# Position Paper

## Position Paper on the Platform to Business Regulation

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**Summary**

The European Commission published proposal COM (2018) 238 final for a "Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services", on 26 April 2018. The proposal addresses issues that concern businesses, intermediaries and search engines with regard to transparency, fair business conduct and complaint handling. Bitkom welcomes the proposal´s aim to create a better level playing field for platforms and strengthening fair business conduct for all intermediaries and their business partners.

A predictable business environment is essentiall for trust in the platform economy and growth of all intermediaries and the businesses they facilitate. Transparency can strengthen trust and the relationships between platforms and their users, businesses and consumers alike. Thousands of platforms are providing services for their business partners in the EU. They have become one of the key players and elements of disruptive services, advancing the Digital Single Market (DSM).

Bitkom therefore welcomes the aim of facilitating a harmonized environment in the European Union with regard to platforms. Strengthening the internal market and legal harmonization will facilitate better cross-border relationships and help building a stronger, more attractive DSM. Business partners from other member states can also rely on rules regarding their relationships with an intermediary or a search engine, being of the same standard. While we welcome the aims and prospects of the proposal, some Articles require clarification or amendments to balance all relevant interests and make the regulation more applicable.

Bitkom appreciates the opportunity to give feedback on the proposal. Our main points concern the following:

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1. Regulation regarding platforms[1] should be as targeted and measured as possible; the provisions need to exclude legal uncertainty regarding scope and application.

2. Market access for new platform providers, service providers and businesses using platforms should be facilitated.
Additional regulatory provisions should be tested against necessity, particularly with regard to their impact on all affected business models. Fair and effective thresholds ought to be applied to avoid undue burdens and allow accurate focus on potentially harmful conduct.

3. New regulation should take account of existing regulation as well as non-state-regulation on platforms and on other stakeholders in the Internet eco-system. Identified problems in the digital market need to be tackled effectively, based on the principle of proportionality.

4. Legislation should be able to adapt in a more specific manner to different business models.

5. The segment about terms and conditions should be modified in order to avoid disproportionate bureaucracy.

6. Provisions on ranking need to take into account all existing and potentially overlapping legislation and already commonly implemented measures, prevent potentially negative impact on trade secrets and mitigate possible risks such as manipulation.

7. Complaint mechanisms and mediation rules need to be balanced, properly sequenced and provide only for adequate, proportionate transparency measures.

[1] The term „platforms“ shall be used in this position paper, encompassing both online intermediation services and online search engines, unless otherwise specified.

Bitkom would like to highlight the following details:

**(1) Targeted Regulation**

Regulation regarding platforms should be as targeted and measured as possible and focus on unfair / abusive conduct. Legal uncertainty regarding scope and application needs to be avoided. To prevent market failure and undue burdens, platforms with insignificant market relevance should be excluded from the most burdensome parts of the regulation such as provisions on T&Cs, ranking and complaint handling. The regulation should not hinder the development and growth of the platform ecosystem or set any undue limits with high regulatory barriers but should focus on ensuring the platform ecosystem is diverse and relationships are fair.

To limit potential negative impacts, i.e. costs for compliance, in well-functioning and balanced parts of the affected digital economy, Bitkom would welcome a more specific strategy, also in order to safeguard non-involved parties. Otherwise, existing regulation regarding transparency rules and business conduct (such as the GDPR, unfair competition law rules) would potentially have to be assessed again with regard to their fitness for providing a clear and comprehensive framework of platform regulation. Important principles such as contractual freedom need to be upheld at the same time.

Political and legal debates, e.g. the review of the AVMS Directive (2010/13/EU) and the review of the electronic communications legal framework, have to be taken into account. Double-regulation or inconsistent political decisions have to be avoided. The reviewed AVMS Directive, as politically agreed in principle, as well as the current Access and Universal Service Directives already cover some of the issues which are now put to legislative deliberation of the proposed Regulation. Therefore, we strongly recommend constraining the scope of the Platform to Business Regulation (Article 1) as follows:

*"This regulation does not apply to services or providers to the extent that the present Regulation provides for comparable rights and duties already laid down in Union law, in particular those stipulated by Directive 2010/13/EU as well as any amendments of this Directive on audiovisual media services, and by the proposed Directive establishing the European Electronic Communications Code."*

**(2) Clarifications of the Scope**

Furthermore, the current proposal does not provide for clear rules on scope and application. It addresses not only intermediary services but also search engines, while it does not consistently clarify in the specific provisions which rules apply to intermediary services and which to search engines.

The scope risks to be misunderstood to encompass platforms worldwide, even where they do not address the EU market or only have negligible commercial activities in Europe. In the extreme case, one European business user and European consumer registered on a platform situated in a third country are enough to trigger the application of the Regulation, which appears disproportionate and may create conflicting legal obligations in jurisdictions outside of Europe. We therefore suggest to limit the scope of application to platforms that target European consumers, in alignment with Recital 7. This also reflects an analogy to the established jurisdiction

developed on the basis of the Rome 1 Regulation (593/2008) Art 6 Para 1 b: „by any means, directs such activities to that country […]". This necessary clarification ensures that the rules are applicable and enforceable as well as creating a level playing field among all economic operators actively addressing the European market, while avoiding disproportionate extraterritorial application.

**(3) Duplications of Obligations should be avoided**

Legislation should be able to take different business models into consideration. As platform-based business models can range from sharing- platforms over search engines to travel booking and price comparison sites, from IoT to banking- systems and entertainment platforms, the differences among these models should be evaluated and adequately accounted for from a regulatory perspective. For most platforms - either B2B or B2B2C - not only competition law and unfair competition rules apply, but also some sector-specific rules as well (e.g. anti-money-laundry legislation, transparency duties, must-carry-regulation for audiovisual media services).

Every additional regulatory layer needs to be examined against the existing measures to prevent contrariety and duplication. We therefore, in general, welcome the fact that this regulation is restricted to B2B2C platforms which are information society services, providing online services.

Services which are already regulated by other legislation with the same legislative intention, such as telecommunications, audiovisual and financial services, should not fall within the scope of this regulation, since obligations are already in place. Regarding the services that would be covered by the proposed regulation, the specific provisions regarding transparency, contractual design and mediation require adjustments.

**(4) Terms and Conditions, Article 3**

The segment about terms and conditions should be modified in order to avoid disproportionate bureaucracy and incapacity of reactions from platforms on inadequate behaviour.

Given the importance of platforms to enable the success of their business users, many existing platforms have already embraced the European Commission's goal to make platforms a predictable environment, creating and outlining clear rules to access the platform and providing a wealth of information and guidelines.

As to Art. 3, it states that "Providers (…) shall notify to the business users concerned any envisaged modification of their terms and conditions". First, the term "envisaged" is unclear for a provider at what point a change of terms and conditions would require a notice. Second, it should be assessed whether notifications should be mandatory in all cases or whether material changes for the business user are a prerequisite for notification obligations. This could avoid a flood of useless e-mails and save time.

Furthermore, one should consider that in cases of new or so far unknown forms of fraud or other inadequate behaviour of a business user, a provider would be obliged to wait for at least 15 days to react with his terms and conditions on such incidents. Bitkom would also like to raise the question whether the 15 day period would need to be applied in cases where the changes of the Terms and Conditions would not have a negative effect/material change on the contractual partner.

Altogether, no need for a regulation in the segment of terms and conditions is obvious given the lack of market failure.

**(5) Ranking, Article 5**

Binding rules on ranking need to take into account all relevant existing provisions, prevent potentially negative impact on trade secrets and mitigate possible risks such as opening up processes to manipulation.

Transparency is an important facilitator of trust which is why many platforms already provide transparent information as envisaged by the proposal. Whatever their size, online intermediaries have a strong interest in both the success of their business users and the consumers' trust. This is why they have set up tools, analytics, APIs and information to support their business users and rules to ensure that the content, services or goods provided on the platforms are safe and secure for the consumer. Both, tools and rules, are used by platforms to compete with each other, either to differentiate their content, services and goods from others' to attract and retain consumers, or to create the best support to attract business users. Any regulation must be fully aware of this self-regulatory framework and the fact that platforms have to balance the interests of business users and consumers.

However, where such measures are not implemented and issues regarding transparency arise, provisions can facilitate an improvement in fair competition and trust between the contractual partys.

Nevertheless, it is important to understand that the ranking on an online intermediation service site is influenced by a variety of factors and filters. Some of these are completely out of the scope of the provider´s control, e.g. if a user decides to sort by price, location, specific technical features, etc. Such options are commonly known, so there is no practical need to write all the functioning down in terms and conditions.

As to search engines, and in respect of Art. 5 par. 2 Bitkom recommends to provide flexibility to platforms by simply referring to already published information. The principles of how all major search engines work and which factors they take into account while generating search results are publicly available in great detail anyway.

While the proposed Regulation explicitely safeguards against having to share trade secrets (Art. 5 par. 4), the need for intermediation services providers (Art. 5 par. 1) to provide 'reasons' behind the relative weight of ranking parameters could lead to having to disclose protected information. The level of predictability can be explained by general parameters , but not the reasons why parameters are weighted against each other in a particular way.

The obligation to provide further details would touch the core realms of the companies' trade secrets as referred to in Art. 5 par. 4 of the proposal. This goes especially for "the reasons for the relative importance of those main parameters as opposed to other parameters", Art. 5 par. 1. Not only does this risk revealing trade

secrets but could also allow rogue players to manipulate the ranking mechanisms, i.e. exploiting certain features with the aim to increase their ranking beyond reasonable SEO, which again is to the detriment of other business users who play by the rules.

**(6) Internal Complaint-Handling Mechanisms, Article 9**

Internal complaint handling is an effective tool to ensure both compliance with rules and a lasting business relationship between the contractual parties. Internal complaint systems are also very fast and cost-efficient for both parties, which is why many major intermediary services already implemented such mechanisms. Complaint mechanisms and mediation rules need, however, to be balanced andproperly sequenced. Only adequate, proportionate transparency measures should be implemented.

While a more general obligation to respond to complaints in an appropriate and timely manner may be acceptable, the necessity and added value of the current proposal to provide for additional rules for complaint-handling mechanisms is questionable. In any respect, Art. 9 par. 4 of the proposal provides for an excessive tool regarding the complaint: an annual list of all complaints filed. The reporting requirement has little added value to business users but a disproportionate burden on intermediaries. At this stage it is unclear what would be considered as a "complaint" in the first place. It is ambiguous and should therefore be specified. Furthermore, much of the information to be included in such reports would require companies to publish business secret data or data from which such information could be concluded as for example the number of users. We therefore urge to scrap such reporting requirements and, should these be retained, to limit the information to be provided to aggregated data with average figures.

**(7) Mediation, Article 10**

Mediation can be a very effective tool for settling disputes. However, it can only be effective if both parties are voluntarily willing to engage in good faith, rather than one being obliged to do so. Bitkom therefore urges the legislator to clarify that mediation is a voluntary process. Any mandatory mediation would be subject to abuse, particularly by business users who are suspected of fraud and other similar violations. Mediation has to be strictly voluntary and with both parties engaging in good faith.

The obligation for the providers to bear half of the total cost in any case is far away from a fair solution, as long as no safeguards against abusive utilisation of the mediation system are implemented. Bitkom therefore suggests the introduction of a good faith requirement to balance the interests of both partys involved, reflecting whether one party did not act in good faith. In case of vexatious or obviously unfounded claims, the mediator should have the option to require the business user to bear all costs.

**(8) Sequencing**

It would also be sensible to include sequencing in the proposal so that business users make use of internal appeal processes before pursuing external mediation or collective redress mechanisms. Internal complaint systems are very fast and cost-efficient for both parties and should therefore be exhausted first, before a mediator is involved.

Collective redress mechanisms can be an effective tool to address certain issues or breaches of law. However, in the case of the proposed Regulation, such an enforcement right may be ineffective for most market participants and additional burdening for platforms. Overall, the benefits for business users should be carefully balanced against the possible negative effects for platforms. The redress mechanism could also have unintended negative consequences for customers who will be exposed to low-quality and possibly harmful content because platforms will be reluctant to take offered content down for fear of litigation. This also means that "good" business actors, playing by the rules, will be disadvantaged as their content will be harder to find.

Generally, there should be more built-in safeguards against abuse of such litigations. It should be ensured that the qualified entity has no institutional self-interest in pursuing claims. To this end, all proceedings should require the per-case authorisation of business users, i.e. an active opt-in, in order to ensure there are no claims brought in cases where there are actually no complaints from business users. This was one of the key principles in the European Commission's Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

**(9) Application, Article 15**

While many intermediaries already provide transparent information and enable effective internal complaint mechanisms, some additional measures would need to be implemented, depending on how the proposal develops. Some platforms would also need to restructure their internal complaint handling mechanisms to provide for the required information and reports in a more timely manner. Last but not least, Bitkom suggests to provide businesses with a reasonable and adequate implementation period of the Platform to Business Regulation of 1 year.