Comments on the proposed regulation on promoting fairness and transparency for business users of online intermediation services and online search engines

Introduction

We have analysed the proposed regulation on promoting fairness and transparency for business users of online intermediation services and online search engines. We welcome the fact that the EU is taking a lead on this important issue.

First, we welcome the fact that the proposal applies to both online search engines where appropriate, as well as online intermediation services, which is of great importance as regards ranking and also as regards court actions. Second, it is positive that clear obligations are set out in Articles 3-8.

We would however like to see some strengthening of Article 3 and subsequent articles:

- First, we believe there should be an overall obligation for the terms and conditions in Article 3(1) to be **objective and non-discriminatory and ideally also fair and reasonable**, over and above a requirement that grounds for suspension or termination should be objective. Such an obligation would clearly enhance the protection for business users.
- Second, we would suggest that the terms and conditions that must be objective and non-discriminatory, as well as fair and reasonable, also include terms governing access to services, and to the tools that they provide.
- Third, we would suggest further amendments to improve drafting of other provisions, including termination, search results ranking parameters, access to data, among others.
- Fourth, there should be strengthening as regards the consequences of non-compliance with those obligations.

Finally, there are clear provisions on redress set out in Articles 9-13, in particular as regards the requirements to be met by mediators, including their independence, and special mediation bodies, plus the bringing of judicial proceedings by representative bodies.

Scope

As noted above, we welcome the fact that the scope of the proposed regulation in Article 1 covers both online search engines and online intermediation services, which is important when applying the provisions on ranking and as regards court actions, and adds an extra layer of protection for business users.

Duties and Obligations

1. Terms and Conditions; Suspension and Termination.

Article 3

It is positive that any terms and conditions that do not comply with the provisions of Articles 3(1)(a)-(c), may, under the terms of Article 3(2), be considered to be non-binding on the business user, where such non-compliance is established by a competent court.

However, the provisions of Articles 3(1) and 3(2) could be strengthened if, instead of requiring a judgment from a competent court, such terms and conditions were simply

considered null and void, in line with what is provided below under Articles 3(3) and (4) as regards modifications of terms and conditions without giving the required notice. The key issue will be the imbalance of contractual power between the two parties and requiring court action to establish whether a provision is non-binding. This could prevent SMEs in particular from easily being able to enforce the provisions of the draft regulation.

We would thus suggest that Article 3(2) be amended as follows:

"Terms and conditions, or specific provisions thereof, which do not comply with the requirements of paragraph 1 shall be null and void."

As regards Article 3(1)(c), the grounds for suspension or termination must be "objective" but there is no clarity on what "objective" means in this context – this is something that should be remedied by adding in Recital 13 a requirement that such grounds must be applied in a non-discriminatory manner in order to be considered objective. It would be preferable of course if such wording could be added to Article 3(1)(c) itself, rather than simply in Recital 13.

However, we note that there is still no overall obligation for the terms and conditions in Article 3(1) to be **objective and non-discriminatory and ideally also fair and reasonable**, other than a requirement that grounds for suspension or termination should be objective. Such an obligation would clearly enhance the protection for business users.

Finally, it is not envisaged that there may be circumstances where termination would cause severe disruption because there are no direct alternatives (see example below).

We would thus suggest that a new 3(1)(c) be added as follows and then that current 3(1)(c) becomes 3(1)(d) with the following suggested amendments:

"(c) are objective, non-discriminatory, fair and reasonable; and

(d) set out the objective*, non-discriminatory, fair and reasonable* grounds for decisions to suspend or terminate, in whole or in part, the provision of their online intermediation services to business users, *taking into account all the circumstances, especially where there is no direct alternative to their services*."

IMPALA has consistently argued that this is key as regards the terms and conditions of access to services, as well as the various tools that those services provide, such as playlists and content management systems, since key services hold significant market power as indispensable trading partners and/or gatekeepers to the digital world (we welcome the fact that Recital 2 acknowledges this specifically).

Article 3(3) on notification of anticipated changes to terms and conditions has clear obligations on notification and implementation of changes. Further, changes could be found to be null and void if they did not comply with 3(3) by virtue of 3(4) but such cases are limited to failure to comply with proper notice. This should be strengthened so that any such modifications and changes should also be found to be null and void if they fail to comply with all conditions of Article 3(1), in particular, 3(1)(c).

Again, Article 3(3) would be strengthened if a condition were added in Article 3(1) to the effect that all terms and conditions must be **objective and non-discriminatory and ideally also fair and reasonable** (see our drafting suggestion above).

Articles 3(2) and 3(4), read in conjunction with recital 15, provide for the severability of any offending clause. This raises the question of why this is not stated in those Articles themselves rather than Recital 15 so as to provide full clarity.

We would suggest the following modification to Article 3(4) for example to deal with this:

"Modifications to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of paragraph 3 shall be null and void, *without prejudice to the validity of the remaining provisions, which will remain valid and enforceable, so far as they are severable from the offending provisions.*"

A similar addition should also be added at the end of our proposed amended Article 3(2) (see above).

Article 4

It is positive that Article 4 provides for a statement of reasons in the case of a termination or suspension, but there is no deadline or absolute clarity as regards the timeframe within which this should be provided, whether a specific notice period should be given as regards the decision or what the time period would be during which this can be challenged by the user. Article 4 does at least state that the statement should be provided without "undue delay".

It is also not clear what the interplay would be with the provisions of Article 3(3). In particular, it is not clear how the notice periods in that Article apply in this specific case as regards suspension/termination – suspension or termination may simply be based on existing terms and conditions but could also be a result of changes to such terms and conditions. If no change to terms and conditions is possible without giving 15 days' notice, this should also be the minimum notice period for suspensions or terminations, unless of course Article 3(5) applied.

We would thus propose that Articles 3(3) and 4 be changed as follows:

"3(3) Providers of online intermediation services shall notify to the business users concerned any envisaged modification to their terms and conditions, *including where they decide to suspend or terminate, in whole or in part, the provision of their online intermediation services to a given business user*."

"4. Where a provider of an online intermediation service decides to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, it shall provide the business user concerned, without undue delay *and within the period of 15 days' notice provided for above in Article 3(3),* with a statement of reasons for that decision."

PRACTICAL EXAMPLE:

The importance of clarity on grounds for suspension or termination, changes to terms and conditions, and the ability to challenge such suspensions/terminations or changes, is illustrated by an example involving YouTube and one of our members. YouTube recently informed the member that YouTube channels that do not reach combined thresholds of at least 4000 hours of watchtime in the previous 12 months and 1,000 subscribers will no longer be eligible for monetisation. This communication was to be taken as constituting 30 days' notice that their YouTube Partner Program terms were to be terminated, unilaterally, apparently based on these arbitrary new thresholds.

As a partial termination of provision of online intermediation services, this would fall within Article 3(1)(c) of the current draft and highlights the importance of tightening up this Article and what objective grounds mean in this context. For example, this change or partial termination might be applied in a non-discriminatory manner to all of those in this position, but is it fair and reasonable to make a unilateral change like this, with far-reaching consequences for users, based on what appear to be arbitrary threshold changes? We note that YouTube does not appear in this case to have provided any objective grounds for the change (which the draft regulation, once adopted, would require under Article 3(1)(c)). There is also the issue of what notice period should apply in this case under the draft regulation – it would be a change to the terms and conditions so at least 15 days' notice would apply, but would also be a partial termination (and, as noted above, there are no notice periods provided in the draft regulation in relation to termination or suspension decisions although we have suggested a change on this above).

2. Ranking

We welcome the fact that Article 5 applies to both online intermediation services as well as online search engines. There is however still no specific obligation provided that the parameters set out in Article 5(1) should be objective and non-discriminatory, although Article 5(1) appears to go in this direction by setting out that it must be clear what the parameters are and "and the reasons for the relative importance of those main parameters as opposed to other parameters" and 5(4) provides that it should be possible to understand how those parameters take into account the quality of the products and services as well as their relevance for consumers.

We would however like to see this strengthened by adding after Article 5(1) the following wording:

"Those parameters should be objective and non-discriminatory and applied in a consistent and non-discriminatory manner."

3. Vertically integrated activities

Article 6 relates to a key problem: that of platforms favouring their own activities over those of other business users. The article provides that online intermediation services should include in their terms and conditions a description of any such differentiated treatment. This is of course useful but does not go to the heart of the problem, that of differentiated treatment taking place. Obviously if the online intermediation service were dominant on the relevant market and engaging in such behaviour, there might be a remedy under EU competition rules. Otherwise, the business user will be informed, but there will be little that it could do to change the situation. Our proposal of a further obligation to ensure that terms and conditions are objective and non-discriminatory (see above, new Article 3(1)(c)) should also apply in this case and any such differentiated treatment should thus be objectively justifiable and non-discriminatory.

4. Access to Data

Article 7 provides for business users to be informed in some detail as regards access to information and categories of information to which the business user will have access. Importantly, information is also provided on the data provided by business users and consumers to which the online intermediation service itself has access. However, there is still no clear right to have access to any specific data, and nor are there provisions concerning the quality of the data.

This is a point that IMPALA has raised before as a key problem in terms of the contractual relationship between services and their members: the failure to report good enough quality data to rights owners in order to allow them properly to exercise their rights under their agreements with services and has argued that content licensors should be provided with best quality data available – on tariffs, users' streaming/downloading of content, as well as search results.

We would thus propose that the following wording be added to Article 7, after Article 7(1):

"Business users shall have a right to be provided with any personal data or other data, or both, which business users or consumers provide for the use of the online intermediation services concerned or which are generated through the provision of such services unless it is impossible to provide such data for technical or legal reasons. Business users shall be provided in all cases where possible with best quality data available."

5. Restrictions on providing other conditions

Under Article 8, the online intermediation service must provide general information on restrictions, but there is in principle nothing to prevent the service from imposing restrictions on users as regards the conditions on which they offer products and services through other means than online intermediation services or to ensure that such restrictions are objectively justifiable. Article 8(2) however appears to make clear that if such restrictions are contrary to EU law, the fact that users have been informed about them does not affect any prohibitions or limitations on those restrictions. In other words, the Article clarifies that the fact that users have been informed does not prevent a prohibition of a restriction under EU law, e.g. competition law, from applying. It would of course be preferable for no such restrictions on business users to apply, even where e.g. EU competition rules do not apply, or only where those restrictions are objectively justifiable.

For that reason, we would propose the following amended wording to be inserted in Article 8:

8(1) "Where, in the provision of their services, providers of online intermediation services restrict the ability of business users to offer the same goods and services under different conditions through other means than through those services, *such restrictions must be objectively justifiable and non-discriminatory, fair and reasonable, in accordance with Article 3(1)(c), and* they shall include the grounds for that restriction in their terms and conditions and make those grounds easily available to the public……"

Redress

Article 9 on Internal complaint-handling sets out detail on what the internal complaint handling system should cover in terms of the subject-matter of potential complaints, and Article 9(2) sets out clear obligations on how complaints should be handled. But there are no timeframes set out although 9(2)(b) talks about processing complaints swiftly and effectively: adding clear timeframes would strengthen Article 9.

We would therefore suggest the following amendment to Article 9(2)(b):

"(b) process complaints swiftly and effectively, taking into account the importance and complexity of the issue raised, *but in any event, providing a first response within 15 days which sets out a timetable for dealing with the complaint*;"

Article 10 on mediation sets out detail on mediation, including the identification of mediators and the requirements that they should meet, in particular as regards independence, as well as provisions ensuring that mediators from outside the EU if legal safeguards are in place in particular as regards independence of mediators. The Article also sets out obligations on online intermediation services in terms of good faith engagement with the process and contribution to the costs. We welcome these provisions.

We also welcome Article 12 on judicial proceedings by representative organisations or associations concerning court actions for non-compliance with the draft regulation, and the fact that this covers non-compliance as regards both online intermediation services and online search engines. It is also positive that such organisations can be set up not only by those representing corporate website users, but that Member States can also set up public bodies that may fulfil this function.

Conclusion

IMPALA welcomes the draft regulation and the fact that the new rules help to address the "power gap", the imbalance between the contractual bargaining power of certain online service providers and SME suppliers or licensors. Nevertheless, there could still be further improvements/strengthening, in particular:

- a general obligation to ensure that terms and conditions, including of access to services and to the tools that they provide, such as playlists and content management systems, are ideally not only objective and non-discriminatory, but also fair and reasonable where appropriate;
- clearer timeframes/notice periods in relation to certain provisions such decisions on suspensions/terminations;
- not only clarity as regards access to data but also better access to data.
- other clarifications, as noted above.

About IMPALA (Independent Music Companies Association)

IMPALA represents European independent music companies. 99% of Europe's music companies are SMEs. Known as the "independents", they are world leaders in terms of innovation and discovering new music and artists - they produce more than 80% of all new releases & account for 80% of the sector's jobs. IMPALA's mission is to grow the independent music sector, return more value to artists, promote cultural diversity and entrepreneurship, improve political access & modernise perceptions of the sector.