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EBF POSITION - PROPOSAL FOR A REGULATION ON PROMOTING FAIRNESS AND TRANSPARENCY FOR BUSINESS USERS OF ONLINE INTERMEDIATION SERVICES COM (2018) 238 final

Providers of online intermediation services, i.e. online platforms, create a plug-and-play infrastructure that enables producers (business users) and consumers to connect and interact with each other in a manner that was not possible in the past. The direct interaction between providers of products and services and customers offers the latter a one-stop-shop for what they want, when they want and in a format they prefer (choice, affordable products, fast delivery). As a result, platforms have become one of the cornerstones of e-commerce and digital markets, helping to reshape the very design of traditional business models and marketing activities.

The European Banking Federation supports the timely approach of the EU Commission's proposal for regulation on promoting fairness and transparency for business users of online intermediation services which will contribute:

- to build a fair and equal treatment for users of online platforms. Ensuring a transparent and balanced business relation between platforms and their business user will make it easier for banks to assess this business model and the associated risks.
- to build a higher degree of certainty for businesses wishing to make use of platforms as part of their business model.
- In turn, this may further stimulate the digital economy and the digital single market as a whole.

We encourage authorities to continue to monitor digital markets closely, including through the new Observatory on the Online Platform Economy, with a view to identifying and addressing any further barriers to digital single market and fair competition.

Under the current form of banking, banks usually act as business users of third-party platforms, for example in order to

- provide financial services (e.g. consumer credit intermediated through an online comparison platform),
- provide different banking apps via a platform ecosystem,
- interact with customers via social media or voice banking platforms.

However, banks may also serve as online intermediation service providers either in the present or in the future.

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In that role, a bank could develop and own a digital platform, which could serve as a “digital marketplace” where financial or non-financial products and services could be offered by third-party business users to (the bank’s) customers. Certain examples – following this line of thinking – can be found today:

- A bank has teamed up with a Payments, Payroll, Invoicing and Accounting company (PPIA) in order to integrate invoicing, accounting and financial insights into its online business banking platform (bank owning the platform, PPIA company: third-party business user).
- Another bank has developed a platform that facilitates the use of mobility solutions for employees and the company mobility manager. The platform focuses on a specific mobility card and a mobile app from which various means of public transport (train, tram, bus), parking and transport sharing systems can be accessed (Bank owning the platform, third-party business user: different mobility actors).
- There are examples of platforms launched by bank consortia, especially in the case of blockchain technologies.
- Finally, another example is a food platform managed by a bank and aiming at matching local food and drink producers with customers.

Suggestions for amendments to the EC Proposal

To support the Regulation’s feasibility, we would like to offer several comments and amendments.

Definition of online intermediation services (Recital 9 & Article 2)

According to recital 9, online payment services, given the fact that they do not meet the applicable requirements set out in the definitions of the proposal but are rather inherently *auxiliary* to the transaction for the supply of goods and services to the consumers concerned, are excluded from the scope of the proposal.

Moreover, we believe that banks should not fall under the definition of online intermediation service providers when distributing third-party products (e.g. funds, insurances or investment services regulated under MiFIDII such as services allowing customers to execute transactions in regulated trading venues. The latter do not involve direct interaction between the consumer and seller). We therefore suggest the following amendment to recital 9 and to Article 2:

Recital 9	
Current Commission text	Amendment
<p><i>Recital 9 (extract)</i></p> <p><i>[...] This Regulation should also not apply to online payment services, since they do not themselves meet the applicable requirements but are rather inherently auxiliary to the transaction for the supply of goods and services to the consumers concerned.</i></p>	<p><i>Recital 9 (extract)</i></p> <p><i>[...] This Regulation should also not apply to online payment services, since they do not themselves meet the applicable requirements but are rather inherently auxiliary to the transaction for the supply of goods and services to the consumers concerned, <u>or to investment services under Directive (EU) 2014/65,</u></i></p>

	<u><i>including those for execution in regulated trading venues, as these are already regulated services and do not involve direct interaction between the customer and trading venue.</i></u>
Article 2 (2)	
Current Commission text	Amendment
<p><i>(2) 'online intermediation services' means services which meet all of the following requirements:</i></p> <p><i>(a) they constitute information society services within the meaning of Article 1(1)(b) of Directive (EU) No 2015/1535 of the European Parliament and of the Council⁹;</i></p> <p><i>(b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;</i></p> <p><i>(c) they are provided to business users on the basis of contractual relationships between, on the one hand, the provider of those services and, on the other hand, both those business users and the consumers to which those business users offer goods or services;</i></p>	<p><i>(2) 'online intermediation services' means services which meet all of the following requirements:</i></p> <p><i>(a) they constitute information society services within the meaning of Article 1(1)(b) of Directive (EU) No 2015/1535 of the European Parliament and of the Council⁹;</i></p> <p><i>(b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;</i></p> <p><i>(c) they are provided to business users on the basis of contractual relationships between, on the one hand, the provider of those services and, on the other hand, both those business users and the consumers to which those business users offer goods or services;</i></p> <p><u><i>(d) they are not investment services regulated under Directive (EU) 2014/65.</i></u></p>

Terms and Conditions (Article 3)

The requirement to "set out the objective grounds for decisions to suspend or terminate" may not fully capture the need to reduce arbitrariness or anti-competitive behaviour in platforms' decisions when it comes to suspension or termination. We suggest also including the concepts of non-discrimination and proportionality to ensure that treatment remains fair and objective:

Article 3 (1)	
Current Commission text	Amendment
<p><i>1. Providers of online intermediation services shall ensure that their terms and conditions:</i></p> <p><i>(a) are drafted in clear and unambiguous language;</i></p> <p><i>(b) are easily available for business users at all stages of their commercial relationship with the</i></p>	<p><i>1. Providers of online intermediation services shall ensure that their terms and conditions:</i></p> <p><i>(a) are drafted in clear and unambiguous language;</i></p> <p><i>(b) are easily available for business users at all stages of their commercial relationship with the</i></p>

<p><i>provider of online intermediation services, including in the pre-contractual stage;</i></p> <p><i>(c) set out the objective grounds for decisions to suspend or terminate, in whole or in part, the provision of their online intermediation services to business users.</i></p>	<p><i>provider of online intermediation services, including in the pre-contractual stage;</i></p> <p><i>(c) set out the objective, non-discriminatory and proportionate grounds for decisions to suspend or terminate, in whole or in part, the provision of their online intermediation services to business users.</i></p>
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Suspension and Termination (Article 4)

According to Article 4, providers of online intermediation services should provide the business user with a statement of reasons in the event of a decision on suspension or termination of the latter from the use of the online platform.

We support the idea that platforms should provide more transparency and sufficient explanation to the business users that were either removed or suspended from the use of the platform. **However, platform providers should retain flexibility in order to ensure that the statement of reasons is proportionate and does not put at risk the integrity of the platform and the data stored on it** by providing details about parameters of the platform which could potentially be used by actors seeking to game the system and initiate fraudulent actions.

Moreover, it has to be noted that, apart from the explicit cases of suspension or termination, there might also be other types of actions initiated by the platform provider that could generate the same effects as the explicit suspension or termination of the business user. A characteristic example is the change in the ranking algorithms by the platform provider, having as an effect the placement of the business user's products in the last position of ranking. Such actions, constituting de facto suspension or termination, should also be covered by the protective scope of Article 4 and consequently require the provision of a statement of reasons by the platform provider to the affected business user. As such, we suggest modifying Article 4 of the proposal as follows:

Article 4	
Current Commission text	Amendment
<p><i>1. Where a provider of online intermediation services 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, with a statement of reasons for that decision.</i></p> <p><i>2. The statement of reasons referred to in paragraph 1 shall contain a reference to the specific facts or circumstances that led to the decision of the provider of online intermediation services, as well as a reference to the applicable objective ground or grounds for that decision referred to in Article 3(1) (c).</i></p>	<p><i>1. Where a provider of online intermediation services 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, with a statement of reasons for that decision.</i></p> <p><i>2. Actions initiated by the provider of online intermediation services that are highly likely to generate the same effects as the explicit suspension or termination of the business user should be considered in the same way as suspension and termination as foreseen by Article 3 (1).</i></p> <p><i>3. The statement of reasons referred to in paragraph 1 shall contain a reference to the specific facts or circumstances that led to the decision of the provider of online intermediation</i></p>

	services, as well as a reference to the applicable objective ground or grounds for that decision referred to in Article 3(1) (c).
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Ranking (Article 5)

Transparency requirements on the parameters determining ranking should be implemented in such a way that preserves **the intellectual property of algorithms** by the platform provider.

Differentiated treatment (Article 6)

The purpose of this article is to make clear what additional advantages platform providers provide to their own products or services that are traded via the platform. As such, where these requirements differ across those products or services, it should be clear that an explanation of the differentiated treatment needs to be given in a *disaggregated way*, so that it is clear to which goods or services the advantages are being provided.

In addition, as access to hardware and operating system functionality on mobile devices is, and will likely continue to be, critical in the provision of digital goods and services, we suggest that it be made clearer that it is included within the description of differentiated treatment. As such we propose the following amendments to Article 6 of the proposal:

Article 6	
Current Commission text	Amendment
<p>1. Providers of online intermediation services shall include in their terms and conditions a description of any differentiated treatment which they give, or may give, in relation to, on the one hand, goods or services offered to consumers through those online intermediation services by either that provider itself or any business users which that provider controls and, on the other hand, other business users.</p> <p>2. The description referred to in paragraph 1 shall cover at least, where applicable, any differentiated treatment through specific measures taken by, or the behavior of, the provider of the online intermediation services relating to any of the following:</p> <p>(a) access that the provider, or that the business users which that provider controls, may have to 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 those services;</p> <p>(b) ranking;</p>	<p>1. Providers of online intermediation services shall include in their terms and conditions a description of any differentiated treatment which they give, or may give, in relation to, on the one hand, goods or services offered to consumers through those online intermediation services by either that provider itself or any business users which that provider controls and, on the other hand, other business users. Where there are differences between the differentiated treatment afforded, according to the type of goods or services, a breakdown of these affected product and service types will be included in the description.</p> <p>2. The description referred to in paragraph 1 shall cover at least, where applicable, any differentiated treatment through specific measures taken by, or the behavior of, the provider of the online intermediation services relating to any of the following:</p> <p>(a) access that the provider, or that the business users which that provider controls, may have to any personal data or other data, or both, which business users or consumers provide for the use of the online intermediation services concerned</p>

<p>(c) any direct or indirect remuneration charged for the use of the online intermediation services concerned;</p> <p>(d) access to, or conditions for use of, services that are directly connected or ancillary to the online intermediation services concerned.</p>	<p>or which are generated through the provision of those services;</p> <p>(b) ranking;</p> <p>(c) any direct or indirect remuneration charged for the use of the online intermediation services concerned;</p> <p>(d) access to, or conditions for use of, services that are directly connected or ancillary to the online intermediation services concerned. This includes, but is not limited to, hardware or operating system-level functionality of mobile devices, where the provider of the hardware or operating system is the same as the provider of an online intermediation service that provides access to third-party applications utilizing the hardware or operating system.</p>
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Access to data (Article 7)

Conditions on the access to data by business users must be consistent with the General Data Protection Regulation (GDPR) and the future regulation on the free flow of non-personal data (FFDR). **The current wording of the Proposal does not include any reference to GDPR and FFDR compliance**, at least in the main part of the text (i.e. not in the recitals).

Review (Article 14)

The review period of three years is considered too long, given the pace with which platforms and the related technology are evolving. Further consideration should be given on whether a **two-year review period** would provide more flexibility and as such, be more appropriate and fit for purpose.

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About EBF

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