

EDiMA position on the proposal for promoting fairness and transparency for business users of online intermediation services and online search engines in the DSM

EDiMA, the European trade association representing online platforms and other innovative businesses, shares the European Commission's aim to create a predictable and safe environment for business users and consumers alike. They are by definition at the core of our activity as online intermediaries and connecting them is our *raison d'être*, allowing us to build innovative products and services for their benefits. Online intermediation services are an interface serving their respective interests. We need to constantly be able to promote consumer expectations on the one hand, and the interests of business users on the other.

General comments

EDiMA welcomes the principles-based approach adopted by the Commission on this draft regulation. Administrative burden must remain proportionate if we want to avoid detrimental threshold effects that would inhibit European online intermediation services from scaling-up. It is crucial that the digital economy respects the variety of business models of online intermediation services. Given the cross-border nature of online platforms and the fact that they strive to create one system across all the markets they operate in, EDiMA welcomes the choice of a Regulation as legislative instrument. In order to sustain the Digital Single Market, which online intermediation services have contributed to strengthen, it is crucial that any regulatory solution is fully harmonised at EU level.

However, we do not believe that the extensive evidence gathering exercises conducted over the past couple of years bring strong enough evidence of a systemic market failure that needs to be addressed by hard law. Nevertheless, we are committed to working with the European institutions to ensure that the shortcomings and unintended consequences of this proposal are addressed and that a robust and constructive regulation results from the process.

Not all platforms are big and not all business users are small

Discussions on P2B often stem from an assumption that the online intermediation services hold a stronger position over their business users - this is not always the case. This proposal implicitly portrays "online intermediation services" as big players and 'business users' are considered small or micro enterprises. Hence, the whole regulation is drafted around this biased presumption. The reality of, for example, the current e-commerce environment in Europe is that some online intermediation services are small enterprises selling goods and/or services only within their own member state of origin¹, or some of the business users are of equal size to the platforms. Large multinational companies sell their products or services via online platforms in order to reach more consumers or new markets. Sometimes, these companies are bigger, stronger and more powerful than the intermediaries they partner with to sell their products or services.

Recalibrating the base assumption would also change the backdrop that business users are de facto in a disadvantaged position.

It is also worth keeping in mind that the relationship between the intermediary and its business users is one of interdependency. An intermediary is only useful to its consumers if business users continue to create and offer quality content, products or services. It is in a platform's interest to ensure that its business users are

¹ According to the recital 5 of the proposal: "online intermediation services [...] have an intrinsic cross-border potential"

treated well and successful; business users will otherwise prioritise other routes to consumers, for example on competing platforms.

While the online and offline worlds converge, the Regulation creates obvious differences in approach

The European Commission maintains that it seeks the same rules for the offline and the online world. Yet, this proposed Regulation creates a regulatory gap between the online and offline environments at a time when so many offline service providers seek a digital footprint - which in turn will only create legal uncertainty. The proposal prescribes more stringent requirements for online intermediaries than for their offline counterparts.

Scope

Current language around what constitutes an “online intermediation service”, especially the requirement that they “facilitate the initiation of direct transactions”, remains ambiguous. Both the Commission’s impact assessment and its proposal point to the fact that the determining factor is the intent on the consumer’s end to consult a variety of offers and ultimately engage in a direct transaction, whether this happens online or offline. EDiMA would appreciate that, in the interest of providing more legal certainty, a clear and narrow definition of online intermediation service is added to the text.

Extraterritorial application

The geographic scope of the proposal encompasses platforms worldwide, even where they only have negligible commercial activities in Europe. In theory, one European business user and European consumer using a platform already trigger all requirements for a platform. This seems disproportionate and may create conflicting legal obligations in jurisdictions outside of Europe. While we agree with the Commission that a level-playing field is important, we call on the legislator to limit the scope of application to platforms that *target* European consumers, similar to established principles in EU consumer law (Regulation (593/2008, ‘Rome 1’).

It is not entirely clear how this proposal will complement current regulatory mechanisms.

The lack of clarity on the boundary between the proposal and competition law is also concerning. The final text should address this issue and provide for clear explanations over the articulation between the regulation and existing competition law.

Transition period

The Commission’s proposal provides for an extremely short transition period of only 6 months, which seems to be far too short bearing in mind the significant changes to business conduct and policies. Changes to Terms and Conditions (T&Cs) require proper legal assessment, often based on outside-counsel. Any changes to current business policy not only require legal analysis but also technical implementation. Some of the changes may even require hiring additional staff – all of these steps are time intense. We therefore call on the legislators to extend the transition period to at least 24 months.

Detailed analysis

Terms and Conditions (ART. 3)

In the EU only, more than 7000 highly diverse platforms are currently operating². In this highly competitive context, online intermediation services need to offer the highest quality of service possible to retain their business users, which often operate on several platforms at the same time as well as sell their goods and services directly. Business users need transparency and predictability, as do online intermediaries. Our companies are committed to inform and guide their users if changes occur in their terms and conditions sufficiently in advance to help them remain fully operational. Flexibility is needed as online intermediaries have different interactions with their users and different ways to operate.

While transparency is needed, some provisions go beyond what is necessary to achieve the goals of the Regulation and could lead to unintended consequences.

A first concern is the definition of terms and conditions given in the article 2.10 of the proposal is too broad. It could encompass internal documents of the platform that could be critical for ensuring the safety of consumers. Again here, further clarification is needed with a more specific definition and reference to the contract between the business user and the platform. This should also specify that not to all product policies or community guidelines and ranking are included.

Whereas EDiMA understands the objective to provide more transparency, we believe the information requirements in the terms and conditions should be limited to areas or issues pertaining to the performance or application of the contract; thus, not unnecessarily lengthening the terms and conditions and rendering the text more complex. We therefore suggest that the transparency requirements suggested under article 5 on ranking and article 7 on access to data be excluded from the terms and conditions.

Secondly, the draft Regulation must ensure that transparency levels are proportionate to the goals of ensuring predictability, while allowing online intermediation services to protect the consumer and business users to innovate. Indeed, the draft Regulation fails to fully take into consideration the key role an intermediary has in balancing the interest of the business user and the consumer. Intermediaries have been able to provide for a safe and predictable environment for consumers and business users, leading to high-levels of trust and contributing to the success of the digital economy. In order to protect the consumer or the integrity of the platform, an intermediary may have to take decisions, sometimes in a speedily manner, which may be detrimental to some specific sections of business users.

Not all circumstances can be foreseen in the T&Cs, as new harmful practices – intentional or not - are encountered regularly, particularly when hosting highly diverse types of content, services or goods. Should these require a change of T&Cs, waiting 15 days before implementing the change would be to the detriment of the consumers. More flexibility should be provided for intermediary services providers to take decisions to protect the consumer or the integrity of the platform.

² According to the “European Commission’s Impact Assessment accompanying the Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services” (SWD (2018) 138 final, page 51 and 136

The 15 days notice period is also disproportionate for changes that have no potential negative impact on the business user. In light of the Commission's focus on proportionality, intermediaries should be able to implement their changes to T&Cs immediately if these are linked to the launch of new features and functionalities.

The requirement in 3.1.a to provide terms and conditions in 'unambiguous' ways will also be disproportionate, depending on interpretation through litigation. This could lead to detailed and over-prescriptive terms and conditions that will be difficult for business users to navigate. Business users are likely to end up focusing on offering content or products that fit the strict requirements of the terms and conditions, rather than innovating by proposing novel solutions. Instead, the draft Regulation, in line with consumer law (such as the Unfair Contract Terms Directive), should require that terms and conditions are provided in a 'plain and intelligible' way.

While we fully share the importance of being transparent up front about potential grounds for account suspension and termination, the requirement to provide 'objective' grounds is also disproportionate and not in line with competition law in many EU Member States. Indeed, unless an intermediary is proven dominant or formally considered an essential facility, businesses have a right to choose their partners, even on subjective ground. The focus on objective grounds could limit that right for a disproportionate number of online platforms.

Article 3.1.b requires terms and conditions to be easily available 'including in the pre-contractual stage'. In practice this would mean that the terms and conditions would have to be publicly available as all users could potentially be or become business users.

Furthermore, the ambiguous definition of what constitutes terms and conditions being 'easily available' will again only lead to a lack of legal certainty which will be left up to litigation to define.

Suspension and termination (ART. 4)

In principle the suspension or termination of a business user's account should be duly notified. However, the required statement of reasons is not always possible. A pending investigation by competent public authorities, legal action against a business user or any measure taken to protect the end user of the platform are all legitimate reasons for suspension or termination of contract. However, in these cases, the platform may not be in a position to provide a statement of reasons, as providing an overview of the 'specific facts and circumstances' which lead to the decision could help ill-intended business users refine their fraudulent strategy.

We would, in addition, urge the co-legislators to make sure Article 4 and recital 16 contain the necessary procedural safeguards to ensure that platforms are not obliged to provide a detailed statement of reasons but rather to provide a concise account as to what prompted the action taken.

Ranking (ART. 5)

Recognising the importance of transparency regarding the main parameters determining ranking, we propose that online intermediary services make these publicly available rather than include them in the terms and conditions. But any obligations imposed regarding ranking should not go beyond than the aim of ensuring business users understand how products and services are displayed to the consumer.

Furthermore, disclosing the reasons for the relative importance of the parameters determining ranking could prove intrusive and will oblige online intermediation services to disclose trade secrets. Trade secrets should be more explicitly protected in this Regulation. Last but not least, Article 5 places not only a transparency requirement as to which parameters are used to impact ranking but also transparency on those not used - this in itself will be a burden on the online intermediaries and therefore the definition of the transparency requirement needs further precision.

Restrictions to offer different conditions through other means (ART. 8)

EDiMA welcomes the recognition by the European Commission in its impact assessment to the proposed Regulation that a complete prohibition of so-called Most Favoured Nation (MFN) clauses would be disproportionate in view of the current evidence and would also be in conflict with EU competition law. MFNs are applied in many commercial contracts in multiple sectors. They are contract terms and are therefore entirely transparent. Making information on MFNs “easily available to the general public” is beyond the scope of the proposal which is designed to regulate a B2B relationship, therefore we urge that this wide information obligation should not be included in this proposal.

Internal complaint-handling system (ART. 9)

Internal complaint-handling systems are the norm among providers of online intermediations services. They have proved to be the most efficient way to resolve disputes effectively and expeditiously as the Commission’s evidence gathering demonstrated³.

We welcome the European Commission focus on complaints. We however regret the lack of clarity as to the definition of a complaint. Could a phone call, or the reporting of a technical issue on the website be considered a complaint? A loose interpretation of this term could capture a much wider set of interactions between an intermediary and a business user, which could lead to disproportionate administrative burden and misleading transparency reporting. The focus on complaints that ‘negatively affects’ the business users is a step in the right direction but remains too open to interpretation.

We have some concerns relating to the reporting obligation included in article 9.4. The goal of a functional internal complaint-handling system is to be effective and to solve disputes for the benefits of all. The requirement to report the time needed to process the complaint could force online intermediaries to focus on speed rather than quality. We also believe that specific carveouts focusing on the protection of trade secrets and situations where disclosure is not permitted by law, e.g. tipping off of money laundering operations, should be included in this article.

Furthermore, publishing details of all the cases resolved and the results would be burdensome for the online intermediaries while not serving the best interest of business users either. Publishing the outcomes of the individual cases resolved by means of on-platform redress mechanisms might not be a desired action for the business users and therefore disincentivise them to use this mechanism. The outcome of individual cases in

³ The Ecorys study for example showed that the vast majority of business users had their complaints dealt with satisfactorily on the platform. (See page 63 to 67 of the Ecorys study)

itself is irrelevant to evaluate the functioning of an internal complaint handling system. Reporting obligations should therefore solely focus on aggregate data.

It is important to ensure that platforms are left with enough flexibility as to how to operate their internal redress mechanisms, especially in light of administrative burden for smaller platforms, as well as the very diverse nature of platforms and their relationship with business users. Even if small platforms will benefit from an exemption from article 9, they are still likely to set up mechanisms similar to those operated by bigger actors in order to compete with them in terms of attracting business users. Otherwise, business users will prefer using bigger platforms offering a fast-track dispute resolution mechanism.

Mediation (ART.10)

Mediation can be an effective way to solve potential disputes between business users and providers of online intermediation services. However, as currently drafted, article 10 could lead to abuse, and duplication of costs. Some provisions of this article lead to some legal uncertainty as for example, specialised mediators don't exist today.

So as to ensure fairness in the process and limit potential abuses of a mediation system, it is essential that access to mediation is only provided after a business user attempts to resolve an issue by means of internal dispute resolution mechanisms.

Mediation is only effective if strictly voluntary and if both parties act in good faith. Making mediation mandatory for one of the users will only lead to abuse and multiplication of costs, without leading to conflict resolution. We believe that online intermediation services should have the right to deny mediation, at least in cases where there is a repeated complainant, or if the complaint is obviously unfounded.

The requirements on which party bears the costs of that mediation are also problematic and unjust. Article 10.2.b outlines that the *'mediation services are affordable for an average business user of the online intermediation services concerned'*. The question therefore remains how to guess the cost margins that are acceptable.

Finally, we strongly disagree with the idea that a least 50% of the mediation's costs are considered a *"reasonable proportion"* of those costs⁴ to be covered by the online intermediaries. Should mediation be used by a malicious business user, seeking to publicise a dispute in order to impact the reputation of the online intermediation services, bearing over half of the costs will lead to abuse. We would therefore advocate that the decision on the division of the costs should be part of the mediation negotiations on a case-by-case basis as is currently standard practice so as to avoid abuse of this mechanism.

⁴ Article 10.4

Judicial proceedings by representative organisations or associations and by public bodies (ART. 12)

EDiMA is concerned to see that in article 12, the European Commission is pushing for the introduction of collective redress at a European level for business users. While compensatory collective redress is now available in 19 Member States, it is important to highlight the complete lack of harmonisation at EU level (primarily due to the limited EU competence in the field of judicial cooperation in civil procedure law matters): over half of collective redress mechanisms at national level are limited to consumer claims or only available to specific sectors.⁵

We understand that this provision is primarily meant to encourage Member States to establish such systems, however the lack of sufficient procedural safeguards to avoid abusive litigation is concerning. The few proposed criteria in article 12.3 are not sufficient, as they are either too easy to comply (must legally exist and have a non-profit making character) or they are vague (must pursue the “collective interest” of the group they represent).

An American class action model of collective redress may become a realistic scenario, transforming the redress mechanism into an opportunity for competitors, large third-party investors, and law firms to start unmerited and abusive litigation.

EDiMA supports the European Commission’s 2013 Recommendation on Collective Redress⁶ which precisely addressed the conditions that can lead to abuse in existing or future collective redress systems. The Recommendations suggest more than twenty-three minimum safeguards to be implemented at national level including a rigorous set of eligibility criteria that entities must fulfil in order to become “qualified” to start collective redress procedures.⁷

Furthermore, there is no caveat against ‘double jeopardy’ where different interest groups take action against an online intermediary for the same reason. This would mean that a business user would be able to start multiple judicial proceedings against a given provider of online intermediation services, individually or collectively via different associations at the same time. That situation is even encouraged by article 12.3.

Considering risk of abuse and unmeritous claims due to the lack of safeguards, article 12 should be limited to existing mechanisms at national level instead of introducing new ones. The Commission should continue its efforts to have strong procedural safeguards at national level following the Commission’s own 2013 Recommendation. Any attempt to introduce collective redress should take due consideration of the large divergences at national level and the limited competence the EU has in the field of judicial cooperation in civil procedure law.

⁵ Study on the State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation (Commissioned by the European Commission to the British Institute of International and Comparative Law) [November 2017].

⁶ Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

⁷ Some examples included in the 2013 Recommendations include loser pays principle, involvement of a judge in the verification/certification of the claim at the earliest stage possible, limits to lawyers’ incentives, limitations and transparency around funding of claims by third parties, preferences for an opt-in (voluntary mandate by the claimant to be represented in the legal suit).