14 November 2018

COMMENTS BY THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL (ITI) ON THE PROPOSAL FOR A REGULATION ON PROMOTING FAIRNESS AND TRANSPARENCY IN PLATFORM TO BUSINESS (P2B) RELATIONS

Introduction

The global economy is digitised and data-driven. With the proliferation of digital technologies and the increased ability of companies to leverage cross-border data flows, the traditional models of doing business have evolved. Companies of all sizes and across industries are able to deliver products and services more efficiently and effectively across the world, enhancing consumer experiences while reducing costs. Online platforms have played an important role in doing so, driving innovation and growth in the economy, creating market opportunities and access for businesses of all sizes.

The Information Technology Industry Council (ITI) understands that the EU must carefully consider how to ensure that it protects important public interests, including the right to conduct both business to business (B2B) and business to consumer (B2C) interactions. Our companies succeed because of the trust and confidence of both our business clients and our customers, and so we have a strong desire to work with our European colleagues to advance these interests in a manner that is consistent with our shared commitment to open and non-discriminatory trade and investment environments.

In general, we are encouraged by the goals of the draft regulation to focus on a specific and narrowly-tailored set of interactions, while maintaining a non-discriminatory approach to digital commerce and innovation. As online platforms take many different forms, interact with business clients and consumers differently, and offer different types of services and products, we are sensitive to the potential impacts that such a regulation could have on current offerings, or even innovations not yet conceived. It is in that spirit that we offer some observations and comments on the amendments proposed by the Internal Market and Consumer Protection (IMCO), Legal Affairs (JURI), Transport and Tourism (TRAN), and Industry, Research, and Energy (ITRE) committees.

Specific comments

Overall, we identified three main themes that could pose potential challenges for businesses of all types, online platforms and other digital technologies companies, and consumers, which include 1) deviation from the intended scope; 2) creation of market uncertainties; and 3) harm for consumers or competition. We detail these comments below:

***About ITI**. ITI is the global voice of the tech sector. We advocate for global public policies that advance innovation; open access to new and emerging markets; promote e-commerce expansion; drive sustainability and efficiency; protect consumer choice and privacy, and enable the transformational economic, societal, and commercial opportunities that our companies are creating. ITI's members comprise leading technology and innovation companies from all corners of the ICT sector, including hardware, software, digital services, semiconductor, network equipment, cybersecurity, internet companies, and companies using technology to fundamentally evolve their businesses.*

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P2B2C Scope: This regulation intends to govern interactions between online platforms and business users active in a platform for the purposes of B2C transactions, products, and services, not for B2B offerings and not outside of Europe. We believe that the amendments in the JURI and TRAN draft opinions for Article 1 Paragraph 2 accomplish this:

> ***Proposal for Article 1, Paragraph 2***
> This Regulation shall apply to online intermediation services and online search engines provided, or offered to be provided, to business users and corporate website users, respectively, **for offering of products and services to consumers** that have their place of establishment or **are operating** in the Union and that, through online intermediation services or online search engines, offer goods or services to consumers located in the Union, irrespective of the place of establishment or residence of the providers of those services.

Fairness Principle: Several amendments proposed the inclusion of "fairness" in Article 1 Paragraph 1. While the goal of this proposal is to bring additional fairness into the relationships between platforms and business users, the concept of "fairness" is poorly defined, difficult to understand, and challenging to enforce. Instead, this regulation should focus on the tools that will bring fairness, not the concept of fairness itself. We suggest that the Commission's original text be maintained for Article 1 Paragraph 1:

> ***Article 1, Paragraph 1***
> This Regulation lays down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency and effective redress possibilities.

Exclusion of Operating Systems and Search Engines: We believe that operating systems and search engines fall outside of the scope of a regulation on platforms. The inclusion of search engines in additional articles goes against the original intent of the regulation to focus on contractual relationships between platforms and their business customers. With regard to operating systems, the "applications store" or other marketplace services within the operating system should be subject to the regulation, as that is where the P2B relationship is defined and enacted. IMCO Amendments 226, 228, and 235 to Article 1 Paragraph 1 suggest the inclusion of operating systems directly in the scope, which we believe is misguided. We suggest that the Commission's original text be maintained for Article 1 Paragraph 1:

> ***Article 1, Paragraph 1***
> This Regulation lays down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency and effective redress possibilities.

B2B Data Transfer: The restriction against transferring data to third parties without consent of the business user, as proposed by IMCO amendment to Article 6 Paragraph 2a, could cause an imbalance in B2B relationships by disproportionately favoring first parties. The use of data in the B2B context should continue to be subject to freedom of contract. There is no reported market failure on this point, and online platforms need this data for the daily management of their services. A provider of online intermediation services cannot

provide customer service without having knowledge of the transactions, nor plan server capacity without knowledge of the growth of transactions, nor provide feedback on advertisement campaigns without insights into transactions, nor detect fraud or other illicit behavior without analyzing the transaction data. Any company that outsources any of these services or that consists of several legal entities would be severely restricted in the services they provide.

Vertical Platforms: Many of the proposed amendments appear to single out vertically integrated platforms and online services, i.e. those that offer competing products or services to their business users. Any new regulation should be careful to avoid setting competition policy, but rather focus on how business users interact with and can benefit from greater transparency and communication with online intermediation services.

Ancillary Goods: The inclusion of a provision on ancillary goods in Article 5 Paragraph 2 by IMCO creates new uncertainty for companies that provide an array of services from multiple business users or from the platform company itself. These services often vary depending on the good or service purchased, the purchase history of a consumer, and availability of an additional good or service, and so it would be impossible to list these in the terms and conditions for each business user. Since these services are typically B2C in nature, and not B2B or P2B, this amendment creates significant uncertainty for online services providers. We recommend against the inclusion of the references to ancillary services.

Default Options: The IMCO amendment to Article 6 Paragraph 1a that suggests that consumer should be able to select a default option without any pre-selection denigrates the consumer experience, where consumers expect products to work upon receipt without complicated setup processes. In addition, the amendments seem to target potential challenges specific business relationships, but are unsuitable for general rules that will apply to all forms of platforms, and might create compliance requirements that are not only unnecessary, but also very difficult to implement in practice in different contexts. Overall, bans on the vertical integration of services are unfounded and ill-advised. This could reinforce anti-competitive behaviours where consumers automatically choose the service they are most familiar with, reducing exposure and options for new market entrants or smaller services to gain in popularity. Instead, platforms should identify where consumers have an option to change the default selection and note which other services are available, such as:

> ***Article 5 Paragraph 1a***
> Providers of online intermediation services that provide, or control businesses that provide, goods or services that compete with those provided by business users, **may offer a pre-selected option,** but shall allow consumers to select which good or service to use as default when the consumer uses the online intermediation service. The consumer shall also be allowed not to select a default option.

Ranking Transparency: Several proposed amendments would require providers of online intermediaries to divulge trade secrets or information that could allow the service to be manipulated by bad actors. ITI believes that the amendments proposed by ITRE and Amendment 385 to IMCO accurately capture the balance necessary to protect both business users and online intermediation services. Amendments requiring providers of online mediation services to provide "all" determining factors or to provide a neutral or objective

ranking defeat the purpose of a differentiated ranking and the value of an intermediation service. Finally, the alignment with EU Directive 943/2016 is critically important. We propose the following text:

> ***Article 6 Paragraph 1***
> Providers of online intermediation services shall set out in their terms and conditions the main parameters determining ranking **without prejudice to Directive (EU) 2016/943**.

Review: Amendments to Article 14 would propose a review two years after the date of entry into force. However, if the regulation has one year for implementation and transition, that would give insufficient time to gather the necessary data to adequately assess the effectiveness of the regulation. Similarly, amendments tabled by JURI and IMCO in Article 14 that suggest that the Commission should review whether operating systems should fall into scope creates uncertainty and doubts about the true scope of the law. In addition to the proposed language above for Article 1 Paragraph 1, we suggest the following for Article 14:

> ***Proposal for Article 14***
> By [date: **three** years after the date of entry into force], and subsequently every three years, the Commission shall evaluate this Regulation and report to the European Parliament, the Council and the European Economic and Social Committee.
>
> The first evaluation of this Regulation shall be carried out, in particular, with a view to assessing the compliance with, and impact on the online platform economy of, the obligations **within the regulation** and whether additional rules, including regarding enforcement, may be required to ensure a **transparent**, predictable, sustainable, and trusted online business environment within the internal market.
>
> In carrying out the evaluation of this Regulation, the Commission shall take into account the opinions and reports presented to it by the group of experts for the Observatory on the Online Platform Economy established in accordance with the Commission Decision C(2018)2393. It shall also take into account the content and functioning of any codes of conduct referred to in Article 13, where appropriate.

Mediation: Mediation should be voluntary and used only after redress options within a company's internal complaint-handling system have been exhausted. Additionally, several amendments tabled indicate the responsibility of both platforms and business users to act in good faith. We support the amendment in the TRAN report to Article 10, Paragraph 1:

> ***Article 10, Paragraph 1 (TRAN)***
> **Independent mediation shall be voluntary and used only after redress options within the internal complaint-handling system have been exhausted.** Providers of online intermediation services may identify in their terms and conditions one or more mediators with which they may 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 that could not be resolved by means of the internal complaint-handling system referred to in Article 9.

Article 10, Paragraph 3 (IMCO)
Providers of online intermediation services **and business users** shall engage in good faith in any attempt to reach an agreement through the mediation of any of the mediators which they identified in accordance with paragraph 1, with a view to reaching an agreement on the settlement of the dispute.

The amendments to Article 10 Paragraph 4 by TRAN and JURI about the proportionate cost reflect the dynamic nature of both the platforms and business users and offer a positive proposal. We propose the following text:

Article 10, Paragraph 4 (JURI)
Providers of online intermediation services **and business users** shall bear a reasonable proportion of the total costs of mediation in each individual case. A reasonable proportion of those total costs shall be determined, on the basis of a suggestion by the mediator, by taking into account all relevant elements of the case at hand, **in particular the relative merits of the claims of the parties to the dispute, the conduct of the parties, as well as the size and financial strength of the parties relative to one another. Should the mediator find that the business user is acting in bad faith or is seeking to abuse the mediation process, it can decide to make the business user bear more than half of the total cost.**

Notice Period for Suspension or Termination: The IMCO amendment to Article 4 Paragraph 1 that suggests 15-day notice period before suspending, delisting, or terminating a business user could have significant negative impacts on the ability of platforms to provide a positive experience for both other business users and consumers. This amendment doesn't consider how online intermediation services are proactively taking action to improve their platforms or consumer or other business user experiences by suspending business users that are breaching terms and conditions by offering illegal products or manipulating search or reviews with fake content. These practices degrade a user's trust in a platform if not addressed quickly. Additionally, for the proposal to be compatible with the E-Commerce Directive 2000/31/EC, it must allow the platforms to comply with their obligations as service provider per Article 14 of the E-Commerce Directive, including upon obtaining knowledge or awareness of illegal activity or information, the platforms must act **expeditiously** or remove or to disable access to the information. If a business user violates the terms of service and jeopardizes the platform's security or integrity, the 15-day notice period should not apply. This amendment could instead read:

Article 4, Paragraph 1
Where a provider of online intermediation services decides to suspend, **delist** or terminate, in whole or in part, the provision of its online intermediation services to a given business user, it shall inform the business user concerned **without undue delay** before implementing that decision, and provide the business user with a statement of reasons for that decision.

1 a. Paragraph 1 shall not apply where a provider of online intermediation services is subject to a legal obligation to suspend, delist or terminate, in whole or in part, the provision of its online

intermediation services to a given business user. In such cases, the business user shall be notified without undue delay.

1 b. Paragraph 1 shall not apply where a provider of online intermediation services suspends, delists, or terminates a business user in order to in order to avoid harm to its service, its business users, or consumers.

We appreciate the consideration by the Commission of these comments and for its thoughtful and inclusive approach to getting this regulation right. We look forward to continuing to work with you in ensuring a narrowly-tailored focus and effective regulation that protects the rights of business users without disadvantaging consumers, online platforms, or the dynamic and competitive environment in which they interact.

Sincerely,

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