Recommendations for trilogues on the proposed Regulation on Fairness in Platform-to-Business Relations

Transparency combined with appropriate and efficient redress mechanisms can help address specific concerns related to intermediary services and ultimately foster trust in online platforms and the digital economy more broadly. As recognised in the Commission's proposed Regulation on Fairness in Platform-to-Business Relations (hereafter the 'Regulation'), businesses increasingly rely on online services to reach consumers. Platforms offer tremendous opportunities to business users of all sizes and sectors as they enable more easily access markets that previously may have been out of reach. This of course contributes to their global expansion and enhances competition. Creating the right framework for platforms which enable businesses and consumers to interact and transact without adding unreasonable burden that would hinder existing services or prevent the emergence of new services will be key for the future development of digital services to the benefit of European consumers.

The proposed Regulation has the potential to allow a higher degree of legal certainty, preserving the integrity and potential of the internal market and enhancing trust in an innovative European platform economy, which currently features a significant amount of self-regulation. While self-regulation provides a helpful degree of flexibility it can also lead to an ecosystem lacking transparency and, at times, accountability. In trying to solve problems related to dependencies from online intermediaries, the Regulation does not lend itself to a broader extension of scope beyond intermediary services, and should not needlessly prohibit business practices which do not cause harm and, in fact, deliver significant consumer value. Moreover, the Regulation should not favour certain business models over others, nor should it limit or severely hinder platforms' ability to offer users the services they increasingly require or prevent small emerging platforms and start-ups from scaling up and competing.

In light of the on-going trilogue negotiations between the co-legislators, AmCham EU would like to emphasise key points for consideration outlined hereafter.

Scope and level of harmonisation

This Regulation intends to govern interactions between online intermediaries and business users active in a platform for the purposes of business-to-consumer (B2C) transactions, products, and services, not for business-to-business (B2B) offerings and not outside of Europe. Therefore, it should be explicitly clarified that this Regulation does not apply to business-to-business services which do not target consumers.

The position of the European Parliament that the scope of the Regulation should be extended to include ancillary operating systems (OS), fails to recognise the significant differences of such services. Operating systems are technical platforms that do not fulfil a purpose of intermediation between consumers and third parties, and therefore do not fit with the spirit and aims of this Regulation. Such extension, without any thorough impact assessment or evidence of systemic harm, could undermine investment in OS functionalities and the security built in at its heart. Even if such an extension is limited to a prohibition of circumvention scenarios, such an approach would require a complete review of the corresponding obligations and their applicability to OS.

Harmonisation is an important benefit of this Regulation for both business users and intermediation services. The proposal should therefore refrain from fragmenting the internal market in any respect. To achieve this, Article 8 paragraph 2 of the Regulation which suggests that Member States can go further than the Commission's transparency obligation in respect of restrictions to offer different conditions through other means, should be deleted.

No blacklists

Only practices whose unfairness is supported by a detailed analysis and concrete evidence of the market position of the respective service and the impact the practice has on other businesses can determine *a priori* that their unlawfulness must be included in the blacklist. Calls for a more ambitious

AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

American Chamber of Commerce to the European Union
Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium • **T** +32 2 513 68 92
amchameu.eu • European Transparency Register: 5265780509-97

More information:
Maika Fohrenbach
mfo@amchameu.eu

Regulation that qualifies perfectly legitimate or ambiguous business practices that only under certain circumstances harm business users or consumers as always 'unfair commercial practices', are misguided. Furthermore, some of the listed practices that are very vaguely defined, bring about important levels of uncertainty for platforms of all sizes. Such a one-size-fits-to-all approach for an innovative industry will harm rather than benefit the competitiveness of the European digital economy and negatively impact economic growth.

'Fairness' & legal uncertainty

The reference to 'fairness' in Article 1 paragraph 1 creates legal uncertainty as this concept is not defined and does not benefit from a common understanding across the EU. Inclusion of this notion in the final Regulation would lead to litigation-driven interpretation which may differ from one court and/or competent authority to another, leading to further market fragmentation. It will also benefit well-resourced industry players, both platforms and business users, over smaller platforms or business users.

Terms & conditions to protect consumers and fight fraud

The definition of an adequate notification period in the case of contractual amendments is critical as it would allow business users to proceed with any necessary assessment and/or action. Such a provision would also provide greater legal certainty to the entire system. At the same time, policy-makers must not overlook the fact that these contracts also seek to protect consumers against potential harmful practices by business users. In this context, we welcome efforts in the European Parliament to make it easier for intermediaries to update their terms & conditions quickly and in reaction to unforeseen and harmful practices emerging online. However, the ability of intermediaries to combat fraud online could be undermined by requirements around suspension of content. While the intermediary should strive to explain to its business users why content is suspended, it should not provide details that would inform a fraudulent business user about the intermediary's fraud detection strategy.

Advance notification before suspending content

Advance notification can enhance legal certainty. Suspension and termination of contracts preceded by an appropriate notification period and supported by reasons including specific facts and circumstances are fundamental pillars of a regulatory structure based on the principles of transparency and legal certainty. However, it is essential that the system includes adequate safeguard clauses to protect the ultimate users: consumers. The latter must be guaranteed that content that is illicit, including counterfeit, and therefore misleading is removed from the platform immediately.

Even more so, in order to tackle consumer exposure to counterfeit products or products that do not comply with local regulations, it is necessary to provide for adequate measures for reporting to the manufacturer as well as adequate means of implementation. If consumer safety with an immediate potential for public harm is at stake, measures for immediate reaction should be foreseen.

The introduction of a notice period, as put forward in Article 4 and amended by the European Parliament, before an intermediary can suspend content is nonetheless concerning as it could potentially undermine a platform's terms of service. In particular, and as stated above, it is important for platforms to be able to take immediate action against sellers who are under suspicion of providing illicit content, counterfeit, etc.

Terms of services also help define an intermediary's market and purpose and differentiate it with its peers, and must be enforceable immediately. For example, an intermediary that only sells handcraft products should not have to wait 10 or 15 days before taking down a seller offering manufactured products. Such notice period should be altogether removed, in line with the European Commission proposal.

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mfo@amchameu.eu

Strengthen the role of the Observatory on the Online Platform Economy

Instead of rushing into a more ambitious Regulation with the risk of harming the digital economy, it is preferable to further investigate and monitor complaints about market failures and assess whether the proposed Regulation and other rules already provide sufficient remedies. The legislators must provide for a flexible and balanced regulatory system that can combine the needs for legal certainty with the demands of a constantly evolving digital market. To this end, the role of the Observatory on the Online Platform Economy should continue to monitor market practices and inform the European strategy with reference to concrete case-studies, promoting a pragmatic approach that ensures a strong connection between legal theory and practical reality.

Most-Favoured Nation Clauses: transparency and not prohibition

Article 8 of the proposed Regulation requires that where intermediation service restrict the ability of business users to offer the same goods and services to consumers under different conditions, they should provide the grounds for those restrictions. Commonly referred to as Most-Favoured Nation (MFN) clauses, these are essential contractual protections (utilised in the offline as well as online worlds) for intermediation services functioning on the basis of a commission, where payment is contingent on the business user achieving a sale through the platform but otherwise pays no fee for the use of its services. The requirements laid down in the Regulation should remain a transparency obligation and not be amended to prohibit contractual clauses which have already been developed in consultation with European competition authorities. The prohibition of MFN clauses was a policy option explored in the Commission's Impact Assessment (p.42, part 1) which concluded that a prohibition would be in conflict with EU competition law.

Individually negotiated contracts should remain outside of the scope of this proposal

The proposal's recital 12 states that the Regulation applies to contracts where the terms are not individually negotiated by the parties. It goes on to state that when assessing whether a contract is individually negotiated this should be based on an overall assessment of the contract as a whole and the mere fact that some articles are individually negotiated may not be decisive in this assessment. The proposal is designed to benchmark fairness in a situation of a power imbalance between platforms and business users. It is therefore correct to exclude those contracts from the proposal's scope. To provide complete legal clarity this point should be reflected in the main body of the Regulation and not simply in the recital.

As set out in the Commission's original text, the assessment as to whether a contract is individually negotiated should be holistic to ensure a wide spectrum of protection. A careful assessment about the nature of the contract would therefore be critical and should focus on the content of the individually negotiated clauses, rather than on their quantity.

Transparency

Transparency of ranking policies should be refined in order to promote a clear and intelligible ecosystem, create a level-playing field among actors as well as an appropriate approach to sharing information on ranking criteria. Furthermore, significant changes in ranking policies, supported by adequate justifications when these imply delisting, should be communicated in a timely manner. If the reasons for which the product was delisted are not justified, it is essential that the platform acts appropriately in order to reintegrate the product without any undue delay.

Greater transparency on the criteria on which the algorithmic decision-making process for rankings or referencing is based, without hampering industrial secrecy, could benefit consumers. Terms & conditions should also ensure greater transparency about access to data by business users as an asymmetric access to large amounts of personal and transaction data can distort the proper functioning of the single market.

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