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Opinion

EU DIGITALISATION AND DATA POLICY

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Executive Summary

- SGI Europe, the organization representing employers and enterprises providing public services and services of general interest in Europe since 1961, welcomes the Commission's initiatives shaping a digital single market and a single market for data.

- Service providers of general interest serve to the public good and protect European fundamental rights. We are taking Europe forward in serving and acting in the general interest and in being key players in the digital environment. By investing in public infrastructure and services, services of general interest provide the basis for eco-nomic activity and accelerate investments in technical innovations.

- Global online players benefit significantly from the public infrastructures operated and provided by service providers of general interest across Europe, as well as from the content they provide. Their behavior and the regulatory framework on digital players have an impact on SGI Europe members.

- SGI Europe would like to lay down its position on the digital regulatory framework and highlight our position on the Commission's initiatives shaping a digital single market and a single market for data dealing with competition policy in the digital era, acknowledging the heterogeneity of the public sector, ensuring digital sovereignty, the future Digital Services Act Package and the future New Competition Tool.

Competition Policy in the digital era

In the past, public policy considerations have significantly influenced the outcome of competition decisions. As a result of the shift to a more economics-based approach to competition analysis, antitrust control has mainly focused on economic efficiency and the protection of price competition, casting aside issues concerning other public interest objectives. Though we support the view that competition assessments should be guided by robust economic evidence, we are concerned that the more economics-based approach may not have delivered what was expected. In fact, based on empirical findings, many warn that the economics-based approach may have harmed (rather than protected) consumer welfare.

Nevertheless, it is not possible to subject services of general interest unconditionally to economic efficiency criteria without negative effects on quality and quantity. Therefore, services of general (economic) interest are in a special position in terms of competition policy because they have a fundamental role in the daily life of EU citizens and represent a democratically chosen tool for competent authorities at national, regional and local level to fulfil tasks of general interest. The importance of SGEIs is reflected in primary EU law through Article 14 TFEU and Protocol No. 26 TFEU as well as in secondary law, as collected in the SGI EUROPE Acquis + for SGEIs.

The Acquis+ for Services of General Interest EU's commitments in the area of SGIs and SGEIs have been clearly identified by SGI Europe in its Acquis+ analysis. These principles need to be respected and included in the current reflection process about the role of competition policy:

- Member States (national, regional and local authorities) have the general competence and wide discretion to define, provide, commission and organise services of general interest, as well as funding them, and European institutions should only control manifest errors thereof.
- For non-economic services of general interest, internal market and the competition rules do not apply.
- For services of general economic interest, the rules of competition and of the internal market apply, only if those rules do not hinder the fulfilment of SGEIs' specific mission being achieved (Article 106 TFEU). The effective performance of a task of general interest prevails over Treaty rules in the event of a conflict.
- Furthermore, competent authorities are free to choose the modes of management. The European institutions are neutral regarding the ownership of undertakings providing services of general economic interest.
- For all services of general economic interest, the standards of quality, security, affordability, equal treatment, the promotion of universal access and of users' rights must be implemented, as foreseen by protocol 26.

The European Treaties thus guarantee and protect services of general interest. These services are particularly characterised by a subsidiary approach, giving the Member States a wide margin of manoeuvre in how and in what form they are provided. While this approach tends to be respected in traditional sectors and areas, we must observe that **the acquis communautaire on services of general interest is not sufficiently recognised by the European Commission, especially in the context of its data initiatives**. For a sustainable design of transformation processes, therefore, a more suitable competition tool is required that is appropriate to the modern economy and adequately integrates the acquis communautaire of services of general interest about their special role protected by the European Treaties. Therefore, the European Commission should be aware of their role as guardians of the acquis communautaire in new provisions and consider that services of general interest require special consideration in EU legislation.

The European Commission should conduct an intense impact assessment concerning all its legislative intentions and check if they consider the acquis of services of general interest in their "preliminary assessment of expected impacts" – especially regarding data, digitalisation or other competition related EU initiatives. Any future legislative projects and competition tools at European level should be much more respectful of the acquis communautaire on services of general interest.

Acknowledging the heterogeneity of the public sector

Public services of general interest are a fundamental pillar of a social, sustainable and subsidiary European Union. These services are organised in a very diverse way in Europe. Their provision ranges from public administrations to for-profit public undertakings - all protected by the European Treaties. Recent initiatives, originally designed primarily for administrations (for example the Open Data Directive), tend to cover all public service providers. The consequence is a controlled standardisation "top-down".

This is because the initiatives use the unspecific concept of the public sector, which, unlike services of general interest, are not sufficiently defined by the Commission and are subject to different semantic concepts across Europe: In some countries the public sector is understood as an administration, in others it involves public undertakings operating under market conditions and in a profit-making manner.

This may in the long-term lead to a situation where service providers of general economic interest are no longer competitive on the European internal market: We often observe a quite strong tendency to equate the public sectors in the Commission's initiatives. This is not in the spirit of European law or of the public sector in general, which considers this diversity to be an important value. **SGI Europe therefore expects a clear distinction within the public sector and a differentiation of which public entity should release which data and in what manner. We strongly recommend a clear distinction between public sector bodies and public undertakings.**

Ensuring digital sovereignty

Few foreign digital companies are currently dominating the digital economy, which is linked but also beyond competition consideration. This phenomenon can for example be observed with regards to cloud computing services where tech giant established outside the EU already dominate the market. Citizens, companies and public entities are becoming increasingly technologically and economically dependent from these few players.

At the same time, it should be noted that these providers are subject to third country legislation. In the last few years some parts of this legislation have raised concerns, notably the CLOUD Act or the Foreign Intelligence Surveillance Act (FISA). This creates vulnerabilities to the security and protection of European data, as prominently highlighted in the recent "Schrems II" decision by the CJEU.

Data confidentiality, digital sovereignty and technological and economic independence must be guaranteed and protected in the EU's present and developing cloud computing market. The soaring importance of digital tools and assets also raises issues regarding digital skills. Individual as well as public and private enterprises, particularly SMEs, must be enabled to acquire digital skills without barriers and be able to understand data processing processes. Only in this way an individual informational self-determination can be achieved.

Although citizens are in principle enjoying superior protection, they are still required to manage and monitor their digital activities and the corresponding risks independently. For most citizens, this is a responsibility that they do not can nor want to manage. **European legislation should therefore make sure that EU citizens, businesses and public authorities are free to choose a provider that allows them to evolve in a self-determined manner and prevent inhibitory effects such as vendor lock-in while respecting European values.** Today the existence of gatekeepers and highly concentrated markets frequently does not allow for such a choice.

The future Digital Services Act Package

As part of the European Digital Strategy, the European Commission has announced a Digital Services Act package to strengthen the Single Market for digital services and foster innovation and competitiveness of the European online environment. The future Digital Services Act package aims to modernise the current legal framework for digital services by means of two main pillars: First, the Commission propose clear rules framing the responsibilities of digital services to address the risks faced by their users and to protect their rights. Second, the Digital Services Act package propose ex ante rules covering large online platforms acting as gatekeepers, which now set the rules of the game for their users and their competitors.

The future Digital Services Act Package should allow careful and targeted proactive measures against illegal online content while ensuring that no general monitoring obligation is imposed on online intermediaries. The degree of proactive measures should meet the requirement of not leading to overblocking nor place the task of determining the legality of content entirely into the hands of private undertakings.

Adopting a new and flexible ex ante regulatory framework for gatekeepers

SGI Europe believes that adopting new and flexible ex ante regulatory framework for gatekeepers is necessary given the strong network effects of the markets in which they operate, and the consequences that the same practice can have depending on the ecosystem affected. However, if ex ante regulation were to be put in place, it would have to be proportionate and limited only to relevant digital economy players in the position of "gatekeepers" whose practices weaken the competitive game in the long term without being apprehended by current competition law. In this respect appropriate set of criteria must be established at EU level to identify the so-called “gatekeepers”.

The introduction of prohibitive practices for gatekeeping platforms needs a robust and targeted definition for both such platforms and forbidden practices in order to avoid spill-over effects on innovation and eviction of competitors from the market. These lists of prohibited practices and obligations will need to be updated frequently to avoid being circumvented and becoming obsolete. In this sense, the following criteria should allow targeting such platform:

- Gatekeeping role: as intermediaries, these platforms control the access to different markets, goods and services or to another group of users as well as shape the information that is transferred to users
- Dependence of third parties: there is no real possibility to bypass the platform which creates significant imbalance when negotiating cooperation terms, and there is no possibility in a reasonable timeframe to create such an alternative
- Network effects: the platform has such many present and active users that it improves the value of its goods and services and creates significant barriers to entry for newcomers
- Access to large volumes of data: data gives significant advantage in terms of improving the goods and services offered, by means of algorithms and data mining and offers the possibility to monetise it notably for advertising markets
- Leveraging conglomerate: the platform easily enters different markets by exerting leverage from one sector of activity to another using its technical knowledge, important customer base, large volume of data and negotiation power

In order to ensure the application of these specific rules, **we do not think it would be appropriate to create an ad hoc authority**, at the risk, otherwise, of making the regulation of digital platforms more complex and difficult to understand. The national and European competition authorities, already in charge of compliance with Articles 101 and 102 of the TFEU, are in a position to play this role.

Updating the different definitions

The notion of “platform” is nowadays used to qualify a large number of very heterogeneous actors. Technical developments have led to a complexification and confusion of the roles played by simple technical intermediaries and what is now included in the notion of “platform”. As proof, the very definitions of several European regulations include different notions and fields of application. For example, the PtoB Regulation refers to “online intermediation services” while the New Deal for consumers only speaks of “online marketplaces”, although both legislations include similar provisions regarding the transparency of these intermediaries.

It is therefore **necessary to define in a transversal way what is meant by this term “platform”,** which can go as far as covering activities such as Internet access providers, pure hosting (and similar cloud services), or online intermediation services. **Therefore, the definition of intermediaries should be modernized ensuring a clear distinction between passive and active online intermediaries**. Platforms engaging with content (e.g. tagging, organizing, promoting, optimizing, personalizing, recommending, presenting or otherwise curating specific content) should be recognized as “active hosting providers”.

Responsibilities of platforms

Ensuring effective safeguards to protect the general interest, fundamental rights and European values should always remain at the forefront. The hosting service providers fundamental right to conduct business should be guaranteed while also ensuring more transparent conditions for the users. Economic interests should not prevent competent authorities at national, regional and local levels to take regulatory actions in the general interest. In addition, we need to ensure that global online intermediaries which play an active role do not perform checks nor interfere regarding services and content that are already regulated and subject to oversight in Europe such as media content and services.

Decisions taken by platforms – for example regarding their “community standards”, notice and action procedures, ranking and recommendation algorithms can have far reaching consequences for the exercise of freedom of expression and information, for media freedom and pluralism, and may even affect democratic processes. Such impact is particularly strong in cases where platforms reach large audiences. Despite this, these platforms still operate in a largely unregulated environment.

Whenever platforms engage in the distribution of content, organise or moderate content, there is a need for effective safeguards to protect the general interest, fundamental rights and European values. This goes beyond the fair treatment of business partners, which is also important, e.g. in situations where global digital players exercise strong bargaining power to take unilateral decisions on the organization, display and removal of third-party content, sometimes to favour their own. It is about serving the public interest in audiences’ access to information and content and to safeguard trust. The Digital Services Act needs to increase levels of transparency and accountability to bring platforms’ responsibility in line with their ability to influence opinion making and their potential to harm citizens.

Platforms should have clear responsibilities, when taking content-related decisions, to protect and support freedom of expression and information. Effective rules are not only needed when platforms take down content considered illegal, but even more so in cases where they take down legal content in general that they consider incompatible with their own terms of use and when they make decisions about the visibility of content and services through organization, ranking, recommendation.

Setting standards for algorithms of general interest

Online platforms have become popular largely because it seems that they offer innovative services at none or low monetary costs. However, the dependence on these gatekeeper platforms comes at a price. In particular, **the use of algorithms and AI systems should therefore be subject to clear standards and transparency requirements**. Similarly, access to platforms’ data should be made available to academia to facilitate independent assessments of algorithms used.

Regarding algorithm-based categorisation of persons or population groups, discriminatory distortions have regularly been proven. The distortions apply to a wide range of applications such as facial recognition, crime prevention, language analysis, university admissions and advertising. This is because the **algorithms** behind these applications **are not always subject to general interest and rarely subject to public control**. It is therefore not possible to view or even intervene in the structure and design of the algorithms, or the data sets, models and assumptions on which they are based.

Since these algorithms are often primarily aimed at profit or the reduction of costs, as well as economic efficiency, public welfare effects and interests usually play a subordinate role in their conception and development. **Competition analysis must therefore focus on assessing the effects of a firm's conduct on non-price parameters**. Only then can a decision adequately consider the specific conditions of the affected markets.

The future New Competition Tool

The future New Competition Tool aims at making sure that competition policy and rules are fit for the modern economy. It addresses gaps in the current EU rules identified on the basis of the Commission's experience with enforcing the EU competition rules in digital and other markets as well as the worldwide reflection process about the need for changes to the current competition rules to allow for enforcement action preserving the competitiveness of markets.

We believe that **competition law as applied in Europe is flexible enough to remain effective and should be the preferred tool to regulate the practices of companies**, whether they operate in the digital field or not. The Commission already possesses a whole arsenal of instruments, whose effectiveness has been widely proven, which enables it to respond to emerging competition concerns.

Nevertheless, it is undeniable that certain existing tools still need to be revised to take better account of the characteristics of the digital economy. In particular, both with regard to the analysis of practices restricting competition and merger control, improvements need to be made in the way the Commission defines relevant markets and takes into account the dynamics of market evolution. **Revised, the existing tools should be sufficient to apprehend the practices of digital companies and guarantee the contestability of the markets.**

Furthermore, the Digital Services Act will also bring a new ex ante rules which will have to be implemented before we see the need for a New Competition Tool. Consequently, **before the introduction of a New Competition Tool, the Commission should first update the current competition tools and wait for and assess the results from the proposed ex ante regulation for large online gatekeeper platforms.**