

Position Paper

UEAPME¹ position on a Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency in online intermediated trade. COM (2018) 238 final

Executive Summary

While online platforms play a key role in the expansion of the digital economy and create opportunities for SMEs, there are proven cases of unfair trading practices in the B2B relations that damage business users and honest platforms as well. This is why UEAPME warmly welcomes this Commission proposal as an important step forward in ensuring fairness in the Digital Single Market. The provisions of this proposal are normal business practice and simply formalize what is a fair and transparent contract relation. There is also no risk that this Regulation will have a negative impact on innovation in the sector. With this proposal, the European Commission has proven that it can react quickly with appropriate legislation to prevent further distortions on the market and as UEAPME we hope that this approach will be followed by the European Council and Parliament.

Introduction

Online Platforms, such as booking websites, online marketplaces and search engines, play a key role in the expansion of the digital economy. Over the last years, there has been a rapid growth of online intermediary platforms which has led to new challenges for the existing business models, especially those of SMEs. However, platforms can also offer a lot of opportunities for small retailers to enter a bigger marketplace and use the service provided by the platform to sell their products or services online. At the same time, this has led to an increasing dependency on these platforms in several sectors.

Consequently, nobody will deny the importance of platforms for the European economy, however, these platforms have to operate in a fair and transparent way. Unfortunately, the misbehaviour of some players in the online world is a fact. This is at the detriment of platforms' users first, but also of all the honest and professional online platforms, of all sizes, that apply fair terms and conditions. Indeed, we do not forget that online platforms can also be SMEs themselves.

¹ UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

Over the last years, an increasing number of complaints have been issued about the trading practices of some platforms. Terms and conditions are suddenly changed, platforms favour their own products, and ranking criteria are unclear. In general, terms and conditions cannot be negotiated due to an unbalanced bargaining power between service providers and online platforms. The core problem at hand is the power of such platforms to unilaterally alter its terms and conditions, and therefore possibly some essential terms of the contract, without the prior consent of the service provider.

This is why UEAPME warmly welcomes this proposal as an important step forward in ensuring fairness in the Digital Single Market. With this proposal, the European Commission has proven that it can react quickly with appropriate legislation to prevent further distortions on the market.

The Commission's proposal is a timely reply to these issues and tackles most of the problems with proportionate measures. This legislation is in UEAPME's view the confirmation of normal and fair business practice. It regulates cooperation in a fair and transparent manner.

Of course, the proposal needs fine-tuning. For example, price parity clauses should be prohibited and dispute settlement through mediation should remain voluntary for businesses. But we believe this is a first step in the right direction and we are strongly convinced of the need to adopt this Regulation before the end of this Commission mandate for the sake of the European economy.

Comments on the recitals and articles

Scope

The Proposed Regulation included in the first draft a horizontal exemption for micro-enterprises. This horizontal exemption has been deleted. According to UEAPME there are no reasons at all to introduce a blank exemption for micro-enterprises. Indeed, the proposed rules in the Proposal are **only good and normal business practices**, which do not constitute any problem for micro enterprises or start-ups nor will lead to killing innovation in this sector.

Recital 12 leaves some room for interpretation by limiting the scope of the Regulation to standard contracts. This limitation is not reflected in the text of the Regulation itself and is also in no way further justified in the Explanatory Memorandum or the Impact Assessment. According to UEAPME, in order to protect platform users effectively, this Regulation should apply regardless whether the contracts are individually negotiated or not. Indeed the procedure foreseen in recital 12, namely *“Whether or not terms and conditions were individually negotiated should be determined on the basis of an overall assessment, whereby the fact that certain provisions thereof may have been individually negotiated is, in itself, not decisive”* can only lead to legal uncertainty. In addition it can lead to abuses and manipulations. As clearly stated in the Impact assessment ² *“Typically, smaller business users have no ability to organise themselves and negotiate better terms either individually or collectively with the online platform. They generally need to adhere to the terms and conditions pre-set by the platform”*. It is clear that especially in relations with powerful platforms SMEs cannot negotiate on an equal basis. Extending the scope as proposed by UEAPME cannot be regarded as a problem for platforms since as the Impact assessment suggests, they do normally not negotiate on contracts:

“Online platforms argue that, given the large number of individual business users, it is not feasible to negotiate clauses with each user”.³

² Commission Staff Working Document – Impact Assessment SWD (2018)138 final part ½. P. 25.

³ Commission Staff Working Document – Impact Assessment SWD (2018)138 final part ½. P. 11

Text proposed by the Commission	Amendment
Recital 12	
12. In order to effectively protect business users where needed, this Regulation should apply where the terms and conditions of a contractual relationship, regardless of their name or form, are not individually negotiated by the parties to them. Whether or not terms and conditions were individually negotiated should be determined on the basis of an overall assessment, whereby the fact that certain provisions thereof may have been individually negotiated is, in itself, not decisive.	12. In order to effectively protect business users where needed, this Regulation should apply where the terms and conditions of a contractual relationship, regardless of their name or form, are not individually negotiated by the parties to them. <u>Whether</u> or not terms and conditions were individually negotiated, should be determined on the basis of an overall assessment, whereby the fact that certain provisions thereof may have been individually negotiated is, in itself, not decisive.

ARTICLE 3: TERMS AND CONDITIONS

• General remarks

Although UEAPME applauds every initiative to increase transparency, this alone does not resolve the unfair trading practices resulting from the unequal bargaining power between business users and providers of online intermediate services.

Indeed, the core problem at hand is the power of such providers to unilaterally alter their T&Cs and therefore consequently essential terms of the contract, without the prior consent of the business user. This should be prohibited, except when a provider would be legally obligated to alter its T&C.

Moreover, due to the imbalance in bargaining power, T&Cs often contain unfair clauses as they strongly favour the service provider. Therefore, a list of non-authorized clauses and practices in T&Cs (or any other contractual document) should be included in article 3, such as:

- MFN-clauses (see comment below) or
- the possibility to determine an unreasonably short notice period in case of a contractual breach or
- the possibility to determine unreasonable high indemnities that in no way reflect the damage incurred by the service provider of online intermediations services, etc...

We propose the following amendments to article 3 on Terms and Conditions.

Text proposed by the Commission	Amendment
Article 3.1 (c)	
1. Providers of online intermediation services shall ensure that their terms and conditions: (a) ...; (b) ...; (c) set out the objective grounds for decisions to suspend or terminate, in whole or in part, the provision of their online intermediation services to business users.	1. Providers of online intermediation services shall ensure that their terms and conditions: a) ... b) ... c) set out the objective grounds for decisions <u>to restrict, suspend or terminate or to impose any other kind of sanction,</u> in whole or in part, the provision of their online intermediation services to business users.”

Motivation: 'to restrict' and 'or any other kind of sanction' needs to be added as sanctions may come in other forms than suspension or termination and need to be justified as well.

Text proposed by the Commission	Amendment
Article 3.1 (d) NEW	
	<p>1. Providers of online intermediation services shall ensure that their terms and conditions:</p> <p>a)...</p> <p>b)...</p> <p>c)...</p> <p><u>d) do not oblige business users to give up control fully or partly over their intellectual property rights.</u></p>

Motivation: Brand-bidding⁴ should be prohibited unless there is a formal agreement with the business user. Intellectual property rights and their use for marketing purposes need to remain under the relevant business users' control.

Text proposed by the Commission	Amendment
Article 3.1. (e) NEW	
	<p>1. Providers of online intermediation services shall ensure that their terms and conditions:</p> <p>a)...</p> <p>b)...</p> <p>c)...</p> <p>d)...</p> <p><u>e) do not prevent business users from obtaining data related to consumers in the context of their use of the relevant online intermediation, directly or indirectly linked to the products or services offered by the business user concerned.</u></p>

Motivation: Although the initiative under article 7 (access to data) is a step in the right direction, it does not go far enough. In times that everything is becoming more data-driven, data should be made/kept available for as many actors as possible, simply to maintain an equal level playing field.

Therefore, at least all consumer data in the context of their use of the relevant online intermediation, directly or indirectly linked to the products or services offered by a business user, should be made available to the latter.

Text proposed by the Commission	Amendment
Article 3.1.(f) NEW	
	<p>1. Providers of online intermediation services shall ensure that their terms and conditions:</p> <p>a)...</p> <p>b)...</p>

⁴ Brandbidding is the practice of bidding on brand keywords when buying advertisements space at search engines, such as Google.

	c) ... d) ... e) ... <u>f) do not constrain actual or potential competition by most-favoured nation clauses (MFN), in order to allow business users to determine their own pricing policy.</u>
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Motivation: Although article 8 is already a step in the right direction regarding MFN clauses, it does not go far enough. Several national legislative initiatives have acknowledged the harmful nature of MFN clauses. So, only asking the platforms to explain why they use MFN clauses (=transparency) does not solve the anti-competitive nature of these clauses. Therefore UEAPME requests the prohibition of such clauses in online intermediated trade.

In any case, whether this amendment will be accepted or not, minimum harmonisation has to be ensured (in the realm of the proposed article 8) so that existing and future national legislation will not be altered and Member States can go further and keep their national legislation on price parity clauses.

ARTICLE 4: SUSPENSION AND TERMINATION

Text proposed by the Commission	Amendment
Article 4.1	
<i>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 statement of reasons for that decision.</i>	<i>1. Where a provider of online intermediation services decides to restrict, suspend or terminate, in whole or in part, the provision of its online intermediation services to individual business users, or to impose any other sanctions, it shall provide the business user or business users concerned with a statement of reasons for that decision.</i>

Motivation: same comment as in the proposal to amend article 3.1 (c): to 'restrict' and 'or any other kind of sanction' needs to be added as sanctions may come in other forms than suspension or termination and need to be explained as well.

ARTICLE 7: ACCESS TO DATA

Text proposed by the Commission	Amendment
Article 7.1.	
<p>1. Providers of online intermediation services shall include in their terms and conditions a description of the technical and contractual access, or absence thereof, of business users to any personal data or other data, or both, which business users or consumers provide for the use of the online intermediation services concerned or which are generated through the provision of those services.</p>	<p>1. Providers of online intermediation services shall include in their terms and conditions a description of the technical and contractual access, or (in) absence thereof, of business users to any personal data or other data, or both, which business users or consumers provide for the use of the online intermediation services concerned or which are generated through the provision of those services.</p>

Motivation: At least some of the data should be made available to the business user. See previous comment under article 3 (request to add a new paragraph (e)).

Text proposed by the Commission	Amendment
Article 7. 2. a), b), c)	
<p>2. Through the description referred to in paragraph 1, providers of online intermediation services shall adequately inform business users at least of the following:</p> <p>(a) whether the provider of online intermediation services has access to personal data or other data, or both, which business users or consumers provide for the use of those services or which are generated through the provision of those services, and if so, to which categories of such data and under what conditions;</p> <p>(b) whether a business user has access to personal data or other data, or both, provided by that business user in connection to his or her use of the online intermediation services concerned or generated through the provision of those services to that business user and the consumers of his or her goods or services, and if so, to which categories of such data and under what conditions;</p> <p>(c) whether, in addition to point (b), a business user has access to personal data or other data, or both, including in aggregated form, provided by or generated through the provision of the online intermediation services to all of the business users and consumers thereof, and if so, to which categories of such data and under what conditions.</p>	<p>2. Through the description referred to in paragraph 1, providers of online intermediation services shall adequately inform business users at least of the following:</p> <p>(a) whether under which conditions the provider of online intermediation services has access to personal data or other data, or both, which business users or consumers provide for the use of those services or which are generated through the provision of those services, and if so, to which categories of such data and under what conditions;</p> <p>(b) whether under which conditions a business user has access to personal data or other data, or both, provided by that business user in connection to his or her use of the online intermediation services concerned or generated through the provision of those services to that business user and the consumers of his or her goods or services, and if so, to which categories of such data and under what conditions;</p> <p>(c) whether under which conditions, in addition to point (b), a business user has access to personal data or other data, or both, including in aggregated form, provided by or generated through the provision of the online intermediation services to all of the business users and consumers thereof, and if so, to which categories of such data and under what conditions.</p>

Motivation: replace the word 'whether' by 'under which conditions'. It should not be a question whether business users have access to some data, but under which conditions.

ARTICLE 8: RESTRICTIONS TO OFFER DIFFERENT CONDITIONS THROUGH OTHER MEANS

- **Proposed Amendment:** to delete article 8 if our amendment on article 3 to add a new paragraph f is accepted

Text proposed by the Commission	Amendment
Article 8 (to be deleted)	
<p><i>Restrictions to offer different conditions through other means</i></p> <p><i>1. Where, in the provision of their services, providers of online intermediation services restrict the ability of business users to offer the same goods and services to consumers under different conditions through other means than through those services, they shall include grounds for that restriction in their terms and conditions and make those grounds easily available to the public. Those grounds shall include the main economic, commercial or legal considerations for those restrictions.</i></p> <p><i>2. The obligation set out in paragraph 1 shall not affect any prohibitions or limitations in respect of the imposition of such restrictions that result from the application of other Union rules or from national rules that are in accordance with Union law and to which the providers of the online intermediation services are subject.</i></p>	<p><i>Restrictions to offer different conditions through other means</i></p> <p><i>1. Where, in the provision of their services, providers of online intermediation services restrict the ability of business users to offer the same goods and services to consumers under different conditions through other means than through those services, they shall include grounds for that restriction in their terms and conditions and make those grounds easily available to the public. Those grounds shall include the main economic, commercial or legal considerations for those restrictions.</i></p> <p><i>2. The obligation set out in paragraph 1 shall not affect any prohibitions or limitations in respect of the imposition of such restrictions that result from the application of other Union rules or from national rules that are in accordance with Union law and to which the providers of the online intermediation services are subject.</i></p>

Motivation: Although article 8 is already a step in the right direction regarding MFN clauses, it does not go far enough. Several national legislative initiatives have acknowledged the harmful nature of MFN clauses. Therefore UEAPME requests the prohibition of such clauses in online intermediated trade. See comment under article 3 (amendment to add new paragraph (f)).

In any case, whether this amendment will be accepted or not, minimum harmonisation has to be ensured (in the realm of the proposed article 8) so that existing and future national legislation will not be altered and Member States can go further and keep their national legislation on price parity clauses.

ARTICLE 8 (New): UEAPME SUGGESTS TO ADD A NEW ARTICLE WITH REGARD TO FAIRNESS AND TRANSPARENCY – REVIEWS

Since this Regulation already handles the issue of ‘rankings’ (article 5), UEAPME is of the opinion that ‘review mechanisms’ on online platforms of business users by consumers should also be tackled here.

Providers of online intermediation services should include in their T&Cs a clear description of how customer reviews on a product or service of the business user are being handled, and what the business users’ rights are.

In any case, review systems should foresee the following guarantees:

- Editorial control: Guest reviews should only be published after verification by qualified editorial staff of the authenticity and reliability of the entry;

- Quality assurance: e.g.: providers should ensure the accuracy of the basic content data and the business users' coordinates; up-to-date data: sites should only display current reviews (e.g.: maximum two years after entry);
- Right to reply for the business owner.

UEAPME recognizes the possible administrative burden arising from this provision. Therefore this article should not apply to small enterprises that provide online intermediation services

ARTICLE 9: INTERNAL COMPLAINT-HANDLING SYSTEM

Text proposed by the Commission	Amendment
Article 9.1.	
<p>1. Providers of online intermediation services shall provide for an internal system for handling the complaints of business users.</p> <p>That internal complaint-handling system shall be easily accessible for business users. It shall allow them to lodge complaints directly with the provider concerned regarding any of the following issues:</p> <p>(a) ...</p>	<p>1. Providers of online intermediation services shall provide for an internal system for handling the complaints of business users.</p> <p>That internal complaint-handling system shall be easily accessible and free of charge for business users and it shall allow them to lodge complaints directly with the provider concerned regarding any of the following issues:</p> <p>(a) ...</p>

Motivation: UEAPME requests to explicitly add that no costs will be charged if a complaint is lodged by a business user (e.g. administrative costs for opening a file).

ARTICLE 10: MEDIATION

Text proposed by the Commission	Amendment
Article 10, 1	
<p>1. Providers of online intermediation services shall identify in their terms and conditions one or more mediators with which they are willing to engage to attempt to reach an agreement with business users on the settlement, out of court, of any disputes between the provider and the business user arising in relation to the provision of the online intermediation services concerned, including complaints that could not be resolved by means of the internal complaint-handling system referred to in Article 9.</p>	<p>"1. Providers of online intermediation services are encouraged to shall identify in their terms and conditions one or more mediators with which they are willing to engage to attempt to reach an agreement with business users on the settlement, out of court, of any disputes between the provider and the business user arising in relation to the provision of the online intermediation services concerned, including complaints that could not be resolved by means of the internal complaint-handling system referred to in Article 9</p>

Motivation: Mediation, even though a useful ADR method, must remain voluntary. However, parties can agree at the contract signing stage on mediation and this should be encouraged. Mediation can create burdensome costs, especially to the smallest platform operators, taking into account that there might be several demands for mediation at the same time. Also for this reason mediation should be voluntary for both parties.

Text proposed by the Commission	Amendment
Article 10, 6 (NEW)	
	<p><u>6. Providers of online intermediation services shall annually establish and make easily accessible to the general public and the business owners concerned, the information on the functioning and effectiveness of mediation related to their activities.</u></p> <p><u>This information shall include the total number of mediation cases, the subject-matter of the complaints, the time period needed to process the complaints and the decision taken on the complaints.</u></p>

Motivation: A similar reporting obligation as for internal complaint handling will ensure transparency and more accountability for these procedures.

ARTICLE 12 bis: SUGGESTION TO ADD A NEW ARTICLE WITH REGARD TO REDRESS MECHANISMS – JUDICIAL PROCEEDINGS

It is clear that due to the inherent cross-border nature of providers of online intermediation services and the use of exclusive choice of forum and applicable law clauses, initiating judicial proceedings by the business user remains in fact very difficult. This is also recognized in the explanatory memorandum (p. 5) of this proposal for a Directive.

UEAPME does not consider it to be realistic to completely rely on internal complaint-handling systems and mediation to compensate the current lack of effective redress mechanisms. This Regulation should therefore go against the standard practice of the use of exclusive choice of forum and applicable law clauses and allow business users to bring an issue with a provider of online intermediation services (preferably) to its own national court within the EU or at least to a recognized instance within the EU where European and the law of the member state where the business user is situated are applied.

ARTICLE 13: CODES OF CONDUCT

One has to ensure the highest possible level of transparency when drawing up codes of conducts. It should be recommended to also involve the representative SME organisations as representatives of the business users.

Brussels, July 2018

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