DIGITALEUROPE

DIGITALEUROPE Analysis of the proposed Regulation on promoting fairness and transparency for business users of online intermediation

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Executive Summary

DIGITALEUROPE agrees with the aim of a fair and transparent business environment. Building trust is key for a flourishing online as well as offline economy. Online platforms (or online intermediaries) are an important driver for growth and jobs and operate by providing services to hundreds of thousands of businesses and millions of consumers across Europe. To the smallest online players, they offer the opportunity to enter global markets and to compete with much larger contenders in ways that have been impossible in the past. In fact, given the cross-border nature of platforms, they also serve a much wider purpose in traversing borders and helping the EU achieve a truly Digital Single Market.

This is why we caution the legislators not to go beyond what was proposed in the Regulation "*on promoting fairness and transparency for business users of online intermediation services*" ('Platform Regulation') by the European Commission. The proposed Regulation has the potential to help finding a reasonable balance in the relationship between online intermediaries and their business users. However, it should not overstep the mark. Certain provisions of the Platform Regulation, even where made with good intentions, risk having unintended consequences that should be duly considered. We have therefore prepared an article-by-article analysis to the legislators that sets out industry concerns, offers suggestions for changes to make the proposal more workable and highlights where the text risks to undermine the key goals of the Regulation.

In this paper DIGITALEUROPE addresses the following issues:

- Clarifying the scope to create a level-playing field among all players targeting European customers.
- Providing reasonable transparency without restraining platforms ability to protect their consumers and avoiding negative impacts on intellectual property rights and trade secrets to safeguard innovation.
- Offering language to boost fairness while limiting the administrative burden for smaller businesses.
- Ensuring effective complaints and redress mechanisms with a view to balancing the interests of platforms, business users and consumers.

Introduction

In Europe, online platforms play a particularly important role as they facilitate cross-border transactions bridging geographic and language divides that would otherwise constitute major hurdles for European consumers as well as for small and medium-sized businesses, the backbone of the European economy. In fact, **platforms have stepped in where regulation has failed to support businesses cross-border and thus constitute a key element in achieving a truly Digital Single Market**. Still, defining 'online intermediary' is a difficult task given that the online economy is most diverse, highly dynamic and increasingly intertwined with the offline world. We can assume there are thousands of online intermediation services in the European Union differing widely when it comes to business models, sectors and geography of activity as well as size. This is where the challenge of horizontal regulation lies: setting principle-based rules that can flexibly apply to all situations.

A too prescriptive Platform Regulation, especially where it aims to address a limited number of very specific problems raised by few stakeholders, risks hampering innovation and growth for all. In particular European platforms, be they nascent, active only in geographically limited markets or niche sectors, risk seeing their competitiveness stifled by unnecessary administrative burdens and constraints of their business freedom. It is important to underline that many platforms face strong business users such as global brands, large software companies or even other platforms. Any regulation should carefully reflect that power differentials, where they exist, are by no means always to the favour of platforms.

Regulatory intervention in competitive markets should be limited to cases of systematic harm that cannot be effectively dealt with on a case-by-case basis. **EU and national competition laws already address abusive practices in cases of dominant companies.** Prohibitions of such abuses, the heaviest intervention, are subject to dominance tests as abusive practices will only harm customers if there is market power. As long as companies are not able to act independently of competition, customers can choose and move elsewhere, which in turn will foster competition and create incentives to innovate.

Analysis of Articles

ARTICLE 1 – Subject Matter & Scope

DIGITALEUROPE recommends:

- Introduce language for maximum internal market harmonisation to ensure that Member States cannot fragment the European Market by developing national level legislation on the relationship between intermediaries and their business users.
- Limiting the application to intermediaries to those platforms that **directly facilitate transactions** since the mere "initiation" of transactions is overly broad.

- Underlining that online advertisement, B2B-services and online content platforms are excluded from the scope of this regulation as intended by the Commission.
- Reconsidering the scope expansion to search engines and assessing the practical implications. Clarifying the geographic scope by limiting application to platforms that "target European consumers", to avoid unintended application of the Regulation to businesses that do not actively seek to address EU customers.[1]

Given their cross-border nature and their contribution to the Digital Single Market, it is crucial that any legislative endeavour targeting online platforms result in maximum harmonisation. If the choice of a Regulation is the right legal instrument for any legislative initiative in this space, it must be explicitly supplemented with maximum harmonisation principles in the draft.

The **scope of the Regulation appears very broad**, as it includes not only platforms that facilitate transactions in their own systems but also where they facilitate only the *initiation* of transactions that happen at a later point in the economic chain. This leaves large room for interpretation and in consequence significant legal uncertainty wherever a platform merely ranks content or even only links to third party offers that could potentially lead to a transaction. It should therefore be clarified what constitutes an "online intermediation service", including a further clarification in the body of the proposal (as per Recitals 7 and 9) that business-to-business platforms and online advertising are out of scope, as well as online platforms hosting online content.

The last-minute **addition of search engines in the scope of the Regulation raises serious consistency questions** as the addition does not seems to fit with the rest of the proposal that is focused on transparency in contractual settings. In the case of search engines, which automatically crawl and index the internet, there are no such contractual relationships with business websites. In consequence, it is unclear how for example the group of claimants under the collective redress provisions is defined for search engine as this could potentially encompass all indexed websites.

Finally, the **geographic scope appears disproportionate** as it currently includes any platform in the world as long as it has the potential to facilitate transactions between European consumers and businesses. DIGITALEUROPE agrees that whoever wants to do business in Europe needs to follow the same rules. However, the proposal applies even where intermediaries who do not actively seek to do business in Europe, i.e. even where services are not offered in any EU language and that are otherwise subject to non-EU legal regimes. Given that a European company that does business in Asia will expect to be subject to local laws, extraterritorial application appears disproportionate and creates potential conflicts of laws in those countries outside the EU.

1 The concept of targeting is well established in EU consumer law and jurisprudence, in particular EU Regulation 593/2008 ("Rome 1"), Art. 6 Para 1 b: "by any means, directs such activities to that country […]". "Targeting European users" will still cover all non-European intermediaries that actively aim to compete in the EU market and thus ensures a level playing field for all players addressing the EU market.

Ultimately, these platforms established outside the EU, will be left with a tough choice: complying with foreign laws outside their jurisdiction or excluding European customers, businesses users or consumers, from accessing their services. The latter is a likely scenario that would result in a reduction of choice for EU consumers and potentially export opportunities for EU businesses.

ARTICLES 2 & 3 – Definitions, Terms and Conditions (T&C)

DIGITALEUROPE recommends:

- Clarifying the definition of T&Cs so that only clauses with the intention of binding both parties are included and that *other information* can be provided without triggering legal ramifications.
- Limiting the prior notice obligation to "… any envisaged **significant** modification of their terms and conditions **that materially and adversely impact business users**".
- Allowing immediate changes that are in the legitimate interest of the platform or its users, such as ensuring the security or operability of the service provided or to prevent abuse or harm to the platform or its users.
- Changing the minimum notification from 15 days to 7 days.

Terms & Conditions (T&C) provide a clear, equal and reliable conditions for all business users of online platforms. Platforms have a vital interest in clear rules as these reduce frictions and render the job of managing platforms easier. However, in the proposal, the definition of T&Cs is too large – it should it be restricted to documentation necessary for the performance of the contract and not include any "other information", which could include any information or guidance material provided to business users. This is particularly important as the Regulation provides for ALL changes to be notified, subject to minimum time period. This not only goes beyond what business users actually need, but also risks over-communication. Further, additional, extensive expansion of T&Cs with transparency requirements around preferential treatment, data access and ranking will increase complexity and volume of T&Cs, which stands in contrast to the aim of making T&Cs more understandable for businesses.

The proposal requires that T&Cs "are drafted in clear and unambiguous language", which appears inspired by similar provisions in consumer protection legislation. In contrast to consumers, businesses can be expected to understand legal agreements and, as professionals, they will be significantly better equipped to deal with legal matters. Given that also large platform users will benefit from such protections, this provision constitutes a major shift in the negotiating positions in what should be governed by the principle of freedom of contract. Interpretation by national courts will likely lead to varying local requirements and increasingly detailed T&Cs to avoid ambiguity. **Focusing on clarity alone should be sufficient** in a business relationship and avoid unnecessary legal uncertainty about how to interpret "unambiguous".

Furthermore, the Regulation rightly tries to address the problem of "sudden modifications to existing terms and conditions [which] may significantly disrupt business users' operations" (see

Recital 15). However, immaterial, neutral or even positive changes to T&Cs do not have disruptive effects to business users, which means pre-notification requirements are unnecessary and disproportionate. For example, a platform, in reaction to a competing platform's move, could not lower the fees it charges to business users without prior 15 days of notification. Neutral changes such as the introduction of new features or product categories would need to be notified in advance, thereby reducing early mover advantages, slowing down necessary changes and, most critically, providing competitors advance notice of competitively relevant changes. Finally, changes performed with legitimate platform, business user or consumer interest in mind risk to be slowed down significantly. For example, where rogue players exploit loopholes in T&Cs, platforms should not have to allow business practices or host content they deem harmful to its users for 15 days. The day-to-day managing of a platform requires a complex balancing of all interests, in certain cases, may require immediate action.

ARTICLE 4 – Suspension & Termination

DIGITALEUROPE recommends:

- Deleting references to "objective" reasons, which create unnecessary legal uncertainty and limit platform's ability to balance interests of consumers and business users.
- Limiting explanations to what is necessary to ensure sufficient transparency, i.e. stating the grounds for the decision to suspend or terminate without referring to "specific facts or circumstances that led to the decision".
- Carving out trade secrets and situations where disclosure is not permitted by law or potentially harmful (for example, cases of money laundering, tipping off or of copyright violations) or confidentiality as use cases where the obligation to provide a statement of reasons for termination/suspension is not required.

The essence of a successful platforms is to attract business to increase to become in turn more attractive to consumers. In other words, platforms have no interest in arbitrarily suspending or terminating any business users – to the contrary. Suspensions or terminations are typically a measure of last resort where the legitimate interests of the platform itself, its business users and ultimately the consumers are at stake. Examples of such situations include cases where business users cause potential danger, physical injury, or compromise a platform's ability to detect violations (fraud, spam, identity theft, malware, phishing). Platforms therefore need to have some discretion to take these complex decisions. The general freedom of contract allows companies offline and online to decide how to best run their business, which includes whom they contract to develop a successful business, to innovate and adjust to rapidly changing environments, as well as to differentiate themselves from competing services. Even under competition law, obligations to enter into a contract, are limited to very specific cases when a number of strict conditions are met.

DIGITALEUROPE agrees that business users should receive reasons for any suspension or termination. However, the qualification of "objective" reasons creates unnecessary risks of varying interpretation. Ultimately, platforms are responsible to enforce their T&Cs and will need to

interpret them on a case-by-case basis, carefully weighing all interests involved. A degree of discretion is necessary simply to curate the platform for example as regards particular styles or opinions or gearing platforms towards specific customer groups. The reasons for suspension and termination will vary from platform to platform and are inevitably subjective business decisions. For example, content considered inappropriate on one platform might not be so on another platform. If the purpose of the Regulation is to foster transparency and allow business users to adjust, a statement of reasons should be sufficient without requiring any undefined objectivity standard.

Finally, providing too detailed information in the context of terminations and suspensions could eventually help ill-intended business users refine their strategies and thereby eventually harm consumers. While generally in line with current practices of complaint handling, **the language regarding "*specific facts or circumstances that led to the decision*" seems disproportionate** and lends itself to extensive interpretations. It creates additional burdens even in clear-cut cases and slows down the complaint handling system, which is time lost on responding to legitimate requests by other business customers or consumers. In certain cases, legal obligations, such as anti-money laundering, or trade secrets will limit the level of information that platforms can provide, which should be reflected in these provisions. Finally, when suspected of fraudulent behaviour and other harmful violations, this requirement could support criminals in refining their strategies.

ARTICLE 5 - Ranking

DIGITALEUROPE recommends:

- **Removing in "*the reasons for the relative importance of those main parameters as opposed to others*",** in order not to reveal competitively relevant information.
- Removing the reference to "terms and conditions" in Art. 5(1). Transparency of rankings does not require legal agreements between parties and can be provided in form of documentation, as is currently best practice. This also allows for better alignment with similar transparency requirements in the New Deal for consumers, thus providing information at one place only.
- Ensuring that trade secrets will be protected (see Art. 5 para. 4).

DIGITALEUROPE believes that clarity regarding the functioning of platforms plays an important role in building trust for both consumers and business users alike. Ranking is a key element in a platform's role of bringing together business users and consumers. Platforms as well as search engines have an interest in making sure consumers quickly and conveniently find the best products, businesses and services. In fact, this is how platforms compete against and differentiate themselves from each other. This is why **significant research and investment goes into constantly improving its service offerings**. Platforms have an interest in providing help to business users in successfully reaching consumers, which includes guidance on factors taken into account in ranking. Similarly, search engines publish significant documentation on the working of their search algorithms.

The advantages of ranking transparency need to be balanced, however, against potential downsides of too strict requirements. The detailed knowledge of underlying mechanisms constitutes

proprietary knowledge and trade secrets. This is why the interest of business users in having an understanding of important ranking factors needs to be weighed against platforms' interest in protecting their competitive edge. Furthermore, **too much transparency can ultimately undermine the underlying idea of rankings**, i.e. helping consumers find what fits best their expectations. Ever since rankings have come about, even prior to the internet, they have had an indirect effect on the market behaviour of ranked players. To some degree this effect is positive and intended, for example where transparency leads to increased quality, better service or more competitive prices. However, some players will focus more on the ranking mechanisms as such instead of providing better offers to consumers.

In the internet, this has become apparent in search optimisation efforts, which can undermine a platform's ranking mechanism. **Rogue players will take advantage of excessive transparency requirements to game ranking mechanisms**, i.e. to manipulate key factors in order to rank higher. This means businesses competing on fair terms will lose customers. Ultimately, this also hurts consumers who may not find the best offers anymore as business users do not compete on the merits but on their ability to influence rankings. Platforms constantly improve their ranking mechanisms, close loopholes and counter rogue practices. Too much transparency will make these efforts significantly more difficult.

The current proposed text obliges online intermediaries not only to communicate the main determining factors but also the "reasons for their relative importance compared to other factors". Revealing the weighing of ranking factors risks providing too much detail. Finally, the "reasons" for using one factor over another seem to go beyond what constitutes useful information for business users. While there may be an interest to know *which* factors form the basis of a ranking, the question *why* a factor was chosen is a business decision. Providing such "reasons" conflicts with the protection of trade secrets (as provided in Art. 5 (4)) and will ultimately hamper innovation.

ARTICLE 6 – Differentiated Treatment

DIGITALEUROPE recommends:

- Limiting the scope to transparency requirements.
- Avoiding legislating on competition law aspects through the back-door as the EU treaties set high intervention thresholds and as the legality of practices will always need to be assessed in the light of the market situation.

Differentiated treatment of a platforms' own services to consumer over competing services, be it generally or in rankings, is not necessarily harmful. **Competition authorities consider such practices are only unjustified where in-depth assessments point to the involvement of considerable market power**. Having better access to certain resources might be a competitive advantage which leads to more competition and customer choice. Having to disclose such advantages will affect how online intermediary services can compete with each other and with traditional services and business models. Even further going intervention, such as outright prohibitions of practices, appears grossly

disproportionate and should therefore not be considered in a horizontal regulation. DIGITALEUROPE therefore cautions against any material additions to this provision or hard-law requirements, which should be limited to competition authorities based on the assessment of the market situation of the company in question.

ARTICLE 7 – Access to data

DIGITALEUROPE recommends:

- Transparency does not require legal agreement. Therefore, this information should be part of information pages rather than part of 'terms and conditions'.
- Avoiding data access obligations that could have serious negative impacts for consumers and will inevitably lead to business users free-riding on platforms investments.

As described above, platforms invest significantly and conduct extensive research in providing the best service to both their business users and consumers. They do this based on the trust in a mutually beneficial relationship with business users. The latter benefit from the platforms' efforts to attract customers by providing a trustworthy platform, investing in customer service and doing marketing across borders to increase reach for business users. Naturally, platforms have an interest in avoiding free-riding on these investments, which means that data access will typically be limited to what is necessary to conclude a transaction between the business users and the consumer. Unfortunately, many business users want both the benefits of being on a platform and direct access to customers to by cutting out the platform on transactions. This ultimately undermines the business case for platforms. Furthermore, **direct access to customer data, i.e. personal data according to the General Data Protection Regulation, increases the risk of data leaks, unwanted commercial communication to consumers and is therefore not in the interest of consumers.**

We therefore urge the legislator to avoid more prescriptive provisions going beyond mere transparency and into any obligations to provide data or refrain from using data.

ARTICLE 9 – Internal complaint handling system

DIGITALEUROPE recommends:

- Deleting the reporting requirement and instead requiring it to appear on the public information pages to business users on typical complaints and subject matters, reflected in: "*help business understand the types of issues that can arise in the context of the provision of different online intermediation services and the possibility of reaching a quick and effective resolution*".
- Should the reporting requirement remain, the focus should be on categories of complaints as well as aggregated and average data in order to protect competitively relevant information.

It is important to ensure that platforms are left with enough flexibility to operate their internal redress mechanisms, as the types of relationships and issues they encounter are as diverse as the types of platforms and functions they fulfil in the digital economy. According to this Regulation,

many information requests could be interpreted as complaints. Indeed, platforms interact with their business users in very different ways, from helping them solve technical issues to advising them on how to improve their product or marketing it to reach consumers most effectively. A question can turn into a complaint and vice-versa.

This has repercussions for the **reporting requirements in this Regulation, which already are disproportionately burdensome** since they will require significant efforts to collect and structure data. The real added value to business users remains unclear given that the reports are unlikely to allow comparisons between different platforms. Finally, reporting requirements risks revealing trade secrets. For example, many intermediaries do not publish information on how many users they have for competitive reasons – as important commercial data could be deduced from reports. Other stakeholders may also use reported data to build cases, for example on illegal content, against platforms.

ARTICLE 10 - Mediation

DIGITALEUROPE recommends:

- Clarifying that **mediation is a voluntary process**, to limit abuse.
- Clarifying that sellers are obliged to complete the internal complaints handling process before going to mediation.
- Aligning the scope of mediation to the scope of the Regulation – a broader scope will lead to abuse.
- Allowing mediators to require a higher cost share from business users where they do not act in good faith in an attempt to reach a resolution or bring cases without merit.
- Requiring "good faith" (currently only a requirement for intermediaries) also from the business users in order to prevent abuse or vexatious complaints.

Mediation can be a helpful tool to resolve conflicts. However, especially in the business-to-business relationship, mediation should be a voluntary process. DIGITALEUROPE is concerned that the Regulation imposes on platforms mandatory mediation without qualifications or exceptions, which will lead to abuse.

Furthermore, there is a **significant risk that some business users will skip internal complaints mechanisms and go straight into external mediation or collective redress**. Online platforms dedicate significant resources to their on-platform redress mechanism, which are also best equipped to quickly and cost-efficiently resolve conflicts – for both sides. We therefore urge the legislator to define a principle of exhaustion of internal redress options before allowing business users to take steps outside the platforms.

DIGITALEUROPE is also concerned over the broad scope to which mediation could apply – i.e. any issues that arise in relation to the provision of online intermediation services. This will provide an avenue, particularly for bigger business users, to use mediation to pressure a platform to change its

rules and business model, however clear and predictable it is, in order to manage potential concerns related to their specific commercial relationship with the intermediary. An alternative designed to help SMEs manage conflict would therefore be abused, leading to important costs to the intermediary. Mediation should be encouraged in this context specifically within the scope of the draft Regulation's requirements.

Furthermore, as regards the cost sharing of mediation proceedings, DIGITALEUROPE sees a risk in the minimum 50% share for platforms, which in many cases is considerably more due to the difference in size and financial strength. It is important that business users have access to mediation, however, there should be safeguards against repeat infringers or completely unfounded claims. In such cases, arbitration courts should be given the power to allocate a higher share of costs to business users. In addition, it is unclear why only platforms "shall engage in good faith in any attempt to reach an agreement through the mediation […]" – this can be reasonably expected from business users as well.

Finally, mediators must abide to strict confidentiality principles, as the process of mediation could involve revealing information about the platform's commercial strategy.

ARTICLE 12 – Judicial proceedings by representative organisations and by public bodies

DIGITALEUROPE recommends:

- Removing collective redress completely, an untested concept, disproportionate in relations issue in B2B relations, which will lead to abuse and which appears unnecessary given the proposal's introduction of internal complaint handling standards, codes of conduct and mediation.
- To prevent abuse, requiring representative organisations to disclose their members, governance and funding sources. This will allow courts to better consider who they are and why they are espousing a particular position.
- Requiring representative organisations should only be able to bring claims on behalf of business users where they have been expressly appointed and authorise on a case by case basis ('opt-in') to prevent institutional interests of the entity (publicity, funds, etc.) to bring cases. In addition, it ensures that where there are actually no complaints about a certain policy, there are no unnecessary court cases.

The creation of a collective redress right risks creating a new class of litigation that will create undue burdens for platforms. Business users already have the right to take individual court action, the Regulation sets minimum standards for internal complaint mechanisms, and introduces (mandatory) mediation. Given the review of the Regulation after 3 years, it is unclear why the Commission proposes, in this context, a completely untested legal instrument before assessing the positive impact of the other instruments. Furthermore, collective redress has been a controversial topic even in the business-to-consumer field for decades as the European system traditionally

focuses more on regulation rather than ex-post enforcement. Given that businesses are a significantly less vulnerable group, it is unclear why collective redress is introduced in the business-to-business relationship.

Such an instrument introduced into the business-to-business environment seems disproportionate, especially since in many cases, business users are in a stronger position vis-à-vis intermediaries as for example international brands selling off the platform, must-have apps or products. As it currently stands, the representative organisation could bring court proceedings even where it has not properly proven its representatives and even where no actual complaints have been received by business users, which leads to a significant risk of abuse.

ARTICLES 14 & 15 – Review and entry into force and application

Extensive assessment of terms and conditions, often involving external counsel as well as the introduction of new procedures in the relationship with business users will require more time than the stipulated 6-month transition period. In many cases, internal policies will have to be first developed, before terms and conditions can be reviewed. Some of these steps will require the hiring and training staff for monitoring and implementation e.g. for complaints mechanisms. Where changes necessitate technical changes to platforms, the time needed will be significantly longer than 6 months. Equally, a review of 3 years following publication will come too early, given that many key provisions are likely to be subject to lengthy court procedures before the exact requirements for platforms are clear. Against this background, a period of 5 years appears more appropriate.

DIGITALEUROPE recommends:

- A review that should be set 3 years after application, not entry into force to allow for proper assessment of the effects of this Regulation.
- A transition period that should be 24 months.

ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies.

DIGITALEUROPE's members include in total over 35,000 ICT Companies in Europe represented by 63 Corporate Members and 39 National Trade Associations from across Europe. Our website provides further information on our recent news and activities: http://www.digitaleurope.org

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