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From:	FR Delegation
To:	Working Party on Competitiveness and Growth (Internal Market)
Subject:	France's written comments on the Platform-to-Business Regulation proposal (EN translation)

Paris, 18 October 2018

NOTE FROM THE FRENCH AUTHORITIES

Subject: **Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services. Comments by the French authorities.**

At the meeting of the Working Party on Competitiveness and Growth (Internal Market) on 11 and 12 October, the Presidency asked Member States to submit written comments. The French authorities would like to make the following observations:

- **Recital 9**

We are not in favour of the following addition to recital 9:

"Also, technology online intermediation services that connect hardware and applications are not covered by this Regulation, as these are not directly connected with the provision of goods or services."

The scope of the Regulation is already restricted insofar as it applies only to online intermediation services and search engines. Moreover, it seems inappropriate to explicitly exclude the other intermediation technologies for two reasons. On the one hand, the concept of '*technology online intermediation services that connect hardware and applications*' is unclear and could in particular cover the whole field of smart speakers, whereas we would like such devices to be explicitly included within the scope of the Regulation. On the other hand, such a specification seems superfluous since the Regulation effectively excludes such types of services.

We would also like recital 9 to be clarified as follows so as to ensure that application stores are unequivocally included within the scope of the Regulation: "*online software applications services **such as application stores***". It is essential that such stores be among the main targets of this Regulation given the increasing importance of the application format for the communication and functioning of businesses in their interactions with consumers or other professional partners. However, application stores have hitherto been mentioned only in the explanatory memorandum, which has no legal force.

Finally, in order to future-proof the Regulation, we would like to make it clear that services which operate partially offline may nevertheless be regarded as 'online intermediation services'. An increasing number of applications operate partially offline, in particular in order to save battery power or limit the user's data consumption. Given the rapid increase in terminal storage capacity and computing power, it is essential that the term 'online' be interpreted with a certain degree of flexibility so as to prevent the Regulation from being easily circumvented. The following wording could be proposed in that connection:

*"Examples of online intermediation services covered by this Regulation should consequently include online e-commerce market places, including collaborative ones on which business users are active, online software applications services and online social media services. **Services that partially operate offline, for example for the purpose of data consumption saving, should also be understood as online intermediation services; as the local storage and the computing power of devices increase rapidly, such a flexibility in assessing the online character of a service is crucial to limit the risk of bypassing the present proposition of regulation. However, this Regulation should not apply to [...]."***

- **Article 1.3**

- Relationship with Member States' law on restrictive practices

We are not in favour of the wording proposed for Article 1(3) and recital 6: *"provided that compliance with articles 5, 6, 7, 9 et 10 of this regulation is ensured"*.

We have already stated that Member States' national law must continue to be preserved in full, and that, in particular, since France's legislation is based on a generic concept ('the notion of significant imbalance'), making the scope of that legislation subordinate to the very specific provisions of the Regulation is not an option. It must be borne in mind that this Regulation adopts a phased, step-by-step and minimalist approach; maximum harmonisation is not practicable. Moreover, the term 'compliance' does not seem suited to the general issue of the compatibility of Member States' law with Union law.

Together with Germany, we have drawn up a proposal for an amendment which also addresses the issue of the compatibility of national law with Union law (including this Regulation):

Art.1. Paragraph 3: "This regulation shall be without prejudice to national rules which, in conformity with Union law, prohibit or sanction unilateral conduct or unfair commercial practices."

In view of the apparent difficulties in understanding this subject, we would like to ensure clarity by adding the following text to Article 1(3), in the same manner as already provided for in Article 8 (parity clauses):

"The obligations set out in this regulation shall not affect any prohibitions or limitations in respect of the imposition of such restrictions that result from the application of national rules that are in accordance with Union law and to which the providers of the online intermediation services or of the search engines services are subject."

"Member States are entitled to adopt and apply stricter rules than those provided in this Regulation".

- Relationship with Member States' law concerning contract law and civil law

Together with Germany, we wish to propose the following wording:

1.3 "This regulation shall be without prejudice to national rules which, in conformity with Union Law, prohibit or sanction unilateral conduct or unfair commercial practices. This Regulation shall not affect national civil law, in particular contract law, such as the rules on the validity, formation, effects or termination of a contract [or the right to damages], in so far as general contract law aspects are not regulated in this Regulation."

- **Article 2**

We welcome and agree to the changes introduced in the new version, i.e. the concepts of '*primary purpose*' and '*durable medium*'. We are in favour of correcting other wording, for example changing '*business user*' to '*the customer*'.

We are also in favour of amending Article 2(5). The Regulation provides a specific definition of websites in a broad sense, since they do not necessarily have a contractual relationship with search engines (contrary to other '*business users*', which always have a contractual relationship with intermediation services). In addition, we would support harmonisation so that the concept of a search engine could also cover applications and other software. Article 2(5) could therefore be reworded as follows:

*'online search engine' means a digital service that allows users to perform searches of, in principle, all websites, websites in a particular language **or software** on the basis of a query on any subject in the form of a keyword, phrase or other input, and returns results in any format in which information related to the requested content **or service** can be found'.*

Finally, in connection with our comments on recital 9, in order to specify that services operating partially offline may be considered online intermediation services, we propose the following amendment:

*'(2) 'online intermediation services' means services, **even partially off-line**, which meet all of the following requirements:'*

Certain platforms make it possible to access services and data without being connected (generally using a version with more limited functionalities).

- **Article 3**

We agree with the concept of '*durable medium*' introduced in Article 3.

With regard to Article 3(2), we would like to extend the notice period of 15 days in cases where modifications to the terms and conditions would entail substantial technical adjustments on the part of the business user. We consider that a notice period of three months would be reasonable in such cases, and therefore propose the following amendment to the second subparagraph of Article 3(2):

'The proposed modifications shall not be implemented before the expiry of a notice period which is reasonable and proportionate to the nature and extent of the envisaged modifications and to their consequences for the business user concerned. That notice period shall be at least 15 days from the date on which the provider of online intermediation services notifies the business users concerned about the proposed modifications.'

In cases where the proposed modifications require the business user to make substantial technical adjustments to its offering, this period should be at least 3 months.'

We would like to ask the Presidency how the number of days is calculated (i.e. whether Saturdays are considered working days).

With regard to Article 3(3) and the corresponding recital 15, we thank the Presidency for its proposals, which serve to fine-tune the assessments and the consequences in terms of sanctions as regards the issue of the transparency and readability of the general conditions of sale.

We prefer option 1 insofar as it has the benefit of including the sanctions in the body of the Regulation and, in our opinion, does not detract in any way from the discretionary power of the authorities referred to in the new Article 12a.

- **Article 4**

We agree with the Presidency version, which dispenses with the notice period for platforms which suspend or terminate the provision of their service to a business user in cases where they must do so in order to comply with the law (typically, terminating the service provided to a business that would engage in the sale of prohibited products).

We wonder about the meaning of Article 4(3)(b) and the concept of '*general legal principle*': does this concept refer, for example, to the concept of force majeure? Furthermore, we are in favour of the addition to this article of cases where the platform suspends or removes content because of the application of a memorandum of understanding, thus including cases where the platforms have adopted voluntary measures with the aim of combating illicit content.

With regard to the arrangements for terminating the business relationship between the platform and its users, the Regulation should provide for a notice period appropriate to the business relationship.

We also agree with the final paragraph added by the Presidency, insofar as it establishes information to be provided to, and a conflicting element in favour of, the business affected by the platform's termination. In this respect, with regard to recital 16a we would prefer the statement of reasons provided to business users to focus only on the professionals' voluntary agreements, and the other legal reasons which led the platform to suspend or terminate the account. In the case of voluntary measures, it would seem important not to discourage good practices of this kind by requiring an overly detailed statement of reasons.

- **Article 5**

We consider it important that European businesses should enjoy an effective 'P2B' market framework based on the principles of transparency and non-discrimination. With that in mind, we would like to introduce the following new subparagraph to Article 5(1):

'Individual ranking parameters shall be determined and applied in a non-discriminatory manner to business users' goods or services.

It is important that search engine services provide up-to-date information and, consequently, be required to communicate major changes which could affect the parameters determining ranking. Any change to the parameters determining ranking could have a substantial impact on the companies listed. Moreover, it is advisable for there to be an obligation to provide notification before applying such technical changes to rankings. We therefore propose the following amendment:

'Providers of online search engines shall set out for corporate website users a reasonable information prior to any major change of the main parameters referred to in article 5.2.'

We welcome and agree with the Austrian Presidency's proposal for Article 5(4), which is a step in the right direction.

With regard to recital 17a, we would like to know what examples the term 'the use of editors' in the final sentence refers to.

- **Article 6**

We would like the wording of Article 6 and recital 19 to be refined, because it is ambiguous: by setting out scenarios in which platforms act, de facto, in a differentiated way, the Regulation seems to indicate that all these practices could be legitimate. We would therefore like to see a paragraph included similar to that in Article 8(2).

"The obligations set out in paragraph 1 and 2 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."

- **Article 7**

We would point out that online intermediation services collect data on the offers proposed by businesses which use their service and, in particular, on their outcome (for instance, anonymous data on the number of views) while business users do not always have such data readily available. This asymmetry of information, to the detriment of business users, accentuates the imbalance in negotiations between intermediation services and business users.

Consequently, to provide for the existence of a list of anonymous or anonymised data which a platform should be required to transmit to business users, we are in favour of amending Article 7 (**Access to data**):

"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 [...], which business users or consumers provide in compliance with Regulation (EU) 2016/679 of the European Parliament and of the Council, for the use of the online intermediation services concerned or which are generated through the provision of those services."

1a. Providers of online intermediation services shall include in their terms and conditions a description of the technical and contractual access, of business users to any other data which business users or consumers provide, in compliance with [Proposal for a Regulation 2017/0288(COD) of the European Parliament and of the Council on a framework for the free flow of non-personal data in the EU] for the use of the online intermediation services concerned or which are generated through the provision of those services".

and recital 20:

"The ability to access and use data, including personal data or data on the use on consumption habits of the views of content, can enable important value creation in the online platform economy. Accordingly, it is important that providers of online intermediation services provide business users with a clear description of the scope, nature and conditions of their access to and use of certain categories of data. The description should be proportionate and might refer to general access conditions, rather than an exhaustive identification of actual data, or categories of data, in order to enable business users to understand whether they can use the data to enhance value creation, including by possibly retaining third-party data services. In addition, the description should include for example the number or views on a regular basis or consumption habits. These information requirements do not touch the providers' right to voluntarily supply any additional descriptions to business users. Processing of personal data should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council".

- **Article 8**

We would point out that the wording of the article could be improved, in order to avoid the article being interpreted as indicating that these practices, *in themselves, can be taken to be compliant with national law*. We propose replacing 'in accordance with national law' with '**Subject to national law**', so that paragraph 1 reads as follows:

*"Where, in the provision of their services, providers of online intermediation services restrict the ability of business users, **subject to national law**, 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".*

In our view, given the legislative measures undertaken by some Member States on restrictive practices and price parity clauses, it is important, as provided for in paragraph 2 of the article, that Article 8 of the Regulation preserves and does not conflict with any rules on the subject laid down by the Member States.

- **Article 9**

We would like search engine providers also to be subject to this obligation to maintain a B2B internal complaint-handling system: all businesses which develop websites referenced by search engines should have a mechanism for seeking a remedy directly from the search engine, in the event of a problem, for instance, over ranking.

It also needs to be ensured that the mechanism is easy to access; with this in view, it could be specified, for reasons of speed and efficiency, that the system should function via an online interface. It would also be advantageous to provide for the possibility of partner businesses communicating with the platform in the language they normally use, as far as possible.

As regards Article 9(4), we agree to the Presidency's version, which aims to define in detail the elements of reporting and transparency concerning complaints, the main types of complaint and the average time taken to process the complaints. In our view, it would be useful for businesses to detail the number of complaints recorded, and the time taken to process them, by category of complaint rather than just giving an overall figure. We also think that in order to give business users a clearer picture, but also to support the work of the observatory for the digital platform economy, it would be very useful to specify a few categories of complaints which should be monitored, as a minimum. To do so, we feel that it would be desirable to add the following to paragraph 4, after the last sentence:

"Such information shall notably specify the number of complaints lodged and the average time period needed to process the complaints for the three following types of complaints : complaints regarding differentiated treatment applied to business users, complaints regarding interferences by the online intermediation service to the commercial relation between a business user and its consumer, complaints regarding data that an online intermediation service refuses to provide to the business user".

Regarding Article 9(5), we still favour the introduction of thresholds in this article. However, we think that the audience volume or number of connections criteria would be more suitable than the usual SME thresholds (which could lead to circumventions). In this regard we would point to the fact that this was the choice made by the proposed Directive on taxation rules for enterprises with a '*significant digital presence*' (number of users).

- **Article 10**

We take the view that, subject to certain threshold conditions to be defined, search engine services must also be included in the scope of mediation. Accordingly, we would like Article 10 to also keep thresholds as per Article 9 and we would favour of introducing the thresholds expressed as a number of connections, in line with those adopted in particular in the proposed Directive regarding '*significant digital presence*'.

We note the changes made to paragraph 3 but take the view that the wording must be clarified to point out that the use of mediation in the event of a dispute is optional, as the Presidency suggested at the last working party meeting. The mediation procedure may in fact be a useful alternative for preventing and settling disputes, since businesses do not naturally resort to the ordinary courts to resolve their differences. The cost and duration of legal proceedings, together with the fact that latter are public, may act as a brake on the use of the courts.

- **Article 12**

We approve the addition by the Presidency of Article 12a and of recital 27b: this new article has the advantage of improving the scope of the Regulation by providing explicitly for the establishment or designation of authorities responsible for supervision and the imposition of sanctions which are duly recognised for the enforcement of this Regulation. This article is in line with our concerns, as we wish to strengthen the '*enforcement and sanctions*' dimension of the Regulation. By providing for the designation of competent authorities in each Member State to penalise infringements of the rules and by making clear that the national authorities are competent to lay down enforcement measures and penalties for infringements of the Regulation, the proposed arrangements ensure that the requirements of the Regulation will be fully applied in all the Member States.

In this regard we prefer option 1, which seems to provide a broader basis by making it quite clear that authorities will be established by each Member State.

- **Article 13**

We are of the opinion that the Article could clarify the role of the Observatory in terms of implementing codes of conduct. The Observatory could in particular be called on to publish a consultative report on good practices, incorporating inter alia guidelines on mediation procedures.

- **Article 14**

We suggest that the review clause provide for a duration of 18 months. It would indeed be preferable to lay down a duration shorter than 3 years, since that the digital ecosystem cycles are faster, and any significant obsolescence or gap in the system applied needs to be avoided. In this regard the Observatory, fully engaged in monitoring the markets and which could be among the first to detect the need for a review of the text, could play a useful role by being entitled to call on the Commission and the Council to undertake a review. We also think that it could be useful to lay down that, when the review is carried out, the Observatory is to be tasked with submitting a report on developments in the sector.

We would like paragraph 2 of the review clause to refer to the possibility of adding to the Regulation new obligations going beyond mere transparency. We think it appropriate to keep this option open, particularly given the work that the Observatory on the Online Platform Economy will have been able to carry out. We therefore request that the term '*restrictive practices*' be added after the word '*including*'.

In paragraph 4 we would point to a drafting error: the phrase 'the opinions of the' should be deleted because it is inaccurate considering the verb used 'are given'. The wording would therefore be:

"The Commission shall ensure that Member States and the relevant stakeholders are given the opportunity to actively take part in the drawing up of the evaluation report".

We support the addition to recital 29.

- **Article 15**

We would like the Presidency to explain why the entry into force deadline has been extended from 6 to 12 months.

The Presidency should not hesitate to contact us for further explanations as necessary.