

# Committed to Europe



## Promoting fairness in online intermediated trade

### Orange's position on the European Commission's proposal for a Regulation on promoting fairness and transparency for business users of online intermediated services

A proposal for a “*Regulation on promoting fairness and transparency for business users of online intermediated services*” was published on the 26<sup>th</sup> April 2018. It addresses the issues of unfair contractual clauses and trading practices identified in platform-to-business relationships, notably requiring transparency from large platforms supported by dispute resolution, mediation and action against inappropriate contractual practices<sup>1</sup>.

Orange welcomes the Commission's initiative to address issues identified in the context of online intermediated trade and globally supports its orientation. At this time, such an intervention is relevant and proportionate considering specific issues at stake in relation to platforms' activities. We understand this proposal as the beginning of a process and of a legislation which may evolve and adapt over time. Such a targeted and evidence based approach is the most likely to succeed from a legislative point of view and to provide concrete benefits in the field.

Orange considers that in parallel, unfair commercial practices in the wider context of Business to Business relations should also be addressed at European level, tackling legal fragmentation in this domain. The proposal should generally be kept distinct from addressing such unfair commercial practices or competition law concerns, thus avoiding any confusion or ambiguity. However, Orange believes that its outcome will ease competition and contractual law enforcement, thanks to improved transparency and expertise that will be gathered through the Observatory's activity.

We welcome the fact that the proposed article 2.5 specifically addresses online search engines in a technologically-neutral manner, so that services like voice assistance are also covered. In addition, the possibility to conduct an overall assessment of the contractual relationship between the online intermediation service provider and the business user is a progress, with the involvement of the “specialised mediators” (Art. 11): Orange considers that even if some provisions may have been individually negotiated between the platform and the business user, this should not deprive the business user from the protection granted by the Regulation (Rec 12). Finally, Orange has been asking for and welcomes the fact that legal proceedings may also be initiated by relevant public bodies (Rec 27 and Art 12.1). We would even support an exclusivity of public bodies in this respect.

Orange has four important comments to the current proposal. Firstly, the grounds for intervention suggested by the Commission could be further clarified; it is justified to target the functionalities of online platforms, implying asymmetries of information that constitute market failures which directly harm the businesses and indirectly the consumers. Secondly, services that may be qualified as online intermediation services and that already fall under sector-specific provisions should be exempted from the Regulation to avoid legal inconsistency. Thirdly, in order to focus on those online intermediation services having a major impact on the EU market, a threshold based on the number of active users on a pan-European scale should be set. Finally, to ensure that the Regulation is equally applicable in all Member States, all commercially offered online intermediation services should be covered. This is to also include online intermediaries supplying commercial services not against monetary payment but based on the processing of users' data.

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<sup>1</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-238\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-238_en)

## Orange supports a political intervention based on the functionalities of platforms

Platforms activities are by nature prone to specific forms of information asymmetry. Therefore the merits of a transparency requirement are unquestionable. Information asymmetry is a well-identified cause of market failure which needs to be redressed, as provided for by the draft regulation. Therefore references to concepts derived from competition law or laws against unfair contractual clauses (such as market or bargaining power) are irrelevant and unnecessary because market failures to be addressed are linked to the online platforms' functions only.

Therefore, there is no need to refer to competitive issues to justify such an intervention. In addition, relating the proposed Regulation to competition concerns would either subject the proposal to criticism of redundancy with competition law, or imply departure from the solid economic and legal grounds of competition law.

## Orange calls for the exemption of electronic communication services

The current draft Regulation is unclear with the situation of Electronic Communications Services (ECS) and whether they also fall in the scope of this new text. Those ECS as defined in the new European Electronic Communications Code (EECC) are already covered by comparable sector-specific provisions. In addition, Internet Access Services (subcategory of ECS) and electronic network providers already abide by strict rules such as transparency and non-discrimination in the scope of the Open Internet Regulation. As a consequence, to avoid any conflicting rules and ensure legal certainty, the ECS should be explicitly exempted from the proposal's scope.

## Orange calls for the introduction of a threshold to target major online platforms only

If the nature of the problems addressed by the regulation does not depend on the size of the platform, their quantitative impact on businesses critically depends on their size, defined as the number of active users of the platforms. As an example, if a platform uses hidden bias in its recommendation or search algorithm or if it enforces capricious changes to its algorithm, the negative impact on businesses will be as large as the number of active users of the platform. Therefore the benefits of imposing transparency requirements will be likely to exceed the costs of implementing these requirements if the platform has a large number of users.

For reasons of proportionality, we suggest to limit the scope of the Regulation to what one could consider as "the most important" online platforms and to exclude the "small" ones. In this respect, a threshold typically based on the number of active users on a pan-European scale would be appropriate. This proposal is inspired by the approach adopted in a French law on platform loyalty which is based the same kind of criterion: monthly number of connections<sup>2</sup>.

## Orange proposes to extend the scope to cover all commercially offered online intermediation services

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 which are funded based on processing 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, all commercially offered online intermediation services should be covered. The definition of online intermediaries should not depend on the criteria whether there is an established contract with the consumer based on consumer law.

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<sup>2</sup> Article 1 of Decree dated 29/09/2017

<https://www.legifrance.gouv.fr/eli/decret/2017/9/29/ECOC1716648D/jo/texte>