

## WHY FAIRNESS IN PLATFORM TO BUSINESS RELATIONS MATTERS

### CONTEXT

On 26 April 2018, the European Commission published a draft [Regulation on promoting fairness and transparency for business users of online intermediation services](#) (thereafter “the Proposal”). The main aim is to bring more transparency in the relationship between businesses and online platforms (*online intermediation services*) where platforms’ services are used to reach end customers. The Regulation partially covers online search engines to ensure a balanced marketplace online allowing European businesses to better exploit the potential of the online platform economy.

Commercial broadcasters in Europe, as users of online intermediation services and of online search engines, view this Proposal as a welcome step forward in balancing online markets and increasing the responsibility of online services. These services have evolved and thrived thanks to a structurally inequitable regulatory framework resulting from the e-Commerce safe harbour provisions of 2000. This lack of regulatory adaptation has paved the way for undue market dominance creating a loss of competitiveness across a range of Europe’s leading sectors. European businesses and consumers are losing out.

ACT members thus welcome the Proposal as this would lead to a win-win situation for both consumers and enterprises in Europe. Yet, it remains important to see some of the provisions contained in the proposal clarified and/or strengthened.

### IMPACT ON COMMERCIAL BROADCASTERS

**Broadcasters as corporate website users.** Commercial broadcasters’ websites and other legal services feature in online search engines’ results yet rarely appear in top results of user queries. Results displayed often favour the platform’s own or subsidiary services. Worse, results pointing to illegal services and/or infringing content are preferred to rightholders’ (e.g. broadcasters’) own services.

**Broadcasters as business users.** Commercial broadcasters offer their services through mobile applications that are available to users via Platform owned/controlled app stores. Such app stores do fall under the definition of an online intermediation service.

### ASSESSMENT OF THE SPECIFIC ELEMENTS OF THE PROPOSAL ONLINE ADVERTISING BASED SERVICES ARE AND SHOULD REMAIN OUT OF SCOPE (Recitals 8, 9, 12; Article 2.2)

#### Rationale

- The ACT agrees with the Proposal that new rules should not apply to services selling online advertising space
- Broadcasters’ online services containing advertisement should not fall under the definition of an online intermediation service; i.e., a service that theoretically facilitates contacts between advertisers (brands) and consumers. This exclusion from scope makes sense as: (1) consumers cannot choose which ads they will see; (2) ads do not always lead directly to a transaction; (3) the technical tools used to host and serve the advertisement are also not visible to consumers (see Impact Assessment p. 8).
- Voice assistance services are becoming more and more popular. They constitute an alternative to classic typing based tools provided by online intermediation services or online search engines. In order to make the proposal future-proof, voice assistance services should be added to the non-exhaustive list in Recital 9 to make sure they fall under the scope of this Regulation.

#### Suggestions for amendments (in bold/italic)

**Recital 8.** [...] *The purpose of this Regulation is to establish duties for those information society services which, in addition to the above requirements, perform a function of “intermediation” in an online marketplace. The mere presence of advertising on a webpage does not itself mean that the webpage falls under the scope of this Regulation.*

**Recital 9.** *Examples of online intermediation services covered by this Regulation should consequently include online e-commerce market places, including collaborative ones on which business users are active, online software applications services, and online social media services, and voice assistance services. However this Regulation should not apply to online advertising serving tools or online advertising exchanges which are not provided with the aim of facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers. The mere presence of advertising on a website does not itself mean that the website falls under the definition of online intermediation service. [...].*

## TOWARDS STRENGTHENED FAIRNESS AND TRANSPARENCY MEASURES (Recitals 12, 16-20; Article3-9)

### **Terms and conditions (Recital 12, Article 2(10), Article 3)**

- When there are some specificities related to the business model of broadcasters (e.g. access to data) which are dealt with in the specific terms and conditions and negotiated bilaterally with the platforms, the outcome of these negotiations should not invalidate progress made under the general terms and conditions<sup>1</sup>
- As stated on the Impact Assessment (p.54), contractual clauses (e.g. choice of law clauses) that would prevent enforcement in EU courts of the Regulation, shall be unenforceable, in full compliance with private international law<sup>2</sup>

### **Billing systems (New Article 3.6)**

- Providers of online intermediation services often impose their own billing systems in their Terms and Conditions. For instance, they automatically charge a non-negotiable part of the revenue to every business users. App-stores take up to 30% of the value of every transactions made inside their platforms. This artificially imposed charge together with the dominance of only few platforms results in an unjustified ‘tax’ that all app developers have to pay to gain access to consumers. Business users should be given the chance to negotiate it. This loss of revenues is affecting our ability to reinvest in creative quality content.
- In addition, content providers often choose to implement a complicated browser-based payment route, rather than incur the charge. This is a poor consumer outcome as it would be far better if users were able to directly transact through the app. It also favours platform providers competing services as they can provide a smoother customer journey. Business users should also be able to have recourse to other forms of billing system than the one imposed by online intermediation services.

### **Suggestions for amendments (in bold/italic)**

#### **Article 3(6) (new) – Providers of online intermediation services’ fee**

***The fee a provider of online intermediation service charges to the business user for the use of its online intermediation services should be proportionate and negotiated between two parties involved.***

<sup>1</sup> Please note that Sky does not support this message. According to Sky, the Regulation should only apply to unilaterally imposed terms and conditions because, as also identified by the European Commission in its impact assessment, businesses generally do not have a chance to negotiate them. Expanding the scope would become an unjustified interference in bilateral commercial negotiations between parties including beyond the scope of online platforms.

<sup>2</sup> Including the Hague Convention and Rome I, Rome II and Brussels Ibis Regulations.

### Suspension or termination (Recital 16, Article 4)

#### Suspension or termination not related to illegal content:

- Providers of online intermediation services should be transparent about the reasons leading to the decision on termination and/or suspension of the business user's service. These reasons should be communicated to the business user without delay and should be clear, actionable, consistent and coherent.
- Sufficient time to respond should be given to the business user in order to react between the notification of the decision and the actual suspension and/or termination of the service<sup>3</sup>. This would give the possibility for the business user to challenge the decision, as referred in Recital 16, or make the necessary changes to the service if possible, before the decision is implemented.
- Business' users should have the possibility to discuss the suspension/termination with the online intermediation service. The latter should be obliged to accept having a discussion with the business user without undue delay.
- A change of terms and conditions should not in itself lead to suspension/termination and/or delisting
- Delisting cannot lead to the termination of a contract before the contract expires

#### Suspension or termination related to illegal content:

- Suspension/termination/delisting should not, in any event, affect legitimate termination, in whole or in part, of a service if it is related to illegal content, as referred to in Recital 14<sup>4</sup>
- A distinction could be made in the Article itself between suspension/termination/delisting of a service on illegal content grounds and suspension/termination/delisting based on other grounds. Alternatively, the scope of Article 4 could be explicitly focused on illegal content as a ground for suspensions/termination/delisting.

#### Suggestion for amendments (in bold/italic)

##### Article 4 - Suspension and termination

1. Where a provider of online intermediation services decides to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, it shall provide the business user concerned, without undue delay, with a ***clear, actionable and coherent*** statement of reasons for that decision.  
[...]

***3. The business user should be given the possibility to discuss, without undue delay, the suspension or termination.***

#### Ranking (Recitals 17 and 18, Article 5)

- Legitimate sites (rightholders' or licensed website/service) should appear first in rankings to ensure their visibility. Websites/services hosting or linking to illegal content should be immediately delisted.

#### Suggestion for amendments (in bold/italic)

Recital 18. Similarly, the ranking of websites by the providers of online search engines, notably of those websites through which undertakings offer goods and services to consumers, has an important impact on consumer

<sup>3</sup> This notice period should not apply when the decision to suspend or terminate is related to illegal content.

<sup>4</sup> Indeed, the delisting, suspension or termination of a business users' account (or services/products) can result from the obligation for online platforms (i.e. hosting service providers as referred to in Article 14 of the E-Commerce Directive 2000/31/EC) to expeditiously remove or disable access to content once they become aware of its illegal nature.

choice and the commercial success of corporate website users. ***This is why websites providing access to legitimate content should appear first in ranking, while websites hosting or linking to illegal content should be immediately delisted.*** [...]

#### **Differentiated treatment (Recital 19, Article 6)**

- In certain cases, differentiated treatment results from preferential deals being made between the online intermediation service or one of its vertically integrated services and content providers. Such deals prevent the content providers from negotiating similar or better conditions (e.g. on pricing policies) with other business users that are competing on the same market as the online intermediation service's controlled business user/subsidiary.
- While Article 6(2)(d), addresses the transparency aspect, the Regulation should clarify that differentiated treatment can only be authorised where it is in compliance with competition law

#### Suggestions for amendments (in bold/italic)

***Recital 19. Where a provider of online intermediation services itself offers certain goods or services to consumers through its own online intermediation services, or does so through a business user which it controls, that provider may compete directly with other business users of its online intermediation services which are not controlled by the provider. In such situations, in particular, it is important that the provider of online intermediation services acts in a transparent manner and provides a description of any differentiated treatment, whether through legal, commercial or technical means, that it might give in respect of goods or services it offers itself compared to those offered by business users. Such differentiated treatment should only be allowed to the extent that competition law is fully complied with. To ensure proportionality, this obligation should apply at the level of the overall online intermediation services, rather than at the level of individual goods or services offered through those services.***

#### **Access to data (Recital 20, Article 7)**

- Access to data generated from the use of the broadcasters' services or content on a platform is extremely important, mainly to improve and adapt the broadcasters' services/content to the viewers' expectations (e.g. on social media). See proposal for new paragraph below.
- Currently, there is often a lack of transparency about the usage of personal data by online intermediation services (e.g. the way personal data is used by the online intermediation services to boost their revenue). The use of data by the online intermediation service should be limited to the sole purpose of providing their service.
- It is currently impossible to prevent online intermediation services from having access to the business users' customer base data. Such data, when processed by the online intermediation services, should be aggregated and anonymised for data protection purposes. This would prevent providers of online intermediation services from having unjustified and broad access to the broadcasters' customers' data.
- To increase transparency, the online intermediation service provider should precisely list and communicate to the business user the information it has access to.

#### Suggestions for amendments (in bold/italic)

#### **Article 7(3) (new)**

***Providers of online intermediation services shall communicate to each business user and grant them access to any data which that business user provides or which are generated through the provision of the online intermediation service, in relation to the business user's activity. Access shall also be granted to any personal data or other data, or both, which consumers provide and which relate to the concerned business user's services. This obligation is without prejudice to the obligations with which online intermediation services must comply under applicable data protection and privacy rules. This obligation shall also apply to providers of***

*online search engines and online news aggregation services, where they also act as providers of online intermediation services.*

*In addition, online intermediation services should not exploit consumers' data which are related to the business user's services, for another purpose than providing their service. In this specific case, online intermediation services should act in compliance with EU data protection and privacy law.*

## TOWARDS CLEARER PROVISIONS ON REDRESS (Articles 9-11)

### **Complaint mechanisms (Article 9)**

- When a business user lodges a complaint as a result of a decision taken by the provider of online intermediation services, the provider should, without undue delay, re-establish the situation as it was before the decision was taken and implemented. This should apply until the outcome of the complaint procedure is communicated to the business user (without prejudice to decisions resulting from legal obligations pertaining to the removal of illegal content).

### **Mediation (Article 10)**

- European law should be the sole applicable legal framework in order to ensure legal certainty and prevent circumvention of the Regulation by way of forum shopping, e.g. through choice of law clauses.

### **Mediator organisations (Article 11)**

- The text needs more clarity on the entity, as well as on the selection criteria, that will validate the "independent mediator organisations" in charge of arbitrating cross-border disputes.

## WHO WE ARE & WHY WE CARE

The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters in 37 European countries. We entertain and inform hundreds of millions of EU citizens each week, delivering substantial value to EU citizens, for instance ensuring plurality in news provision as well as drama and sports to EU audiences.

Europe's commercial TV's path to digitalisation started 20 years ago. We are now distributing TV according to our customers' preferences, whether that is digital terrestrial, digital satellite, cable or via stand-alone or multichannel networks online. The ACT member companies finance, produce, promote and distribute content and services benefiting Europeans across all platforms. At ACT we believe that a healthy and sustainable DIGITAL SINGLE MARKET plays a fundamental role to support Europe's economy, society and culture.

For more information on the ACT position please contact Agnieszka Horak, Director of Legal and Public Affairs – [ah@acte.be](mailto:ah@acte.be)

