

ETNO and GSMA position in relation to the proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services

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ETNO and the GSMA welcome the European Commission's targeted approach aimed at tackling a number of identified issues with regard to the contractual relationships between online platforms and their business customers.

- A EU-wide approach to imbalances surrounding lack of transparency, unilateral change of terms and conditions, delisting and ranking of users is necessary to address legal fragmentation in the single market and ensure a healthy internet ecosystem which supports competition, diversity and choice.
- In order to ensure proportionality, not to hinder innovation and the development of welfare enhancing platforms, the Regulation should include high thresholds and focus only on large platforms that are gatekeepers with strong bargaining power.
- It is regrettable that the proposal fails to address some crucial issues that may arise in the contractual relations with large online players with major economic impact, such as discrimination and unfair practices. Better transparency alone is not sufficient to correct the asymmetries and power imbalance between large platforms and their users when the latter have little or no choice among similar competing platforms. Based on reasonably high thresholds, some basic safeguards should be added, to complement the proposed light-touch measures.
- However services that may be qualified as online platforms according to the definition in Art. 2 and that already fall under sector specific provisions should be exempted from the regulation to avoid legal inconsistency and regulatory burdens.
- The establishment of an Observatory and a mandatory automatic review is crucial to explicitly address those issues not yet sufficiently covered in this first step of regulation.
- Finally, competition law, which applies to market failures, currently does not effectively tackle all issues such as discrimination and unfair practices that harm business users.

ETNO and the GSMA's specific remarks on the elements of the proposed Regulation are as follows:

Scope and Definitions (Art. 1-2)

We welcome the functional definition of "online intermediation services" in Art. 2, but we believe that the definition should also include online intermediaries supplying commercial services not against monetary payment but that are funded based on the processing of consumers' data. The current draft definition of online intermediaries requires a contractual relationship with the consumers. However, depending on each Member State's legal situation, services provided against consumers' data often do not constitute a contract. To ensure that the regulation is equally applicable in all Member States, online intermediaries providing commercial services to consumers should be included. The definition of online intermediaries should not depend on the criteria whether there is an established contract with the consumer based on consumer law.

A targeted approach directed at major online platforms and excluding other platforms with lower bargaining power should attach clear thresholds to the applicability of the proposal's measures, in accordance with the principle of proportionality. This particularly refers to burdensome rules. As a result, co-decision makers should consider a layered approach that imposes stricter rules only on

major online platforms. The introduction of reasonably high thresholds will help address issues in relation to major platforms (e.g. identified on the basis of the number of active users) that can leverage their negotiation power when concluding contracts with their customers. Smaller platforms that are subject to a more competitive landscape would not be burdened. The qualification as major platforms that falls under the new provisions should not be based on the size of the platform provider, but on the relevance of the platform in the market.

ETNO and the GSMA's understanding is that electronic communications services (ECS) do not constitute online intermediation services for the purpose of the Regulation. For the sake of legal certainty and to avoid double-regulation, we recommend that services covered by comparable sector-specific provisions, such as ECS as defined in the new European Electronic Communications Code (EECC), are explicitly exempted from the scope of this proposal. Internet Access Services (subcategory of ECS) and network providers already abide by strict rules such as on transparency and non-discrimination in the scope of the Open Internet Regulation, including on vertically integrated services. Moreover, some sector-specific provisions in the EECC and the revised Audiovisual Media Services Directive address issues around openness and fairness.

The obligations should consistently apply to providers of online search engines (including voice search), which in the proposal are only subjects to rules on ranking (Art. 5) and related codes of conduct (Art. 13). A user can experience negative consequences when a search engine provider unfairly suspends listing a service (Art. 4), changes its ranking (Art. 5) or give preferential treatment to its own vertically integrated services (Art. 6). In addition, we urge legislators to further assess the regulatory qualification and the crucial role of Operating Systems as being gatekeepers in B2B relations.

Terms and Conditions, Suspension and Termination, Ranking, Differentiated Treatment (Art. 3-6)

The scope of the Regulation is too narrow and does not address even most basic requirements that prohibit unfair contract terms and unfair business practices in business-to-business relations.

The limitation to transparency of information about a platform's terms and conditions and practices will add little value with regard to openness and fairness concerning major online platforms, especially in relation to the larger platforms that can be sure that their business customers will generally not switch to another competing online platform.

However, we understand that this proposal is supposed to be a first step and takes into account the limited remaining time to adopt new rules still in this legislative period. Therefore, we deem necessary to at least include basic safeguards beyond transparency for platforms over a specified threshold. Based on reasonably high thresholds, this should include the prohibition of blocking business customers in the scope of established contractual relations, if such blocking is not objectively justified or legally required.

Additionally, the follow-up process of the step-by-step approach needs to be specified, ensuring that it is tangible. Further assessment and defining required legal steps should be explicitly included in the scope of the Observatory's obligations and the automatic review process. The Observatory should identify unfair contract terms and commercial practices, which should then be addressed in the scope of the foreseen next review of this Regulation (see also comments below).

Internal complaint-handling system (Art. 9)

Effective and speedy handling of customer complaints is a key element of customer satisfaction, which is a powerful incentive for any service provider. ETNO and the GSMA are not convinced of the suitability and proportionality of an overly detailed obligation.

We would prefer a general obligation for all major online intermediaries and search engines to ensure effective complaint mechanisms – for example, a compulsory national point of contact for addressing complaints – and to refrain from further detailed obligations on how to adequately respond to complaints, e.g. the degree of individualised responses.

Mediation (Art. 10)

ETNO and the GSMA support a sound mediation process in the scope of Business-to-Platform relations, since such agreements can serve as role models for similar cases and further other mediation procedures with major platforms. We recommend that large players have an obligation to start mediation when a business customer lodges a valid complaint.

These steps need to be complemented by the introduction of clear timelines inspired from merger control procedures (e.g. 25 days for the initial assessment, 90 days for a more detailed evaluation), to ensure certainty and minimise the burden on complainants.

However, while this instrument can have a great potential to swiftly solve disputes at low costs, it remains ineffective if the platform provider simply refuses to agree to balanced compromises. The effectiveness of agreed decisions and other legal obligations must also be ensured, including the proper application of enforcement instruments.

Codes of Conduct (Art. 13)

We agree that codes of conducts by online platform providers are deemed crucial to support attaining the objectives on this Regulation. However, such voluntary measures are clearly not sufficient and need to be complemented by legal safeguards.

Review and Observatory (Art. 14 in conjunction with Commission Decision C(2018) 2393 final)

ETNO and the GSMA support the automatic review process of Art. 14, which can help identify and tackle additional serious issues related to platforms with major impact in the EU market. This is particularly crucial keeping in mind the overly narrow scope of this draft regulation. The provision on the automatic review should be complemented by specifying concrete issues to be further investigated in particular with regard to prohibiting severe unfair contract terms and practices applied by major platforms. As a next step, adequate measures should tackle identified measures.

The evaluation of the Regulation's application should take into account not only those substantive matters, but also all the other issues related to definitions, thresholds, redress mechanism and enforcement. The envisaged monitoring of the market via the Observatory on the Online Platform Economy as described in the European Commission Decision C(2018)2393 can provide competent authorities with a solid and comprehensive understanding of the evolving online platform-to-business market, which is urgently required. Particularly, the Observatory should be explicitly obliged to identify severe unfair contract terms and practices as input for the next automatic review and should be entitled to require online platforms to provide information on request in order to inform their monitoring.



About ETNO

ETNO has been the voice of Europe's telecommunication network operators since 1992 and has become the principal policy group for European electronic communications network operators. Its 39 members and observers from Europe and beyond are the backbone of Europe's digital progress. They are the main drivers of broadband and are committed to its continual growth in Europe.

ETNO members are pan-European operators that also hold new entrant positions outside their national markets. ETNO brings together the main investors in innovative and high-quality e-communications platforms and services, representing 70% of total sector investment.

About the GSMA

The GSMA represents the interests of mobile operators worldwide, uniting nearly 800 operators with more than 300 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading events such as Mobile World Congress, Mobile World Congress Shanghai, Mobile World Congress Americas and the Mobile 360 Series conferences.

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