EUROCHAMBRES

Position Paper

8 June 2018

EUROCHAMBRES position on the "Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services"

EUROCHAMBRES supports the idea to establish a fairer level playing field between internet platforms and companies that offer services and goods on those platforms. We welcome this proposal as we think it will help to pre-empt a multitude of national regulations in this area that would fragment the European Digital Single Market.

We believe in fair competition, contractual freedom and the rule of law. This entails that public authorities should intervene in contracts as little as possible but that existing rules – especially in market surveillance and competition law - should be enforced in a determined and consistent way.

We observe that the rules proposed in Art 3 to 7 on terms, termination of the contract, ranking, and access to data intrude considerably on contractual freedom, which we generally consider problematic. However, we acknowledge that, due to the nature of the platform economy, such rules may exceptionally be appropriate in this context. We believe, though, that this exception should be strictly limited to the platform economy. Still, such provisions may not be interpreted in a way that companies would be obliged to unveil their trade secrets. In particular, we support rules that enhance transparency for business users and oblige platform providers to clearly set out under which conditions they offer their own products or services and which side agreements, such as advertisement contracts, influence the ranking of offers.

Still, we are concerned about certain aspects of the proposal, as they would, if adopted, change the legal regime for the economy as a whole and go far beyond what is necessary to reach a fair balance between companies. In this respect we doubt that such rules especially for the "digital economy" are necessary and prefer a holistic approach that entails all branches of the economy.

- Most importantly, we find it excessive to oblige one party to a compulsory complaint handling system (Art 9) or compulsory out of court meditation (Art 10). While these instruments are indeed of great use and should be actively encouraged, they should remain voluntary. If the legislator assumes that courts are too slow for the internet age, which might well be the case, it will be necessary to make them future-proof and accelerate procedures. Likewise, the provisions on the bearing of costs (Art 10 lit 4) are inappropriate.

- We believe in fair competition, which should be enforced by competition authorities in a determined way. This is a core competence of the state power and may not be passed on to private entities.

Competition authorities have all means necessary to take action against monopolies or misuse of a dominant position, be it in the digital or the analogue economy. Private companies or business organisations lack comparable means such as the right to conduct "house searches" or offer leniency. Consequently, we oppose any kind of class action or collective redress of organisations (Art 12) on behalf of their members. Competition rules are important and it is especially in areas with new and developing business models that economic actors must be able to rely on a determined application of these rules by national and European competition authorities.

- Regarding the rule of law, we furthermore recommend to make sure the proposed regulation is without prejudice to existing rules: This concerns in particular the relation to the E-Commerce Directive, which is currently the most relevant piece of legislation for platforms. Furthermore, the effects of this proposal on competition law and its application require further clarification. The interaction of Art 10 and 11 with the Mediation-Directive seems indistinct. As already mentioned, the proposed regulation intrudes considerably on contractual freedom. Therefore a clarification vis-à-vis the "Regulation on the Law Applicable to Contractual Obligations" (Rome I), especially on which law is applicable, seems appropriate.

- Likewise, and with respect to the fact that the proposal is presented as a regulation, it should be clearly stated if this proposal intends to fully harmonise platform contractual rules or not. While it has been clearly stated that Member States are permitted to adopt laws that go beyond the rules set down in the case national bans on best price guarantees (Art 8), the proposal does not stipulate if this regulation renders redundant existing national laws on platform contractual relations, or if they are considered complementary and will thus remain in force. This is especially true for areas such as warranty law, invalidity of contracts and national competition law, as in similar legislation, such as the Directive concerning Unfair Commercial Practices (2005/29/EC) the European Court of Justice has ruled that the European legislator has fully harmonised all aspects that were not explicitly exempted.

- Generally, and with regards to the exception for smaller companies in Art 9 lit 5, we are concerned that the proposal - if adopted as such - will prove devastating for start-up platforms. While big platforms might be able to comply with the multitude of obligations, smaller platform providers have to bear disproportionate costs. This may well persuade them to establish their activities outside the EU. It seems that the "think small first" principle has been grossly neglected and the proposal has been designed exclusively for big platforms. This is especially the case for the provisions in Art 9, 10 and 12. We therefore suggest a general exemption for providers of online intermediation services until they have reached a turnover of 50 mio €, in line with the SME definition for medium sized companies.

- Finally, the exact purpose and expected added value of the proposed EU observatory on platforms should be outlined more precisely.

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