

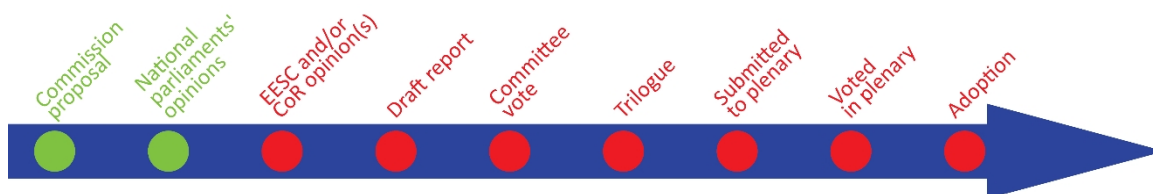
Fairness and transparency for business users of online services

OVERVIEW

The Commission adopted a proposal for a regulation on promoting fairness and transparency for business users of online intermediation services on 26 May 2018. Providers of online intermediation services (e.g. Amazon and eBay) and online search engines (e.g. Google search) are required to implement a set of measures to ensure transparency and fairness in the contractual relations they have with online businesses (e.g. online retailers, hotels and restaurants businesses, app stores) which use such online platforms to sell and provide their services to customers in the EU.

The proposal is still at an early stage in consideration in the European Parliament, where it has been assigned to the IMCO committee.

Proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services		
<i>Committee responsible:</i>	Internal Market and Consumer Protection (IMCO)	COM(2018) 238 26.4.2018
<i>Rapporteur:</i>	Christel Schaldemose (S&D, Denmark)	2018/0112(COD)
<i>Shadow rapporteurs:</i>	Philippe Juvin (EPP, France) Daniel Dalton (ECR, United Kingdom) Dita Charanzová (ALDE, Czech Republic)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Publication of draft report	



Introduction

The Commission identified the promotion of fairness and responsibility of online platforms as an area where further action was needed to ensure a fair, open and secure digital environment in its May 2017 [mid-term review of the digital single market strategy](#). Against this background, on 26 May 2018, the Commission adopted a proposal for a [regulation on promoting fairness and transparency for business users of online intermediation services](#).

Context

Online platforms (e.g. search engines, social media, e-commerce platforms, app stores, and price comparison websites) are increasingly playing a central role in social and economic life. They enable consumers to find online information, and businesses to exploit the advantages of e-commerce. But online platforms also raise new policy and regulatory challenges. One of the issues which has attracted lots of attention lately is the role of intermediation played by such platforms, between online businesses selling their services and products online and their customers. The Commission's [fact-finding exercise](#) has shown that a large number of these businesses experience problems in the course of their business relationships. The main problematic behaviours observed in 'platforms-to-businesses' (P2B) relations are:¹

- Sudden unexplained changes in terms and conditions, unilaterally imposed by platforms without prior notice, such as changes to return and exchange policies of e-commerce platforms or increases in the price of apps, to which businesses do not have time to adapt;
- Delisting of products, services or businesses or suspension of accounts without clear statements of reasons, and without suitable safeguards against arbitrary delisting/suspension of accounts;
- Issues related to ranking of business users or their offers. Two thirds of small and medium-sized enterprises (SMEs) explain that their position in search results has a significant impact on their sales, and the impact of ranking on consumer choice has been documented in several studies;² Some business users claim there is a lack of meaningful accountability and predictability with regard to ranking systems used by online platforms, due to biases in their search-related practices;
- Issues related to data access and use. While online platforms aggregate large amounts of personal and non-personal data, some businesses claim there is a lack of clarity as to the conditions for access and use of those data. They criticise the lack of transparency of online platforms' policies and practices with regard to the collection and retention of data, and in the conditions for business users to use such data. Furthermore, the Commission's study has shown that a vast majority of online platforms do not give business users the opportunity to ask for customers' consent to obtain and process their personal data;
- Discrimination of businesses and favouring of online platform's own competing services, for instance through more favourable ranking or use of transaction data to improve their products/services. A related issue concerns 'most-favoured nation' (MFN) clauses that require a supplier to offer a product or service on an online platform at the lowest price and/or on the best terms offered and can have an anti-competitive effect;
- Lack of effective redress. According to the Commission's investigations, a large number of businesses believe that online platforms and search engines do not offer adequate internal or effective external redress mechanisms to correct harmful trading practices. Almost a third of all problems in 'platforms-to-businesses' relations remain unsolved (and a further 29 % can only be resolved with difficulties) while 32 % of EU businesses selling online believe there are no reliable dispute resolution systems available to solve disputes with the operator of online general search engines.³ This is due to the fact that business users fear retaliation in case of complaints and because of other structural factors (i.e. small companies do not have knowledge of the judicial redress possibilities, costs incurred are high and the procedures are lengthy).

Some 60 % of private consumption and 30 % of public consumption of goods and services related to the digital economy takes place through online intermediaries, with more than 1 million businesses (including online retailers, hotels and restaurant businesses and app stores) involved in selling goods and services via online platforms in the EU.⁴ However, according to a Commission [study](#), 46 % of business users experience problems with online platforms in the course of their business relationships, and such harmful behaviour has an impact in the EU economy in the range of €2 to €19.5 billion a year.⁵ A [survey](#) conducted by Developers Alliance challenges the magnitude of the problems in the applications industry, however, and concludes that only 25 % of the developers who face a major challenge with a platform say their problem was not resolved.

Existing situation

No relevant specific EU legislation

There is no specific legislation addressing platform-to-business relationships at EU level. EU consumer protection law (e.g. the [Unfair Commercial Practices Directive](#)) is limited to 'business-to-consumers' ('B2C') transactions, and existing measures targeting harmful trading practices are applicable only to the offline world – not to 'business-to-business' (B2B) relations in the online world. The Commission considered that existing rules are not applicable to the above-mentioned harmful online practices, given the specificities of online business models and the role of algorithms.

At the same time, however, a number of Member States have already adopted some laws addressing specifically online platforms' behaviour (i.e. France, Austria and Italy) while others (e.g. Germany, Belgium, Italy) are considering doing the same, which introduces a risk of legal fragmentation in the EU.⁶

General EU competition law is limited

According to the Commission, existing EU competition rules do not adequately address the issues in B2B relations. EU antitrust rules are aimed at tackling anticompetitive agreements ([Article 101 of the Treaty on the Functioning of the European Union – TFEU](#)) or abuses of dominant position ([Article 102 TFEU](#)). However, the trading practices at stake do not necessarily have an anticompetitive object or effect under Article 101 TFEU and it is difficult to apply Article 102 TFEU, which requires to establish the existence of a dominant position in the relevant market.⁷

The European Commission fined Google for abusing its dominant position for online search engines by giving an illegal advantage to its own comparison shopping service ([Google Search \(Shopping\) case](#)) in June 2017. The technical, legal and economic grounds of the decision and its consequences have been widely [debated](#) by scholars. Some consider that the European Commission ordered Google to implement a form of [search neutrality](#) and argue that policymakers must impose 'non-discrimination' rules since 'transparency' alone will not solve the competitive issues at stake.⁸ Others call for more far-reaching policy intervention such as the enactment of a system of [liability for algorithms](#) similar to that enshrined in the [E-commerce Directive](#).⁹

Parliament's starting position

The European Parliament [resolution](#) of 15 June 2017 on online platforms and the digital single market expressed concerns about a series of unfair B2B trading practices, and called on the Commission 'to propose a pro-growth, pro-consumer, targeted legislative framework for B2B relations based on the principles of preventing abuse of market power and ensuring that platforms that serve as a gateway to a downstream market do not become gatekeepers.'

Preparation of the proposal

The Commission held a [public consultation](#) followed by extensive discussions with stakeholders in 2016 and 2017 as well as workshops and bilateral discussions with stakeholders. Several studies on the [terms and conditions of online platforms](#), on issues related to [data access in platform-to-business relations](#) and various internal research on the [legal and economic aspects](#) of online platforms and their B2B practices were conducted. Finally, an [impact assessment](#) was carried out. EPRS is currently preparing an initial assessment of the Commission's impact assessment.

The changes the proposal would bring

Objective

The proposal intends to ensure a fair, transparent, and predictable treatment of business users by online platforms, to provide business users with more effective options for redress when they face problems, and to create a predictable and innovation-friendly regulatory environment for online platforms within the EU.

Choice of legal instrument

The Commission proposes a regulation ([Article 114 TFEU](#)), directly applicable in Member States, to establish the same level of obligations for companies and have coherent application of rules in a matter which is essentially cross-border. It considers promoting voluntary industry-actions and other non-binding instruments (i.e self-regulation or co-regulation) is unlikely to be effective especially for imposing redress mechanisms and fairness rules.

A study from [Williamson and Bunting](#) stresses that it is not clear why fairness rules should not be general horizontal provisions governing the entire market (including platforms and other business models and online and offline businesses), and argue that such concerns should only arise where there is a competition problem.¹⁰

Scope

The new rules would apply to 'online intermediation services' and 'online search engines' that provide their services to business users and corporate websites established in the EU, and offer goods or services to consumers located in the EU. According to article 2, 'online intermediation services' would mean services that (i) constitute information society services, (ii) allow business users to offer goods or services to consumers in order to facilitate direct transactions between them, and (ii) are provided on the basis of contractual relationships both between the providers and business users and between the providers and consumers. 'Online search engines' would refer to digital services that allow users to perform searches of websites on the basis of a query.

The Commission explains that e-commerce market places (e.g. Amazon Marketplace, eBay), [app](#) stores (e.g. Google Play, Apple App Store, Microsoft Store), social media for business (e.g. Facebook, Instagram), price comparison tools (e.g. Skyscanner, Google Shopping) and general online search engines (e.g. Google Search, Yahoo!) would fall within the scope of the draft regulation – independently of whether they are established in a Member State or outside the EU. However, the new rules would not apply to online advertising nor to payment services which are rather tangential to the transaction. While there is some agreement as to what constitutes a search engine, the [concept of intermediaries](#) is more questionable.

Fairness and transparency measures

Terms and conditions (article 3)

Providers of online intermediation services would be required to ensure that their terms and conditions for professional users are easily understandable, easily available for business users, and that there are objective grounds for suspending or terminating the services. A breach of this transparency measure would result in the contractual terms and conditions becoming non-binding on the business users. Such providers would be required to notify in advance their business users of any envisaged modifications of their terms and conditions (with a notice period of at least 15 days from the date of the notification) unless they would be subject to a specific legal obligation. Similarly, a breach of this obligation would have far-reaching legal consequences as the relevant modifications would be considered 'null and void' (i.e they would be considered never to have existed with effects *erga omnes* and *ex tunc*).

Suspension and termination of contracts (article 4)

Providers of online intermediation services are required to provide business users – without undue delay – with a statement of reasons (including detailed and specific facts or circumstances and the objective grounds for the decision) that led to a suspension or termination of contract.

Ranking (article 5)

The ranking of goods and services has an important impact on consumer choice and, as a result, on the commercial success of a website and business. Therefore, providers of online intermediation services would have to set out in their terms and conditions the main parameters determining ranking and the reasons behind the relative importance of the different parameters (including a description of the possibility to influence ranking against direct or indirect remuneration). Providers of online search engines like Google search would have to set out for corporate website users the main parameters determining the ranking.

Business users must be able to understand to what extent the ranking mechanism takes into account the characteristics of the goods and services offered online, the relevance of such characteristics for consumers and the design characteristics of the website used (e.g. optimisation for display on mobile telecommunications devices). However, providers of online intermediation services and of online search engines would not be required to disclose any information amounting to trade secrets pursuant to [Directive 2016/943](#). In this respect, an [OECD study](#) stresses that most algorithms are trade secrets, and that even if companies publicly release or share their secrets, their long and complex program codes would still be extremely hard to interpret, while the effects of algorithms can also be particularly difficult to evaluate.¹¹ It has also been [stressed](#) that while the proposed article would not require disclosure of anything protected under the Trade Secrets Directive, it seems to be impossible to release meaningful information on search ranking criteria without also releasing trade secrets.

Differentiated treatment (article 6)

Providers of online intermediation services would be required to include in their terms and conditions a description of any differentiated treatment given to goods and services they offer themselves (or by business users they control) compared to the treatment they give to goods and services offered by other business users, and *a minima*, describe 'access to data', 'ranking', 'indirect remuneration' and 'conditions of use of directly connected or ancillary services'.

Access to data (article 7)

The terms and conditions would have to include a description of the 'technical' and 'contractual' access of business users to 'personal data' (or other type of data) that business users or consumers provide to online intermediation services or that are generated through the provision of those services. However, this obligation would remain proportionate (Recital 20).

Studies¹² have established that, while companies are increasingly using big data analytics, for instance to help them develop new products and services, improve security and risk management, and gain clearer insights into customer needs, they sometimes cannot access the data they need or would like and face contractual limitations when wanting to (re-)use data. The magnitude of the problem arising and the need to impose conditions on 'access to data' in the context of platform intermediation were discussed at the time of the public consultation. The Commission notes in its impact assessment that 'business users do not have consistent views as to their level of satisfaction with the data access policies of the online platforms they use. ... Some argue that they lack access to specific types of information regarding their customers, while others acknowledge that they can access a large variety of data, but that they lack the resources or skills to exploit it'.¹³

Offer of different conditions through other means (article 8)

Providers of online intermediation services would be required to explain on what grounds they restrict the ability of business users to use other alternative services to offer the same goods and services to consumers under different (more favourable) conditions.

Redress mechanisms (articles 9-13)

The Commission would encourage providers and their representative associations to draw up codes of conduct¹⁴ and impose on online intermediation services to implement corrective measures.

Internal complaint handling system

Providers employing more than 50 persons would have to establish and operate an internal system for handling complaints from business users about non-compliance with a legal obligation laid down in the regulation, or any technological issues, measures taken or behaviour by providers that could affect business users in a non-negligible manner. They would have to process each complaint swiftly and effectively, and communicate the outcome of the complaint process individually, in clear and unambiguous language. All relevant information regarding that internal complaint-handling system would be set out in the providers' terms and conditions.

Mediation

Providers would have to identify one or more mediators in their terms and conditions, and provide quick out-of-court dispute resolution mechanisms including an agreement to pay at least half of the total costs of mediation. Furthermore, the Commission would encourage the creation of special mediators for addressing in particular disputes arising because of the cross-border nature of online intermediation services. However, submitting to the outcome of mediation proceedings would remain voluntary for platforms and business users, who would have the possibility to initiate judicial proceedings at any time during or after the mediation process.

Judicial collective proceedings by representative organisations

Representative organisations and public bodies would have the right to take actions before national courts, to stop or prohibit any non-compliance by providers of online intermediation services and search engines with the requirements of the regulation.

While this new right to collective action for businesses mirrors the existing right to collective action for consumers,¹⁵ some key differences would remain. The associations that can bring collective interest litigation for businesses would be verified at the time the action is brought on an ad-hoc basis rather than by means of pre-designation such as for the collective action for consumers. Also, the action for businesses would be limited to injunctive relief (i.e. stopping or prohibiting any non-compliance) rather than compensatory (i.e. granting damages) in the case of actions for consumers.

EU Observatory and review

Finally, the Commission would set up an EU Observatory to monitor the impact of the new rules as well as emerging issues and opportunities in the digital economy and, on this basis, to assess the need for further measures within three years.

Advisory committees

The European Economic and Social Committee (rapporteur Marco Vezzani, Group II – Workers, Italy) is working on its [opinion](#), which is expected to be adopted in September.

National parliaments

The deadline for the submission of reasoned opinions on the [grounds of subsidiarity](#) was 29 June 2018. None of the 16 parliamentary chambers from 16 Member States that scrutinised the proposal adopted a reasoned opinion.

Stakeholders' views¹⁶

The trade associations representing providers of online intermediation services have voiced strong concerns about the proposal. [Digital Europe](#) is concerned about the effects any disproportionate and unwarranted regulation could have on platforms and for their users. They stress that a one-size-

fits-all approach applied to such diverse business models will lead to disproportionate administrative burden and additional costs, raising market entry barriers for new platforms, and that any transparency and redress requirements should be carefully weighed against their potential negative impacts on consumer and business users. Furthermore, over-prescriptive requirements as to the transparency of algorithms could significantly limit such innovation according to them. The Computer and Communications Industry Association ([CCIA](#)) stresses that there is no evidence of a systemic problem that would justify a regulation (i.e. the strongest EU legislative instrument) and argues that a more flexible approach, rather than an outsized, one-size-fits-all regulation, would be more appropriate. [EDiMA](#), the trade association representing online platforms, questions the need for overly prescriptive transparency requirements, which, according to them, go far beyond any standards applied to intermediaries in the offline world. Furthermore, they stress the proposal fails to take account of the differences between online platforms and their business models, and does not clarify how it is supposed to complement existing EU competition law.

The [Developers Alliance](#), representing software developers, supports the European Commission's intention to encourage better relationships between platforms and their users through transparency but is concerned about the lack of an evidence basis for this legislative intervention and advocates a light-touch and targeted solution.

Some online businesses such as [HOTREC](#), the European umbrella association of hotels, restaurants and cafés, and the European technology and travel services association ([ETTSA](#)), representing, inter alia, online travel platforms and search sites, are supportive and welcome the Commission's approach, which, in their view, is balanced and avoids being overly prescriptive.

Other stakeholders, although generally supportive, criticise some of the proposed provisions. The European small business alliance, [ESBA](#), suggests creating a light-touch regime that works for companies of all sizes, and warn that exempting SMEs from imposing complaint-handling mechanisms could be counter-productive for SMEs as clients might choose alternatives with a more effective complaint-handling system. Europe's telecommunications network operators and the Global System for Mobile Communications ([ETNO and GSMA](#)) believe that the definition of 'online intermediation services' in article 2 should also include online intermediaries supplying commercial services not against monetary payment but funded based on the processing of consumers' data. They also ask that the observatory to be set up is given the mandate to identify unfair contract terms and commercial practices in the scope of the planned review of this regulation. The European Trade Union Confederation ([ETUC](#)) stresses that not just SMEs and micro-traders suffer from unfair practices; individual workers providing labour or services through platforms are also confronted with unfair or hidden terms and conditions, the absence of any means of redress, and discriminatory algorithms and are unable to negotiate fair pay and conditions. As a consequence, ETUC calls for the regulation's scope to be enlarged to cover other platforms such as Uber and Deliveroo.

Legislative process

European Parliament

The proposal on promoting fairness and transparency for business users of online intermediation services has been referred to the Internal Market and Consumer Protection Committee (IMCO), which appointed Christel Schaldemose (S&D, Denmark) as rapporteur in June 2018.

Council

On 15 May 2018, the Bulgarian Presidency of the Council circulated a [document](#) asking the national delegations if they agreed with: 1) the need to foster predictability and transparency for business users of online platforms, and 2) if they were supportive of a step-by-step approach (i.e. enhanced transparency measures and redress obligations in a first stage and possibly other measures following the EU Observatory's monitoring exercise) as proposed by the Commission.

EP SUPPORTING ANALYSIS

Eisele, K., Promoting fairness and transparency in the online platform environment, Initial appraisal of a European Commission impact assessment, EPRS, forthcoming.

OTHER SOURCES

[Fairness and transparency for business users of online intermediation services](#), European Parliament, Legislative Observatory (OEIL).

Williamson B. and Bunting M., [Reconciling Private Market Governance and Law: A Policy Primer on Digital Platforms](#), 2018.

[Algorithms and collusion Competition policy in the digital age](#), OECD, 2017.

Council note on [Regulations on platforms-to business relations](#), 15 May 2018.

[Resolution of 15 June 2017 on online platforms and the digital single market](#), European Parliament.

ENDNOTES

¹ [Impact assessment](#), pp. 10-21.

² ECME Consortium / Deloitte, [Study on the coverage, functioning and consumer use of comparison tools and third-party verification schemes for such tools EAHC/FWC/2013 85 07](#), 2015, p. 150.

³ [Impact assessment](#), p. 18.

⁴ Ibid, pp. 10 and 20-21.

⁵ Ibid., p. 27.

⁶ Ibid., p. 19 and Annex 8.

⁷ Ibid., Annex 8.

⁸ Bostoen F., [Neutrality, fairness or freedom? Principles for platform regulation](#), Internet policy Review, Vol. 7, Issue 1, 2018.

⁹ Zingales N., [Google Shopping: beware of 'self-favouring' in a world of algorithmic nudging](#), CPI, 2018.

¹⁰ Williamson B. and Bunting M., 2018.

¹¹ OECD, 2017, p. 45.

¹² See for instance European Commission, [Study on emerging issues of data ownership, interoperability, \(re-\)usability and access to data, and liability](#), 2017, and [Enter the Data Economy](#), EPSC Strategic Notes, Issue 21, 2017.

¹³ [Impact assessment](#), p. 15.

¹⁴ Article 13.

¹⁵ [Proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC](#), COM(2018) 184, European Commission, April 2018.

¹⁶ This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.

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