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European Economic and Social Committee

TEN/662

Fairness and transparency for users of online intermediation services and search engines

OPINION

European Economic and Social 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
[COM(2018) 238 final – 2018/0112 (COD)]

Rapporteur: **Marco VEZZANI**

Referral	European Parliament, 28/05/2018 Council of the European Union, 22/05/2018
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Section responsible	Transport, Energy, Infrastructure and the Information Society
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Outcome of vote (for/against/abstentions)	190/0/3

1. Conclusions and recommendations

1.1 The European Economic and Social Committee (EESC) welcomes the Commission's proposal for a regulation and considers it to be an important first step towards promoting fairness and transparency for business users of online intermediation services. The EESC believes that this proposal is particularly important because it constitutes the first attempt to regulate B2B relations in the area of e-commerce, and recommends that it be approved swiftly in order to plug a clear legislative gap.

1.2 However, the Committee considers that this regulation alone cannot resolve all the digital single market's problems and that it is unable to close the loop. The cornerstone of the regulation is transparency, but this will not suffice to regulate a highly dynamic and complex market, as is the case with the digital market. The disparities in terms of strength between global players and business users (particularly SMEs) can only be addressed by establishing clearer boundaries and relationships between stakeholders and combating abuse of a dominant position. The Committee also recommends prompt action to tackle the *social dimension of digitalisation* by triggering social dialogue. Tax dumping, the data economy and data ownership deserve the same level of consideration and should be tackled by means of a holistic approach, as the Commission is already doing in other fields.

1.3 The EESC recommends including in the regulation a ban on *price parity clauses*, which continue to hinder competition and harm businesses and consumers and which could turn the major online platforms into oligopolies or monopolies. It is vital that consumers be able to buy goods and services at lower prices, that firms be able to build up their business effectively through their own websites and that new online platforms be able to grow and to operate with existing platforms on a level playing field.

1.4 The EESC considers that any differentiated treatment (such as ranking) giving preference to certain businesses (particularly when in exchange for payment) should be spelled out to business users as part of the contractual terms and conditions and be clearly labelled "sponsored advert", "content paid for" or some similar wording so as to be easily recognisable to consumers when they search for products or services online. It is equally important that business users and consumers be informed about the main parameters for building the criteria which determine the ranking of business users.

1.5 The Committee is in favour of introducing mechanisms for settling disputes out of court, and recommends that harmonised criteria be identified guaranteeing the independence of mediators. The EESC believes that chambers of commerce, which already perform these activities effectively at national level, could be a valid option. It is equally important that the mechanisms for bringing injunctions to prevent or stop harm to business users should be straightforward, clear and inexpensive.

1.6 The EESC considers that the EU Observatory on the Online Platform Economy will have a key role to play in implementing both this regulation and all other relevant legislative initiatives. This means that the observatory will be highly politically, as well as technically, important. Drawing on the many opinions it has issued on this matter, the EESC is ready and willing to support the work of the group of experts by sending a delegate to act as observer, to help convey the views of organised civil society.

2. Introduction

2.1 Online platforms and search engines are a fundamental part of the *digital ecosystem* and have a strong impact on the way it is organised and operates. In recent years, they have taken on a pivotal role in internet development by offering new social and economic models through which they guide the choices and action of individuals and businesses.

2.2 E-commerce is growing exponentially in Europe. The turnover of retail sales in 2017 was estimated at EUR 602 billion (14% up over 2016), completely in line with the upwards trend of the previous year, with sales equalling EUR 530 billion (15% up over 2015)[1].

2.3 According to Eurostat[2], in 2016 20% of EU28 businesses were active in e-commerce. This figure hides major disparities depending on the size of the business – to be more accurate, 44% of large businesses, 29% of medium-sized businesses and only 18% of small businesses sell online.

2.4 85% of businesses active in e-commerce use their own website, but the use of online platforms is continuing to rise: 39% of businesses (business users) make use of them[3]. This is due to two factors: SMEs are becoming increasingly interested in e-commerce and see online platforms as a strategic tool for penetrating the digital market, and social networks are becoming exponentially more influential when it comes to organising users' real and virtual lives.

2.5 Although over one million European SMEs use online intermediation services, there are relatively few platforms providing these services. This means firstly, that SMEs are completely dependent on online platforms and search engines and secondly, that the platforms and engines have the power to take unilateral action which is prejudicial to the legitimate interests of businesses and consumers.

2.6 According to another Commission study, almost 50% of European businesses operating on online platforms encounter problems. Moreover, in 38% of cases, problems arising from contractual relations are not resolved, while in 26% they are resolved but with difficulty[4].

1 European E-commerce Report 2017.

2 Eurostat, Digital economy and society statistics – enterprises, 2018.

3 Eurostat, Web sales of EU enterprises, 2018.

4 europa.eu/rapid/press-release_IP-18-3372_en.pdf.

2.7 Consumers in particular are indirectly affected by the curbing of full and fair competition. This is felt in a range of situations: from a lack of transparency regarding the ranking of goods and services to lack of choice due to business mistrust in the digital market.

2.8 The forms of redress open to businesses are limited, difficult to access and often ineffective. It is no coincidence that the bulk of businesses (93%) restrict their online sales to their home market – this is largely because legislative fragmentation makes settling cross-border disputes a lengthy and difficult process[5].

2.9 To date, European legislation has focused on defining the relationship between businesses and consumers in online trade (B2C), whereas the relationship between businesses and online platforms (B2B) has never been dealt with decisively.

2.10 This is why the Commission has incorporated into the proposal to review the Digital Single Market Strategy[6] an initiative which aims to build up this area of European legislation in order to guarantee fairness and transparency, and prevent abuse due to the legislative gap or the fragmentation resulting from the various different national legislative systems.

3. Summary of the proposal

3.1 The proposal aims to regulate the intermediation services offered to businesses by online platforms and search engines. This includes online software application services (app stores) and the online services provided by collaborative platforms (social networks).

3.2 The regulation applies to all online intermediation service providers (established inside or outside the EU), provided that the business users or corporate website users are established in the EU and at least part of the transaction involves these users' offering their products or services to European consumers. The consumers must be located in the EU but it is not a prerequisite that this be their place of residence or that they hold European citizenship.

3.3 In order to guarantee fairness and transparency, the platforms must inform businesses simply and clearly about the terms and conditions of the contract. Businesses must be informed of any amendments at least 15 days in advance and, in particular, briefed on the methods for publishing content and the criteria used for terminating or suspending the service.

3.4 The proposal also stipulates that businesses must be informed about the parameters used to define the **ranking** of content or websites, even when they are paid for. Any **differentiated treatment** on the part of the service provider or business users controlled by the provider giving preference to products or services offered to consumers must be spelled out in the terms and conditions of the contract.

5 Eurostat, E-commerce statistics, 2017.

6 COM(2017) 228 final.

3.5 In order to safeguard the rights of small businesses more effectively, the Commission states that online service providers must establish an **internal complaint-handling system**. Complaints must be handled rapidly and communicated clearly to users. The providers will also be required to publish regular reports on how many complaints are received, what they concern, how long it takes to handle them and what decisions are reached.

3.6 There is also provision for an **out-of-court dispute settlement system**. A business will thus be able to appeal to a **mediator** nominated in advance by the service provider as part of the contractual terms and conditions.

3.7 The mediators must be impartial and independent. Providers are encouraged to promote the establishment of associations of mediators, particularly with a view to settling cross-border disputes.

3.8 The **compliance costs** will largely fall to service providers, whereas SMEs will be exempt[7]. The measures described above will not prevent anyone taking legal action; they are designed to tackle and settle disputes effectively and within a set timeframe.

3.9 The new legislative arrangements will be monitored and, accordingly, an **EU Observatory on the Online Platform Economy**[8] will be set up. It will support the Commission by analysing digital market developments and assessing the regulation's implementation and impact. The findings will be used in the three-yearly review of the proposal for a regulation.

3.10 The proposal establishes a right for an injunction to be brought by representative organisations, associations or public bodies to stop or prohibit any non-compliance by providers of online intermediation services with the requirements contained in the regulation.

3.11 The Commission calls on online service providers and the organisations representing them to draw up **codes of conduct** to contribute to the proper application of this regulation, taking specific account of the needs of SMEs.

4. General comments

4.1 The EESC was one of the first to support the digital revolution and the related economic and social processes. Specifically, being aware of the risks and opportunities of digitalisation, the Committee has always urged the Commission to identify a safe, clear, transparent and fair framework for the digital single market.

7 Recommendation 2003/361/EC.

8 The observatory will be set up under Commission Decision C(2018) 2393. It will comprise between 10 and 15 independent experts selected by means of a competition. They will remain in office for two years and will not be remunerated for their work.

4.2 In line with its previous opinions[9], the EESC welcomes the Commission proposal promoting fairness and transparency of online intermediation services. The Committee particularly praises the proposal's flexible approach as it must establish a clear reference framework for a sector which is changing constantly, while also guaranteeing a level playing field.

4.3 The Committee believes that this initiative is essential for protecting SMEs, the primary users of these services[10], and for establishing a legislative framework guaranteeing fair, genuine competition. It is also crucial that SMEs be able to capitalise on the growth opportunities available to them in the digital single market through their own websites and online platforms.

4.4 It is important here to bear in mind that entering the digital market is an extremely complex challenge for SMEs. They need to invest adequately in changing their production and distribution systems and acquiring new expertise and specialised skills; if they do not manage to do so, they will automatically be thrown out of the market and their reputations will be harmed. Further mechanisms (including financial ones) are thus needed to support this transition.

4.5 The EESC considers that "*price parity clauses*" (also known as "*most favoured customer clauses*") are a serious obstacle to the development of fair and open competition in the digital single market. These clauses force business users to quote their lowest price – compared to other online platforms or to their own website – on a given online platform. This leads to significant market distortion since it reinforces the position of the scant handful of online platforms currently in operation (thus preventing the development of new platforms), reduces the opportunities available to consumers to access lower prices and binds business users to the platform, keeping them from developing their own distribution network with consumers. This practice has already been prohibited in many EU countries[11] on the initiative of these countries' competition authorities, a measure which has had a positive impact on the way in which the market operates and so been beneficial to both businesses and consumers. The EESC therefore hopes that these clauses will shortly be prohibited throughout the EU, possibly in connection with the regulation under discussion.

4.6 The EESC would point out that to date, the bulk of the online intermediation services market is controlled by a handful of major players, many of which are based outside the EU. It is therefore important, during the implementation of this regulation, to monitor and guarantee both fair competition between online platforms and opportunities for new (particularly European) platforms to enter the market.

4.7 The EESC is pleased to note that many of the requests and recommendations made in its previous opinions have been incorporated into the regulation. Specifically, the Committee sees strong analogies and continuity as regards the transparency and clarity of contractual terms and

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9 OJ C 75, 10.3.2017, p. 119.
OJ C 81, 2.3.2018, p. 102.
OJ C 12, 15.1.2015, p. 1.
OJ C 271, 19.9.2013, p. 61.

10 OJ C 389, 21.10.2016, p. 50.

11 Germany, France, Italy, Sweden, Belgium and Austria.

conditions, the comprehensive explanation of parameters for ranking and any unequal treatment, the setting of stable mechanisms for making complaints and settling disputes out of court, instilling a responsible attitude in online platforms (codes of conduct) and the monitoring of processes[12]. Specifically, the Committee would point out that any **differentiated treatment** giving preference to products or services offered (often in exchange for payment) must be communicated clearly and in an understandable manner to consumers.

4.8 The Committee considers that the proposal is fully in line with the broader legislative framework of the digital single market which, however, is still far from complete. Performance levels in the EU are below those of its main global competitors in terms of numbers of online users, businesses and transactions. The EESC therefore calls on the Commission and the Member States to step up efforts to regulate the entire e-commerce sector and, more broadly, *e-democracy* so as to make the internet and the digital market a safe place which provides opportunities for everyone.

4.9 The *data economy* is a key part of the digital market. The EESC believes that *data ownership* in particular cannot be left solely to an agreement settled by means of a contract between two stakeholders. Moreover, the information disclosure provided for by this proposal fails to resolve one crucial issue, regarding the potential use of such data once a private stakeholder comes into possession of them. The EESC therefore recommends that the Commission address this issue as a matter of urgency and take steps to regulate it, in the chief interest of users and of the very concept of the *data economy*[13].

4.10 The EESC feels that the digital single market should guarantee a level playing field for all economic players involved, whether they are European or not. The Committee therefore recommends that the Commission combat all unfair trade practices (such as digital tax dumping) by establishing that tax on profits must be paid where the corresponding economic activity takes place[14] and must be consistent with the actual turnover[15]. For instance, it would point out that the "Airbnb" platform paid only EUR 69 000 in taxes in France in 2015, compared to around EUR 5 billion for the entire hotel sector[16].

12 OJ C 75, 10.3.2017, p. 119, OJ C 81, 2.3.2018, p. 102.

13 OJ C 345, 13.10.2017, p. 130; OJ C 345, 13.10.2017, p. 138.

14 OJ C 75, 10.3.2017, p. 119.

15 ECO/459, *Taxation of profits of multinationals in the digital economy*, Mr Andersson and Mr Dandea, 2018.

16 http://www.lastampa.it/2016/08/11/esteri/airbnb-in-francia-riscoppia-il-caso-tasse-KfgawDjefZxFdSNydZs8XP/pagina.html.

4.11 The Committee considers that it is essential that the legislative framework of the entire *e-commerce* sector be completed as soon as possible, with a view to establishing appropriate guarantees and safeguards for all stakeholders active in the digital single market[17]. Specifically, the EESC feels that it is crucial to tackle the most controversial aspects of the social dimension of digitalisation, including wages, contracts, working conditions and hours of people employed either through digital platforms[18] or to provide services connected to these platforms[19]. The Committee therefore recommends that European social dialogue be triggered rapidly[20]. Furthermore, given the growing body of legislation regulating this sector, the Committee recommends drawing up a Code of EU Online Rights for Europeans[21].

5. Specific comments

5.1 The EESC is in favour of a comprehensive definition of the concept of *online intermediation service providers*. The internet and e-commerce are developing rapidly and unpredictably, and so the EESC considers that the means and timeframes for managing such services must be regulated rather than the digital operators which provide them; due to rapid and unpredictable internet development, the nature or roles of these operators could soon change[22].

5.2 The Committee considers that this proposal tackles a significant gap in legislation and that it is pivotal for addressing the fragmentation resulting from the national legislative systems, currently one of the main issues that creates problems in cross-border disputes. The Committee also considers that the proposal fits neatly into the existing legislative framework comprised of digital single market rules and the handful of rules which currently regulate (directly or otherwise) B2B relationships. The broad legal framework built on the founding values of the EU is able to guarantee ample freedom of manoeuvre for the institutions responsible for enforcing the rules, ensuring that they are able to take effective action.

5.3 The EESC endorses the requirement for online service providers to disclose the main parameters used to rank content and websites. Nonetheless, the Committee would point out that this initiative must be managed carefully as it could promote fraud by business users, something that would be prejudicial to other businesses or consumers, resulting in market distortion.

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17 INT/845, *Artificial intelligence/impact on jobs,* Ms Salis Madinier and Mr Samm, 2018.

18 OJ C 125, 21.4.2017, p. 10.

19 OJ C 75, 10.3.2017, p. 119.

20 OJ C 434, 15.12.2017, p. 30.

21 OJ C 271, 19.9.2013, p. 127.

22 OJ C 75, 10.3.2017, p. 119.

5.4 Mediators will play a key role in settling out-of-court disputes. The EESC feels that the defining characteristics of mediators and the arrangements for recruiting them are not completely clear, and would point to the differences between Member States and recommend that harmonised criteria be identified to guarantee their independence. The Committee proposes that consideration could be given to establishing a European professional register in order to boost the confidence of business users. In this context, the Committee would propose tapping the expertise of chambers of commerce and the work they have already successfully achieved at national level.

5.5 The EESC welcomes the introduction of injunctions to safeguard business users; this instrument is very important for overcoming the "fear factor" which often holds back small businesses with regard to major multinationals in the sector. The Committee considers in particular that the mechanisms established to bring an injunction must be clear, straightforward and inexpensive.

5.6 The observatory will be extremely important for monitoring developments in the digital market and the proper and full implementation of the regulation itself. Specifically, the EESC considers that the experts should be selected with great care, guaranteeing their independence and impartiality. The EESC is ready and willing to support the work of the group of experts by sending a delegate to act as observer, who will help convey the views of organised civil society[23].

5.7 Although a regulation, flanked by a harmonised system of penalties, is considered to be the most suitable instrument, the EESC endorses the call for online service providers to draw up codes of conduct guaranteeing that the legislation will be implemented fully and properly.

5.8 The Committee would point out that currently, and primarily in the United States, large platforms employ business practices designed to force other players out of the market, such as free shipping, which undermines parcel delivery companies. In the medium term, this could produce oligopolies which would harm both businesses and consumers. The EESC therefore urges the Commission to keep careful watch on such practices.

5.9 The EESC believes that this proposal will have significant indirect effects on both consumers (by offering them a wider range of products and increasing competition between businesses) and on employment (jobs will be created as more businesses are active in the digital market). It is therefore important that small digital platforms (such as cooperative platforms) also find a niche in the online market.

23 Commission Decision C(2018) 2393, Article 10.

5.10 The EESC reiterates its call to the Commission and the Member States to support digital innovation by means of appropriate digital literacy strategies flanked by targeted education and training pathways, with a particular focus on young and vulnerable people[24]. Moreover, with a view to boosting awareness among business users, the Committee believes that it is crucial to involve industry associations in order to draw attention to and support specific training courses, with particular emphasis on SMEs, so it becomes possible to capitalise fully on the opportunities provided by the digital single market.

Brussels, 19 September 2018

Luca Jahier
The President of the European Economic and Social Committee

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24 OJ C 173, 31.5.2017, p. 45; OJ C 173, 31.5.2017, p. 1.