Increasing transparency and fairness for business users on online platforms

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According to a Eurobarometer survey, nearly 50 per cent of business users have experienced problems with online platforms in the course of their business relationships, with complaints ranging from the ability of providers to change their terms and conditions without warning to the lack of transparency around platform policies.[1] In 2017, the European Commission committed, as part of its review of the Digital Single Market strategy, to *"prepare actions to address the issues of unfair contractual clauses and trading practices identified in platform-to-business relationships, including by exploring dispute resolution, fair practices criteria and transparency"*.

It unveiled its proposal for a regulation on platform-to-business relationships on 26 April 2018 (the Regulation) - the first specific legislation to address platform-to-business relationships at an EU level. On 13 February 2019 the European Parliament, European Council and European Commission reached informal political agreement on the proposal. The text was formally adopted by the Parliament on 17 April 2019 and is expected to be approved by the Council imminently. The Regulation will subsequently be published in the Official Journal and come into effect 12 months later.

Background to the proposal

While the Commission has been careful to outline the economic and consumer benefits of online platforms, its proposal for legislation in this area has been driven by a perceived growing dependence of businesses on online platforms as a source of revenue and access to consumers. This trend, in the Commission's view, has in turn increased the scope for platforms to develop potentially harmful trading practices that, it considers, can hamper the full realisation of the intrinsic cross-border potential of these services and negatively impact the functioning of the internal market. Its intervention is therefore aimed at ensuring the online platform "ecosystem" remains fair and transparent.

Broad scope of the Regulation

The Regulation applies to "online intermediation services". The interpretation of this is quite broad. It captures online services which (i) aim to facilitate transactions between businesses and consumers and (ii) are provided on the basis of contractual relationships between the providers and business users who are offering goods or services to consumers. This therefore includes e-commerce marketplaces (for example,

[1] Final report on business-to-business relations in the online platform environment, 22 May 2017, ix. https://publications.europa.eu/en/publication-detail/-/publication/04c75b09-4b2b-11e7-aea8-01aa75ed71a1/language-en

eBay and Amazon), online software applications services such as app stores, social media services used by businesses (such as Facebook and Instagram) and price comparison tools (such as Skyscanner).

However, it excludes online advertising tools and exchanges (which are not provided with the aim of facilitating the initiation of direct transactions between businesses and consumers) and payment services (which are auxiliary to the transaction for the supply of goods and services to consumers), as well as business-to-business intermediaries and pure online retailers selling goods directly to consumers without the involvement of third parties. Notably, online search engines are also largely excluded from the Regulation, with the key exception of the provisions relating to ranking transparency to which they are subject.

Platforms or search engines falling within these definitions will come under the scope of the Regulation regardless of their place of establishment, provided they offer their services to businesses that: (i) are established in the EU; and (ii) offer goods or services (via the relevant platform or search engine) to consumers located in the EU.

Focus on three key areas

The Regulation provides for three key areas: greater transparency; alternative and enhanced redress systems; and the ongoing monitoring of the Regulation itself to ensure it is keeping up to speed in a dynamic and ever-changing sector.

Transparency

In recognition of the fact that amending the contractual relationship or restricting or terminating the services an online intermediary provides can have a significant impact on business users, the Regulation aims to increase transparency around terms and conditions applicable to business users. Online intermediaries are therefore required to ensure that terms and conditions applicable to business users are easy to access and understand, and to provide users with at least 15 days prior notice before implementing any modifications to those terms.

They are also required to provide users subject to delisting or suspension with a statement of reasons for delisting at least 30 days before the termination enters into effect (with some limited exceptions, such as for repeated infringements). The statement of reasons must be sufficiently detailed to allow business users to ascertain whether there is scope to challenge the decision.

Previously, the issue of a company being prohibited from accessing a consumer base via an online intermediary's platform fell squarely within the question of abuse of dominance under Article 102 TFEU. The Regulation vastly expands this in scope, taking it from being an issue for online intermediaries with market power and making it applicable to all such companies regardless of their market power. This is therefore an example of ex ante regulation attempting to level the playing field, imposing a potentially significant monitoring burden on companies.

Of particular significance in other areas where greater transparency is required are the obligations to explain (i) the parameters used to determine ranking of search results; (ii) any preferential treatment a platform gives to its own products; and (iii) the use of MFN clauses.

The Regulation requires intermediaries to set out the general criteria determining search results rankings and, to the extent ranking can be influenced by payments, explain the nature and effects of such

payments. This mirrors the push by regulators for greater transparency in online practices under consumer protection law. One such recent example in the consumer space is the investigation by the UK Competition and Markets Authority (CMA) into the online hotel booking sector, which stipulated that any commercial interests behind practices such as the ranking of search results should be disclosed to consumers.

Vertically-integrated platforms competing with other sellers on the site are also required to describe in their terms and conditions any differentiated treatment given to the platform's own goods and services compared to those offered by business users. This is an issue brought to the fore in recent cases such as ongoing probes into certain of Amazon's practices vis-à-vis its business users.

Finally, to the extent most-favoured-nation (MFN) clauses are included in terms and conditions applicable to business users, platforms are required to publish a publicly available description of the economic, commercial or legal grounds for using MFNs. During the Regulation's passage through the European Parliament, the Parliament sought to impose stricter rules on certain provisions such as the use of MFN clauses. However, this has since been pared back, with the final wording returned to the Commission's original proposal obliging businesses to explain the grounds for using MFNs.

Nonetheless, this is still a potentially burdensome provision – it is unclear from the Regulation how much description is sufficient to meet this requirement, and setting out and justifying the use of MFNs could be complicated. Moreover, this will necessitate divergent approaches across EU Member States as the use of even narrow MFNs in some countries – such as Belgium and Austria – is prohibited in certain contracts completely.

The Regulation's transparency requirements in respect of preferential treatment of platforms' own goods and services or MFNs (considered most recently in the online hotel booking cases) will not affect the EU competition law position on these practices – the Regulation is intended to complement the existing competition law framework. The new rules on transparency and redress constitute a maximum standard insofar as this relates to businesses. Subject to competition and consumer protection law, Member States will not be able to impose stricter rules.

However, companies falling within the Regulation's scope should be aware that transparency requirements in relation to these issues will certainly facilitate the ongoing monitoring of them by European competition authorities. Moreover, there is a risk that the obligation with respect to increased transparency will highlight the commercially sensitive inner workings of platforms and search engines, with potential pressure on them to change certain business practices.

Effective redress

To address concerns that business users have not to date had sufficient access to effective tools to resolve disputes, platforms (other than those with under 50 employees and with a turnover of less than €10 million) will now be required to set up internal complaint handling systems and nominate at least two mediators with whom they are willing to engage in out of court settlements. The Regulation also envisages the right for industry organisations and associations to bring court proceedings on behalf of businesses to challenge non-compliance, while the new alternative dispute resolution channels will potentially open the door to spurious complaints from savvy business users seeking commercial leverage.

Moreover, enforcement of the Regulation will fall to Member States, who will be required to take "appropriate action" to guarantee that online intermediaries are compliant. While online platforms may hope the Regulation will serve to lessen the current political pressure on tech businesses, it creates

further challenges for a sector already under increasing scrutiny from regulatory enforcers and may well heighten the litigious environment in which big technology companies currently find themselves.

Ongoing monitoring

In order to monitor and ensure the continued effective functioning of online platforms, the Regulation established an "Observatory of the Online Platform Economy", made up of independent experts, who are to address issues such as algorithmic decision-making, data access and B2B commercial relations. The Regulation will be reviewed after 18 months (and subsequently every three years) to ensure it is keeping pace with developments in the market, with the potential for further legislative proposals and enforcement in the future.

Conclusion

It remains to be seen how big a burden the Regulation will place on businesses; this will ultimately depend on how strictly it is enforced and how onerously the disclosure requirements are interpreted. It is undeniably helpful for small businesses – and therefore indirectly consumers – to ensure that the online platforms we rely on are well-functioning. However, arguments have been made that obligations such as these could chill innovation – if not with respect to the larger and well-established players, might the increased disclosure, transparency and redress burden not have a disproportionately chilling effect on smaller businesses? The Regulation is, as it stands, reasonably limited in scope, but businesses would be wise to remember that this is not the defining point of their obligations. The Regulation marks a significant legal step to be taken amidst the wider institutional and academic discussion on the regulation of big tech companies – it is unlikely to be the last.

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