BUSINESSEUROPE

POSITION PAPER

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The Platform to Business proposal

KEY MESSAGES

1. Further clarity is needed to determine which platforms this legislation applies. It should not inadvertently apply to business to business (b2b) platforms. Yet whether operating for a fee or free, all business users on p2b2c platforms should benefit from this Regulation.

2. The 15-day notification obligation should only apply when changes in terms and conditions would make essential changes to the content of the contractual relationship between the platform and the business user or would impact the business user's activities and business model.

3. Platforms should be transparent on their use of differential treatment, data access and use of parity clauses, in relation to the services they offer.

4. The proposal is primarily aimed to benefit of business users and platforms and not consumers themselves. Therefore, consumer notions such as making annual internal complaint procedures public is disproportionate to achieving the objectives set out by the Commission.

5. The ability to bring collective action should not deviate from current EU acquis in relation to applicable law or jurisdiction.

WHAT DOES BUSINESSEUROPE AIM FOR?

Greater transparency and fairness within the platform economy to the benefit of business users without limiting the attractiveness of the services platforms offer. Harmonised rules in relation to the most critical elements that terms and conditions should include to enable greater transparency for business users to better determine their future and continuing relationship with the platform. A wide uptake of accessible and efficient dispute handling mechanisms. A legally clear scope to apply this Regulation only in the platform-business-consumer situation (P2B2C).

Context

The development of data aggregation and analysis technologies have drastically boosted the platform economy which continues to revolutionise market places and businesses as a result.

Online intermediary services (hereafter "platforms") have become strong players of the digital economy. They are expected to account for 30% of global revenues by 2025.[1] They offer great opportunities to those that use them, business users (hereafter "users") of all-sizes can more easily access markets that they previously couldn't reach. This aids their global expansion and furthers competition. At the same time, an increasing dependency has been placed on platforms in serval sectors as they have become an essential channel for users to reach their customers. As a result, if these platforms do not adhere to fair and transparent principles, the wider digital economy is frustrated and competition distorted. This is particularly the case for those smaller users attempting to scale-up and sell cross border for the first time.

That is why BusinessEurope supports the Commission's proposal in order to further ensure the principles of transparency and fairness in our digital economy. At the same time, we should not limit the abilities of platforms to offer users the services they require or promote small emerging platforms and start-ups from competing. The platform-user relationship is currently defined by contract law. Drawn up unilaterally by the former and signed by the latter. While existing market distortions from this practice should be addressed basic principles of competition and contractual freedom should sustain.

1. Scope

The proposal should more clearly define which type of platforms are covered. It should not apply to pure B2B platforms. The platform economy is diverse. It encapsulates platforms that offer their services to users targeting consumers, users targeting businesses and also search services. That is why, as a horizontal piece of legislation, this proposal should clearly define which type of platforms are covered.

The Commission intends to regulate in the relationship platform-to-business-to-consumer (P2B2C). We welcome this scope. Platform services in the pure B2B sector (P2B2B), such as industrial platforms, are usually sector-specific and have smaller existing information imbalances. Therefore, B2B platforms should be excluded from the scope of this proposal. The Commission also does not stipulate in its explanatory memorandum the need for this action, especially as relevant issues are solved by contractual agreements. For this reason, it should be made clear in Article 1 that this regulation does not apply to B2B platforms.

While Article 1 makes clear that the Regulation is only intended to cover use of platforms, by "business users" or "corporate website users", the definition of an "online intermediation service" is less clear. It does not explicitly exclude B2B platforms. In Article 2(2), an online intermediation service is defined as a service meeting three criteria:

[1] https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-blog/how-insurers-can-get-the-most-out-of-a-digital-transformation-in-2018

(a) an information society service;
(b) that allows direct transactions between business users and consumers;
(c) on the basis of a contractual relationship between the platform and both the business user and consumer who is offered goods and services.

There is a concern that Article 2(2)(b) does not sufficiently exclude B2B platforms and therefore it should be amended so that it is clear that only platforms are covered that enable direct transactions "from business users to consumers". In addition, it would be helpful to include, a clear, explicit, exclusion of B2B platforms in the scope of the description in Article 1 or the definition in Article 2(2).

Thresholds for the application of this regulation should be provided in order not to capture those platforms who are not causing dependency problems identified by the Commission. In particular, criteria of applicability to the scaling-up SME platforms needs to be defined. Europe has a considerable amount of growing SME platforms, although most are B2B platforms, any caught within the scope of this proposal could also receive an exemption from elements of this proposal until they catch up with the size and the bargaining power of their global counterparts.

We would like to see all business users benefit from this Regulation whether services are being offered for a fee or for free. Some business users offer all or part of their content for free in relation to the platforms they chose to feature on. Yet recital 5 would only include business users that offer services through a commercial transaction (a fee). This would mean numerous business users, such as content providers acting in the public interest, would not benefit from this Regulation. Moreover, any differentiated treatment risks creating an additional burden for platforms that should assess on a case-by-case basis if the business user offers free services and adapt the contractual relationship accordingly in order to comply with this Regulation.

Moreover, **it should be specified that this Regulation should also apply to individually negotiated contracts**. Recital 12 should be amended in this regard. Transparency of all situations should be covered regardless of the type of contract – particularly as most platforms negotiate standard contracts. Therefore, we believe that a slight widening of the scope is worth the gain in legal certainty and harmonisation.

2. Terms & Conditions

The notification obligation should cover only essential modifications to the content of the contractual relationship. Many platforms already use transparent terms and conditions and they are mostly available at all times and in particular before contracts are made with users. If these alter users are generally informed. But as terms and conditions can be altered for various reasons we would like to see clearer language on when users need to be informed of updates. In order to relieve administrative burdens and keep the platform as beneficial as possible to its users, neutral changes that do not impacting users need not be announced. Otherwise, the 15-day notice period within Article 3(3) should stand before changes are entered into force. It is important that the notification obligation relates to essential modifications to the content of the contractual relationship.

It is important to further clarify what is meant by "objective grounds" (Article 3 (1)(c). Legal uncertainty may be generated also by the wording of Article 3(1)(c) where the platform shall ensure to set out in its terms and conditions the "objective grounds" for decisions to suspend or terminate the provision of their online intermediation services to business users. It is important to further clarify what is meant by "objective". Moreover,

we believe that Article 3(1) should specify that rights business users have to keep control over their data and their intellectual property rights.

A standardised communication should first be sent to the user that has been removed due to malpractice under Article 4(2) before any specific follow-up details may be requested. To ensure trust in platforms, enable greater legal certainty and allow companies to plan their business strategies, platforms should provide clear reasons as to why a user is suspended. At the same time, platforms need to police a seemingly endless number of users in an efficient manner to ensure a respectable platform. Therefore, in order to alleviate disproportionate administrative burdens while enabling greater transparency for platform decision making, a standardised communication could first be sent to the user that has been removed due to malpractice under Article 4(2). Only then should users have the ability to ask for follow-up details on why they were removed specifically. In practice, there are a common number of reasons for removal and flagrant breaches are usually only targeted. As a result, it is unlikely that these users would follow-up decisions.

Further detail on what is meant by indirect remuneration should be included under Article 5(1) to reinforce legal certainty. We agree that transparency of ranking systems of all platforms should be improved as many differ in terms of how transparent they are. This is particularly the case for those that remunerate for higher rankings. It is paramount that this information is accessible and understandable for business users. Further detail on what is meant by indirect remuneration should be included under Article 5(1). In relation to transparency of ranking, precise reasons why certain parameters are more important than others could be, under certain circumstances, business sensitive information which is not trade secrets and consequently not protected under Article 5(4). Most platforms use similar ranking parameters but differ in the importance they give to them as a means of competitive advantage therefore, highly detailed information about this should not be made public.

The requirement to inform whether differential treatment is practiced by a platform within Article 6 is justified. In order to plan their business strategies, it is important that business users understand through terms and conditions, what deferential treatment would be applied if an agreement was entered into with the platform. However, basic principles of contract law should be adhered to. Differential treatment is a part of the contractual freedom of each and every company and is a common expression of private autonomy. However, we recognise that general transparency into these practices would benefit the platform economy. However, legal uncertainty is added to this principle as Article 6(1) broadens the scope to include business users listed on the platform that carry out similar actions. In reality platforms cannot know every practice of every business user listed upon them.

We agree that Article 7 should improve transparency in relation to access data but this should not be expanded upon to create a general data access right for all platforms. We support Article 7 so far as it will increase business user transparency on the access rights they have. It would also enable users to deploy more successful e-commerce strategies. In relation to personal data, access conditions are decided through contractual practices which are transparent to those involved. At the same time this can be difficult for SMEs who feel pressured in contractual arrangements. Nevertheless, the General Data Protection Regulation (GDPR), which has recently come into force should improve this situation and sufficiently cover instances in relation to transparency of access to personal data provided by the business platform (eg. from consumers using their business service). Nevertheless, Article 7 intends to improve transparency alone and while data access is an important debate for the digital economy and predictable outcomes are required, it is not to be decided in this specific piece of legislation alone.

Therefore, this provision should not be expanded to create a general data access right. To guarantee the confidentiality, integrity and availability of the information and data managed and stored by the platform (P2B2C) for transactions between suppliers and customers, the security-by-default should be considered. In addition, an online platform (P2B2C) can use private / public cloud infrastructures, so the implementation of additional security and privacy measures should be considered

While Article 8 will improve transparency in relation to parity clauses it should go no further. The contractual relationship between the users and the platforms should continue to be guided by competition law. However, we recognise the benefit into investigating the impact of these clauses on the market and competition in order to determine the benefits and consequences of any potential harmonised legislative action.

3. Dispute handling

Adjustment of provisions on internal complaint procedures is needed, as the established annual review on the functioning of complaint handling procedures is too far-reaching. The need for platforms to have internal complaint procedures under Article 9 is a fair way to resolve disputes between platforms and business users in a cost time-effective manner. Furthermore, as the introduction of a complaint procedure will create a new competitive space between platforms we believe that EU level guidelines based on best practices could be sought in order to encourage small platforms to adopt such a system. However, we do not see the benefit in publicly sharing references to individual business user cases in relation to this procedure. This annual review on the functioning of complaint handling procedures is too far-reaching. It would require considerable effort in terms of staff deployment, administration and time without being justified by any real added value. This provision should therefore be deleted, moreover that the proposal is aimed at platforms and business users, not the general consumer.

It must be made clear that mediation is voluntary and complaint handling systems can only be triggered progressively by a complainant. Use of mediation is also a useful mechanism for business users under Article 10 and is often used by platforms as an affordable route to justice for both parties. Nevertheless, it must be made clear that mediation is voluntary and that the complainant cannot activate all dispute settlement possibilities at the same time. It is not clear from the proposal for a regulation whether mediation is voluntary or obligatory. It should also be clarified that the complaint-handling systems can only be triggered progressively. The internal complaint-handling procedure (article 9) must be tried first before mediation (article 10) is explored in a second step. On costs of mediation, it seems disproportionate to charge platforms half the costs of mediation if a business user was to bring an unsubstantiated claim under Article 10(4). Therefore, we suggest to define when a claim can be considered unsubstantiated or to modify it by adding that platforms don't have to pay half the costs of mediation when the business users don't engage in good faith. Platforms could be completely exposed to the cost risk of baseless and repeated complaints.

The ability to bring collective actions under Article 12 should be conditioned more precisely and dispute procedures should not deviate from the EU acquis on applicable law and jurisdiction. Not only will organisations be permitted to bring claims, resulting in a growth in this industry that is self-perpetuating in frustration of the platform economy, but national decisions on those claims could fragment application of this Regulation as a result. No criteria for bringing a claim is included within this provision leaving it open to anyone at any time to bring an action. Even though this only entails an application to stop or prohibit non-compliance, it should be ensured that the right of action is framed as narrowly as possible in order to prevent abuse. In any event, the "legitimate

interest in representing business users or in representing corporate website users" should be further restricted. Collective redress should follow Member State law where such practices exist regardless. The applicable law of the platform providing the service should apply following the status quo of existing single market rules. For clarity that would mean the platform should have a European Headquarters in existence. In any event, it is essential to avoid the abusive excesses of a collective redress system. For this reason, it is important to structure collective redress to make sure the mechanism is not abused by bad actors and introduce safeguards, ensuring that organizations able to bring an action are properly recognized and certified by EU countries and are transparent about who finances them.

In order to guarantee the highest possible level of efficiency we strongly suggest to involve business users in the process of drawing up codes of conduct with platforms under Article 13.

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