

POSITION ON THE PROPOSAL FOR A PLATFORMS-TO-BUSINESS REGULATION

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Introduction

IAB Europe notes the European Commission's efforts to reduce legal uncertainty and fragmentation in the online platform environment with the introduction of the *proposed regulation on promoting fairness and transparency for business users of online intermediation services*¹. However, the draft Report of the European Parliament's IMCO Committee has given rise to concerns amongst players in the online advertising ecosystem, in light of a potential extension of scope to include online advertising serving tools and online advertising exchanges (hereinafter referred to as 'online advertising platforms'). IAB Europe therefore respectfully presents the following points for consideration:

- The proposed Regulation aims to address aspects of the user experience online **specifically in the context of online intermediation**, addressing transparency in relation to terms and conditions, ranking of goods and services, delisting and suspension of users from a platform, treatment of data, and contract clauses. At the same time, it also aims to provide transparency to small businesses about these aspects, to avoid any abuse by online intermediation services and search engines and to give all businesses equal opportunities.
- IAB Europe recognises potential ambiguities in the interpretation of the text wherein the type of activity that our member companies engage in for their advertising products is out of scope, but the *services* in which they also engage may be perceived as falling within scope. However, the absence of a contractual relationship with consumers means that online advertising platforms remain beyond the file's remit.
- In light of this, we believe the text should maintain the clarification in Recital 9, explicitly stating that online advertising serving tools or online advertising exchanges do not fall under the category of online intermediation services, meaning they have no direct effect on consumers, and should therefore remain out of scope of the Regulation going forward.

Analysis: online advertising v online intermediation services

Upon analysis of the Commission's proposal, IAB Europe initially concluded that online advertising platforms are not likely to fall within scope. This analysis centered on a number of key factors:

- Recital 9 to the proposed Regulation expressly excludes online advertising serving tools and online advertising exchanges from its scope of application, where these are not intended to facilitate direct transactions involving consumers;
- In that regard, the notion of consumer is narrowly construed for the purposes of the proposed Regulation. Recital 10 and Article 2 are clear that only natural persons are included in this definition and only where they are not acting within the scope of any trade or business they may carry out;

¹ Available here:

[http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2018/0238/COM_COM\(2018\)0238_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2018/0238/COM_COM(2018)0238_EN.pdf)

- With regard to Article 2’s definition of ‘online intermediation services’ more specifically, the definition hinges on the cumulative conditions under points (i), (ii), and (iii):
 - i. IAB Europe’s member companies include information society services as defined by Article 1(1)(b) of Directive (EU) No 2015/1535, therefore condition (i) is met;
 - ii. Our member companies do “allow business users to offer their goods or services to consumers” including “with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded. Therefore, one may argue, condition (ii) is met;
 - iii. However, condition (iii) stipulates that the service is provided to both business users and consumers on the basis of contractual relationships. Moreover, it requires that these contracts are between on the one hand the provider of those services and, on the other hand, each of those business users and consumers. Online advertising platforms do not provide such a function, even if the notion of consumer was construed more widely. Thus, condition (iii) is not met, on the basis of which IAB Europe concluded that online advertising platforms fall outside of scope of the proposal.

Our view is that the Commission’s proposal takes the right approach by excluding online advertising platforms. With regard to the goal of providing transparency for consumers making use of online platforms, typical display advertising is presented in a distinct manner and is easily recognisable. This is because it does not form part of the content – often appearing distinctly between paragraphs of text and postings, or around content (either on the sides, top, or bottom). The proposal is meant to address situations where the nature of a post is ambiguous to users due to it being incorporated as part of content or search results.

From the perspective of smaller businesses being displayed on an online platform through online advertising tools, there is no possibility for any confusion as to why that advertising appears there, because businesses have to actively buy the advertising space to appear. Online advertisement placement does not happen organically – a business will have had to employ the use of advertising platforms which help facilitate the buying of advertising space on websites. In doing so, the business would not only be aware of, but likely have chosen, which types of websites and ad placements they wish to buy. The advertising platforms then facilitate that transaction through various methods, including real-time auctioning and direct buying of advertising space.

Notable amendments proposed by the IMCO Committee

- IAB Europe draws attention to **Amendment 102** to Recital 9 which deletes language indicating that “[...] this Regulation should not apply to online advertising serving tools or online advertising exchanges which are not provided with the aim of facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers.” **As explained above, the inclusion of online advertising serving tools and advertising exchanges in the scope of the Regulation does not in any way aid in achieving the goals set out by the proposal.**
- IAB Europe notes with concern **Amendment 76** to Recital 5 which removes the “commercial” distinction to transactions, on the basis that “it is appropriate to include all

transactions including those that are not strictly commercial, such as the provision of data in return for services”. The goal of this Regulation is to provide transparency for **business users** and **consumers**, so it is appropriate that the scope is limited to commercial transactions. The GDPR² already provides extensive protection for the personal data of users of online platforms, particularly in Chapter III on Rights of the Data Subject.

- IAB Europe welcomes **Amendment 116** to Recital 10, proposed by MEP Charanzova, stating: “[...] For the purpose of this Regulation, therefore, online intermediation services and search engines that allow solely direct or target offers of goods and services from businesses to other businesses are excluded because while there may be an imbalance relationship, there is no direct consequence on consumers.”
- IAB Europe also welcomes the clarification offered in **Amendment 236** to Article 1 which adds text stating: “This Regulation shall not apply to: online advertising serving tools or online advertising exchanges; online payment services; and online intermediation services who solely direct or target offers of goods and services from businesses to other businesses”.

Conclusion

IAB Europe believes that online advertising companies, like other businesses, should be free to determine themselves under which conditions they make their services available in Europe. We therefore respectfully present the following positioning on the proposed file:

- Online advertising serving tools, as well as online advertising exchanges, should remain outside of the scope of the file. The Commission’s proposal already achieves this through Recital 9 but including it in Article 1 on the scope would be welcomed by IAB Europe and its members for further legal certainty.
- The proposal’s aims would not be realised through the inclusion of online advertising platforms within the scope, as the issues being addressed are not relevant for online advertising companies.

Furthermore, IAB Europe believes that there must be transparency about what the most important factors are for determining pricing and ranking, findability of non-sponsored content should be ensured, and that clear labelling of sponsored content in ranking results must be ensured. Specific details in pricing and ranking algorithms must be respected as legitimate trade secrets, and business users should be provided with full access to legally collected consumer data which is generated through the consumption of this business users’ products or services through the online intermediation service, without prejudice to applicable data protection and privacy laws. No government authority should influence the choice of business model, price, ranking, algorithm, or the terms and conditions agreed freely upon by business partners, as long as the agreement is in compliance with current legislation.

For additional information, please contact [Grace Earley, Public Policy Assistant](#) at IAB Europe (earley@iabeurope.eu).

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).