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| From:    | MT delegation                                                            |
| To:      | Working Party on Competitiveness and Growth (Internal Market)            |
| Subject: | Malta's written comments on the Platform-to-Business Regulation proposal |

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## **MT Position**

Malta thanks the Austrian Presidency for the revised compromise text  
*The following is Malta position:*

**Recital 15** –Malta prefers option 1.

*Justification - The proviso that if there are “terms and conditions or specific conditions thereof which are not plain and intelligible then these should be interpreted to the detriment of the provider of the online intermediation service” will serve as a detriment and go some way to ensuring clarity. Malta also agrees that if there are terms and conditions, which are not publicly available, or do not set out the grounds for suspension or termination these should not be binding on the business user unless their non-binding nature would be of detriment to the business user.*

**Recital 16** - Malta would prefer that if a timeframe needs to be included for the provision of the reasons for decisions mentioned in this Recital, then this should at least be set at **20** days before the entry into force of that decision, rather than the 10 days proposed

*Justification-An extension of the timeframe from 10 days to 20 days is being proposed. The decision to suspend or terminate the provision of services, in whole or in part, to a business user, can have a serious effect on businesses and one must keep in mind that this can happen during peak seasons for businesses (for example the hotel sector). Businesses may find it difficult to take appropriate action in time. Therefore, Malta is suggesting a time period, which is more extensive for businesses.*

## **Article 3: Transparency requirements for Terms and Conditions**

Malta proposes the following new sub article (d) to Article 3(1) on Transparency requirements for terms and conditions

1. Providers of online intermediation services shall ensure that their terms and conditions:

**d) inform business users on their additional distribution channels and potential affiliate programmes that they are going to serve with the offers of business users. Business users shall be granted the right to ask for their removal from such additional distribution channels.**

*Justification: Business users shall have a right to know, where their services are being marketed. Providers of online intermediation services are often working with several affiliates, however business users have no influence on which market places (and in which style and way) their products are made available and on how payments are guaranteed. Business users shall have the right not to have their products / services traded on sites causing harm to their business.*

## **Article 3(3):**

Malta agrees with the wording provided under Option 1. This reflects the Malta position for Recital 15 above.

## **Article 3 (new sub article 5)**

Malta proposes the inclusion of a new sub article 5 under Article 3

**5. Providers of online intermediation services must be transparent as to which other platforms and websites appertain to the said intermediary, are affiliated, and/or use the intermediary’s rankings.**

*Justification: There may be occasions when a business user deletes or updates their information with the online intermediary service provider, but then the affiliate websites, etc would not be updated accordingly. These results in either the business users not knowing that there is incorrect information on other platforms regarding their business and/or the business users have to go through an unnecessary lengthy and burdensome procedure to ensure that their data is updated on such other platforms.*

*It is, therefore essential that there is full disclosure as to which other service providers share such information with the online intermediary and that there is the burden on the online intermediary to ensure that such other affiliates update relative data accordingly.*

#### Article 3 (new sub article 6)

MT proposes the inclusion of a new sub article 6 under Article 3

**6. Where the provision of an online intermediation service or online search engine is based on a subscription for a pre-determined duration and that subscription is subject to automatic renewal upon expiration, the provider of the online intermediation service or the online search engine shall notify the business user or corporate website user on a durable medium not later than one month before expiration of the subscription. That notification shall clearly indicate that automatic renewal of the subscription is imminent and shall provide the option to not automatically renew the subscription.**

*Justification: The use of online intermediation services or online search engines are often based upon paid subscriptions that are automatically renewed after their expiration. The problem with this is that most of the time, such platforms do not alert the business user/corporate website user that the subscription is about to expire and be automatically renewed. As such, small businesses who do not have the capacity to keep track of such subscriptions are forced to pay the amount of a new subscription and abide by a contract that they had no intention of renewing.*

*Malta believes that the proposed amendment falls within the scope of transparency to business users and corporate website users.*

#### **Article 4:**

Malta proposes the following textual amendment for Article 4(1)

1. Where a provider of online intermediation services decides to sanction perceived misconduct, or suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, it shall, in a retrievable manner, provide the business user concerned, at least ~~10~~**20** days before that decision enters into effect ~~without undue delay~~, with a statement of reasons for that decision on a durable medium ~~in a verifiable manner~~. Such decision shall be proportionate.

*Justification: An extension of the timeframe from 10 days to 20 days is being proposed. The decision to suspend or terminate the provision of services, in whole or in part, to a business user, can have a serious effect on businesses and one must keep in mind that this can happen during peak seasons for businesses (for example the hotel sector). Businesses may find it difficult to take appropriate action in time. Therefore, MT is suggesting a time period which is more extensive for businesses.*

Malta proposes the following textual amendment to Article 4(3)

3. The period referred to in paragraph 1 shall not apply where a provider of online intermediation services

- a) is required to suspend or terminate, in whole or in part, the provision of its services with immediate effect under a regulatory obligation pursuant to national or Union law or, where applicable, in order to benefit from the liability exemption as laid down in Article 14(1)(b) of Directive 2000/31/EC;
- b) decides to suspend or terminate, in whole or in part, the provision of its services with immediate effect on the basis of a general legal principle or a statutory provision of a Member State, which is in accordance with Union law.

The provider of online intermediation services shall nonetheless provide the business user concerned with a statement of reasons within 10 days~~without undue delay~~ that shall contain a reference to the specific facts or circumstances that led to the decision or necessitated the course of action taken on a durable medium.

*Justification -The phrase 'without undue delay' is too open ended and including a timeframe of 10 days is seen as reasonable enough.*

Malta proposes the re-inclusion of the deleted text in Article 5(4) rather than the new text:

**5(4) Providers of online intermediation services and providers of online search engines shall, when complying with the requirements of this article not be required to disclose any trade secrets as defined in article 2(1) of Directive (EU) 2016/943.**~~The obligation to disclose the main parameters as laid down in this article shall not adversely affect the rights of online intermediation services and online search engines.~~

*Justification: The deleted text is clearer and therefore preferred. The term 'adversely affect' is seen as lacking clarity.*

#### **Article 8: Restrictions to offer different conditions through other means:**

On Article 8, there are still some concerns on how this Article will be implemented in practice and queries as to whether it is enough for the Online Platform to include the grounds for restrictions in the Terms & Conditions. Who is expected to conduct checks on this matter?

Furthermore, will there be a condition on the platform to prevent it from abusing of its position i.e. can a platform refuse a Business User from selling goods/services through that Platform because it is found to be offering better solutions through other means? How are businesses safeguarded?

It is a fact that healthier competition is expected to provide more and better choices to consumers. While the ideal situation would be that providers of online intermediation services do not restrict the ability of business users to offer different conditions to consumers for obtaining the goods and services at issue through other means than those services, this may not be possible. We understand that the European Competition Network is keeping this sector under review and that the Impact Assessment carried out has indicated that a ban on an MFN clause would be disproportionate and against EU Competition rules.

In view of this, with regard to Article 8 Malta suggests that the wording would call for more transparency and reflect that the use of MFN clauses is limited given their harmful consumer and industry impact. If the proposed Regulation does not prohibit the use of MFNs, it should at least ensure it does not effectively lead to the validation of these harmful clauses.

Malta also supports the LU comments on Article 8(2) and requests the deletion of this paragraph. It is not the aim of this Proposal to regulate potential unfair practices and so the content of paragraph 2 appears to go beyond the scope and can be considered unnecessary.

On this Article, we understand that the Presidency had to seek the Council Legal Services advice.

**Article 10 – Mediation:**

Malta has the following clarification request:

If an online intermediation service decides to suspend or terminate the provision of its online intermediation services to a given business user, does the fact that a complaint is lodged or if there is mediation or a court case lodged against the online intermediation service halt the decision to suspend or terminate the services provided to the business user by the online intermediation service or does this action take place regardless of the complaint?

**Article 12 a – Sanctions:**

Malta agrees that the Regulation should provide for some form of enforcement mechanism. Malta's preferred option is Option 1, as it provides more clarity for all parties.