulation, and believes that ex ante regulations might hamper innovation, and diminish the chances of new start-ups to find their market. Within the next year Norway will initiate a national case study to look into the collaborative economy's potential in a socio-economic perspective, map out existing initiatives and describe regulatory challenges.

At the same time it is clearly a challenge for governments to keep up with the rapid pace this sort of innovation represents, and the challenges it brings. We think that it is important to initiate a dialogue both on the international and the national level in order to find the right balance between regulation and letting innovation follow its own course. We also believe that this economy is a heterogeneous one, thus, a single regulation to manage all the different challenges the collaborative economy could present, is a very hard task to perform.

Some issues already stand out as the major issues that authorities have to deal with in the collaborative economy.

First, national tax authorities have limited control over the cash flow within the collaborative economy. Currently, important players, such as Uber and Airbnb, do not pay corporate tax to Norway. Keeping track of VAT in the collaborative economy may prove to be a challenge.

Second, the collaborative economy challenges the traditional understanding of a market consisting of consumers on the one hand and traders and businesses on the other hand. In particular, it may be difficult to regulate how the collaborative platforms should be handled when it comes to safeguarding consumer rights, such as warranty, tort e.g. We also recognize the employment opportunities this economy provides. These new ways of organising work, however, bring on new challenges related to types of association, regulations and collective agreements.

Norway will welcome an EU observatory of the collaborative economy. It is our point of view that it is necessary with a comprehensive and thorough information gathering on this phenomenon, before any regulations are proposed. We see that the Commission in its communication on upgrading the Single Market, sets as an action to develop a European agenda for the collaborative economy. This will assess possible regulatory gaps and monitor the development of the collaborative economy.