ECOMMERCE EUROPE POSITION PAPER

Proposal for an EU Regulation on fairness and transparency in online platform trading

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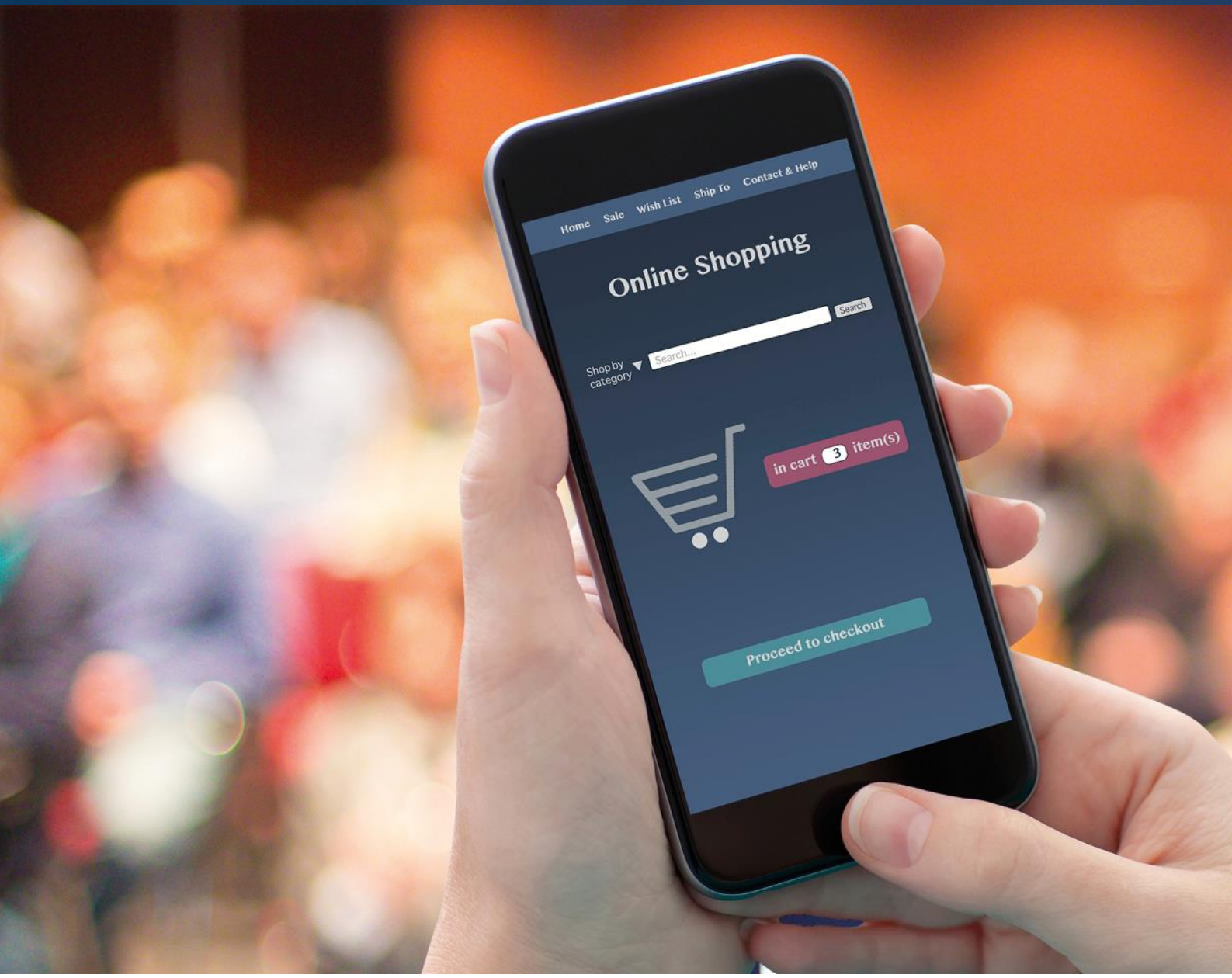

ECOMMERCE EUROPE

INTRODUCTION

On 26 April 2018, the European Commission proposed an EU Regulation on fairness and transparency in online platform trading, together with the creation of an Observatory on the online platform economy. This initiative followed the commitment made in President Juncker's 2017 State of the Union address to "safeguard a fair, predictable, sustainable and trusted business environment in the online economy". The European Commission's objective is putting in place a harmonized framework for minimum transparency and redress rights, which should protect companies that depend on online platforms for reaching consumers, while crucially safeguarding platforms' innovation potential.

In September 2018, the European Parliament's IMCO Committee has released its draft report prepared by the Rapporteur MEP Christel Schaldemose on the draft Regulation. The original idea of this proposal is to define elements of transparency and predictability in the Platform-to-Business relations without prescribing any specific unfair contract terms. However, the amendments proposed by the Rapporteur extend it to add elements of content of the terms and conditions. This updated position paper takes also into account and reflect on the changes proposed by MEP Schaldemose.

RECOMMENDATIONS FOR POLICYMAKERS

1. Support the soft-touch approach of the Commission's Proposal

Ecommerce Europe believes that this Regulation has the potential to bring more clarity in the relations between online merchants and the platforms through which they sell. Considering that some Member States are legislating in this field, a single, fully harmonized European framework for "platforms-to-business" relations would bring more legal certainty for all parties involved. Although Ecommerce Europe questions some elements of the proposal and asks for more clarity on some specific details, we will in general support this proposal as far as the soft-touch approach of the Commission will be kept.

In that perspective Ecommerce Europe does not support the suggestion of the EP IMCO Rapporteur, MEP Christel Schaldemose, to introduce the notion of 'fairness' as a part of the subject matter and scope of the proposal, as this will have a negative effect on this soft-touch approach by introducing normative rules for the purely B2B relations, as the relation between platform service providers and business users is. This relation is governed by contractual freedom and only few mandatory provisions to regulate this B2B relation. Such a fairness standard will be unclear and hard to assess because of the diversity of contractual relations and the several different business models and interests that exist in P2B relations. Thus, without any doubt, this will create legal uncertainty. Without substantial proof for the need of such an open norm for P2B business relations, which are commonly governed by contractual freedom and only few mandatory regulation, Ecommerce Europe does not see any need to bring this notion of fairness - which is creating legal uncertainty - into the regulation.

As the proposed Regulation is purely directed to B2B relations, Ecommerce Europe does not support either the extension of the scope of the Regulation to Business-to-Consumer relations and consumer protection, as suggested by MEP Schaldemose for ancillary goods and services information and on default options. Although Ecommerce Europe generally supports the Rapporteur's ideas on consumer protection, this subject should not be dealt with in a regulation having only B2B relations as a subject and should preferably be dealt with in the context of the New Deal for Consumers package, especially when considering that neither evidence nor a proper impact assessment have been provided to support

such an extension to B2C relations.

This Regulation introduces principle-based obligations that are supposed to increase transparency, for instance with regard to terms and conditions and how ranking in search results works. In this context, Ecommerce Europe also recommends the co-legislators to keep the relative business safeguards, since we would not support an obligation for online platforms to disclose trade secrets such as algorithms.

In addition, Ecommerce Europe welcomes the fact that the draft law provides for a framework for setting up complaint handling systems and meditation between business users and platforms. In this context, we support self-regulation and, as representative of the e-commerce industry, we would like to engage with other stakeholders in setting up the necessary self-regulatory framework. However, Ecommerce Europe does not support the proposal on representative court action, as it fails to provide the right balance between collective and individual redress actions.

2. Align the territorial scope with the provisions of Rome I and clarify the material scope

Article 1 of the Commission's Proposal provides for the material and territorial scope of the proposed Regulation. Ecommerce Europe supports the provision on the material scope as well as the exception for small intermediary platforms that employ fewer than 10 persons and that have a turnover not exceeding € 2 million. However, Ecommerce Europe strongly recommends replacing the term "persons" with "FTE" (full-time equivalent), as the current wording would bring small platforms with part-time employees only representing a total FTE under 10 (the smallest platforms) unnecessary under the scope of this Regulation.

Furthermore, online general search engines can also be important sources of Internet traffic for businesses and can affect the commercial success of corporate website users offering their goods or services online in the internal market. The ranking of websites by the providers of online search engines, including of those websites through which businesses offer their goods and services to consumers, has an important impact on consumer choice and the commercial success of those corporate website users. Thus, even in the absence of a contractual relationship with their corporate website users, online general search engines equally exhibit a dependency-enabled issue, specifically for potentially harmful ranking practices, which may affect business users.

In that perspective, Ecommerce Europe asks for more clarity in how far online search engines should be subject to the provisions of the proposal. Although Article 1.1 states that online intermediary services and online search engines are subject to this Regulation, nearly all the provisions of the regulation are only directed to providers of online intermediary services, except for Articles 5.2 on ranking criteria, 12.1 on judicial proceedings and 13.2 on codes of conducts that give limited provisions for providers of online search engines. In the view of Ecommerce Europe, online search engines that facilitate the initiating of direct transactions between business users and consumers and provide this service to business users on the basis of contractual relationships between, on the one hand, the provider of the search engine services and, on the other hand, those business users should also be subject of the provisions in the Articles 3-12 of the proposed regulation, as those business users of online search engines services are more or less in the same position and need transparency and fairness as business users of online intermediary services. That is why Ecommerce Europe pleads for extension of the scope of the articles 3-12 of the proposal also to those specific providers of online search engine services.

Ecommerce Europe does not support the proposed provision on territorial scope in article 1.2. As Ecommerce Europe understands it, the Regulation will apply to all platforms wherever they are based, offering intermediation services to business users based in the Union that use these platform services

to do business with consumers located in the Union. Ecommerce Europe is asking for further clarification from the text of the provision and the Commission on the interplay between this provision on territorial scope and the Rome I Regulation[1]. In the view of Ecommerce Europe, Article 1.2 of the Proposal seems clashing with Article 3 of Rome I on the freedom of choice of applicable law and Article 4 of Rome I on the law of the residence of the platform provider, which is applicable in absence of choice.

Furthermore, to avoid confusion and different interpretations, the wording of Article 1.2 of the Proposal should be aligned with the wording of Article 6.1 of Rome I on consumer contracts. Ecommerce Europe advises to replace "[…] doing business with consumers located in the Union," by "direct their commercial or professional activities to the country or to several countries including that country where the consumer has his habitual residence,". In this perspective, Ecommerce Europe strongly recommends the Commission to reconsider the proposed provision on territorial scope.

3. Transparency, terms and conditions, suspension and termination, ranking, differentiated treatment, access to data and restrictions

The articles 3 till 7 of the Proposal oblige intermediary platforms to provide for transparent and easily accessible terms and conditions for their business relations, in which:

- the grounds for suspending or terminating the platform activities of business users,
- the main parameters determining ranking and the options to influence that ranking,
- any differentiated treatment the platform gives to itself or other business users,
- the access to data processed in the platform environment and restrictions for business users on offering their goods and services by others means than the platform

are clearly set out.

Ecommerce Europe generally supports the provisions in the articles 3 till 7 of the Proposal as they provide, in a clear way, for the necessary transparency on the most relevant issues for business users in their relation with intermediary platforms. Ecommerce Europe also welcomes the clear rules on notification of changes in terms and conditions of the platforms and the obligatory transition period of at least 15 days as it will give business users a reasonable time to anticipate on and adapt these changes.

However, as 15 days can be a short period in case the envisaged modifications require businesses to make significant technical adjustments to its goods or services we welcome the suggestion of Rapporteur Schaldemose to extend the notification period for those modifications that, seen their nature and character and obvious for the intermediation service provider require a longer period than 15 days to be technically implemented and provided that business users in such cases have the opportunity to accept the modifications immediately or at an earlier stage than the extended period. Ecommerce Europe, however, does not support a fixed extension to 30 days as such a fixed period doesn't allow flexibility and is not needed as the provision already provides for a period of **at least** 15 days and thus allows and obliges for a longer period in cases needed.

Furthermore, Ecommerce Europe sees a risk of over-communication towards sellers by platforms. In light of Recital 15 of the Regulation, which says "[…] Sudden modifications to existing terms and conditions may significantly disrupt business users' operations. […]", it should also be considered that some changes in terms and conditions are beneficial. However, these positive changes, for example the lowering of listing fees for sellers in reaction to a competing platform's commercial decision, could

[1] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

not apply before 15 days despite being positive for the sellers. Furthermore, the introduction of new product categories or features, in itself neutral or even positive changes for sellers, would equally require prior notification. Since terms and conditions are generally public information, this has the unwanted effect of giving competitors a 15 days heads-up on competitively relevant business decisions. The same accounts for when platforms need to act quicker for interests that clearly outweigh the interests of business users. Therefore, Ecommerce Europe suggests making an exception for beneficial terms and conditions, the introduction of new product categories or features or when quicker intervention is based on interests that clearly outweigh the business users' interests, in the sense that they could be applicable immediately after notification. In that perspective, Ecommerce Europe welcomes the suggestion of Rapporteur Schaldemose that submitting new goods or services on the online intermediation service during the notice period shall be considered to be a clear affirmative action to waive the notice period, although we would prefer a regulation allowing the trader to waive the notice period by any clear affirmative action.

While we generally support the proposed provisions, Ecommerce Europe has some doubts on the wording of Article 3.1.(c) where the provider of online mediation services shall ensure to set out in its terms and conditions the "objective grounds" for decisions to suspend or terminate the business users' activities on the platform. As the meaning of "objective" in relation to grounds can vary, it is very unclear what is meant by "objective grounds". This will create unnecessary legal uncertainty. That is why Ecommerce Europe suggests the policymakers to further clarify the interpretation of "objective grounds" or delete the word "objective" in the provision of Article 3.1.(c).

Ecommerce Europe is also concerned by the proposal of Rapporteur Schaldemose on Article 4.1 introducing and information obligation on the reasons of a decision to suspend, delist or terminate the online intermediation services, of at least 15 days before implementing this decision. In the view of Ecommerce Europe, such a strict period does not allow for flexibility on earlier suspension, delisting or termination based on transparent contractual stipulations or evident and serious breaches of contract that in a normal B2B relation are seen as appropriate. It will also limit intermediaries' ability to apply proactive measures against fraud, unsafe products, inappropriate content and other abuses that need quick response. That is why Ecommerce Europe supports a provision that doesn't opt for a fixed period but obliges the online intermediation service provider to notify his decision "without undue delay". We alternatively would only support a fixed 15-day notification period when it explicitly allows for exceptions in case of abuse or non-compliance that obviously require a quicker response.

Furthermore, Ecommerce Europe does not support the wording of Article 5.1 on ranking where the provider of online intermediation services "shall set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters". In the view of Ecommerce Europe, setting out the reasons for the relative importance of the parameters will most likely force intermediary platforms to disclose essential business models and secrets. Thus, Ecommerce Europe does not support any provision that unnecessarily forces companies to disclose essential business information or secrets. That is why Ecommerce Europe suggests deleting the words "the reasons for" from the provision in Article 5.1 to make clear that platforms only need to provide information on the relative importance of the main parameters determining ranking and not provide for the more sensitive information on the reasons for this relative importance. With regards to the draft IMCO report, Ecommerce Europe does not support the suggestion of Rapporteur Schaldemose to introduce a non-discrimination obligation (Article 5.1.1(a) - amendment 37) for the appliance of individual parameters determining ranking since, on the one hand, her proposed obligation mainly guarantees free competition which subject should not be dealt with in this P2B Regulation and, on the other hand, no proof is given that existing European competition and antitrust legislation is not fit to solve the envisaged problems on discrimination in ranking.

Finally, Ecommerce Europe does not support the wording of Article 6.2.(c) where the platform in relation to "**any** differentiated treatment" shall provide for a description of "**any** direct or indirect remuneration charged for the use of the online intermediation service". According to the interpretation of Ecommerce Europe, since the word "any" is used twice, this obligation would in practice mean, on the one hand, that platforms have to adjust their terms and conditions any time a remuneration is charged, which is practically not feasible and, on the other hand, would be obliged to fix their remuneration fees in a standard way, leaving no room for individual contractual agreements on remuneration and thus hampering innovation and competition on remuneration for platform services. To make clear that it is only a general information obligation on remuneration and the effect it has on differentiated treatment, Ecommerce Europe strongly advises to remove the word 'any' in "any differentiated treatment" and in "any direct or indirect remuneration charged for the use of the online intermediation service".

Furthermore, Ecommerce Europe supports the provision on Access to data in Article 7, as it will enhance transparency for business users on their access to personal data and other data generated through the provision of the online intermediation service, which access is undoubtedly of eminent importance for successful online commerce. However, Ecommerce Europe misses a fundamental reference to the General Data Protection Regulation (GDPR), which is applicable to all platforms and business users falling under the scope of the proposed Regulation. This means that, for the processing of and access to personal data generated through the provision of the intermediary platform services, the intermediary platforms as well as the business users of this platform service - in their respective relations with the consumer[2] - have to be compliant with the provisions of the GDPR. In that perspective, Ecommerce Europe supports the call of business users of the intermediation services asking for an explicit reference, in the provision of article 7, to the applicability of the GDPR and an obligation for providers of online intermediation services that fall under the scope of the proposed Regulation to build their platform services in such a way that business users of the platform are enabled to be compliant with the GDPR and, as far as Business-to-Consumer contracts are concerned, with other mandatory EU Consumer Law.

4. Internal complaint-handling system, Mediation and Representative court actions

a. Internal complaint-handling system

Overall, Ecommerce Europe welcomes the provisions of Article 9 of the Proposal on a mandatory, easy accessible internal complaint-handling system for providers of online intermediation services. On the one hand, the provision provides for a detailed and mostly balanced principle-based legal framework for transparent internal complaint-handling while, on the other hand, it provides for enough entrepreneurial freedom for providers of intermediation services to build their internal complaint-handling in conformity with their business identity, goals and profile.

Nevertheless, Ecommerce Europe does not understand the *ratio* of the provision of Article 9.4 of the Proposal, which would be excessively burdensome for providers of online intermediation services. In particular, Ecommerce Europe does not understand why a yearly overview of the functioning and effectiveness of an **internal** complaint-handling system should be disclosed to the general public and not only to the relevant participants in online intermediation services, meaning the business users of the platform and those who are interested in participating in the intermediation service.

[2] i.e. Platform-to-Consumer (P2C) for the platform service rendered to the consumer and Business User-to-Consumer (BU2C) or the sales or service contract concluded by the trader and the consumer.

In the view of Ecommerce Europe, the practical handling of internal complaints should not be public information but confidential, in particular considering its internal character and the interest and privacy of the complaining business user and the provider of the intermediation service. The same accounts for settlements made to solve complaints lodged. Furthermore, practice shows that a relatively high percentage of claims lodged in internal complaints handling systems actually are not complaints but requests for information or instructions.

In that perspective, Ecommerce Europe does not see any need for the proposed extensive information obligations for providers of online intermediation services, which will probably lead to the disclosure of internal and confidential information to the general public. Considering the interests of the parties involved, Ecommerce Europe strongly recommends restricting the information on the functioning and effectiveness of the internal complaint-handling system. An obligation to disclose on a yearly basis to the business users acting on their platform and those that consider engaging with that platform, a general overview of most frequent complaints featuring aggregated or average data on how and how fast they are solved, should be sufficient.

b. Mediation

Overall, Ecommerce Europe welcomes the provisions on mediation of Articles 10 and 11 of the Proposal. This provision would establish a clear legal framework, which provides on the one hand for an easy accessible out-of-court mediation system that, on the other hand, provides for enough leeway for involved parties to shape their relation in the way they prefer and mainly providing for transparency rules. While mediation should be open to all sellers, it is important to underline that internal complaints handling systems are usually faster and more efficient. This is why Ecommerce Europe calls for mediators to consider the fact whether sellers have exhausted internal procedures before accepting mediation claims. In other words, we suggest introducing an obligation for mediators to redirect parties to the internal mechanisms first, before being admissible to the mediation procedure.

Furthermore, Ecommerce Europe is concerned about the provision on costs of the mediation in Article 10.4 of the Proposal. Although, we can overall agree on the principle that platforms, as the stronger party, have to bear at least 50% of the total mediation costs, Ecommerce Europe believes that it is particularly unfair to make the platform pay these costs in cases where the mediation claim of the business user is obviously unfunded, without any ground, abusive or a repeated mediation claim coming from one party on the same or similar subject matters that have already been decided on definitely. That is why, in such cases, Ecommerce Europe suggests introducing in Article 10.4 a fair and reasonable exception on the obligation for platforms to bear at least half of the total costs.

In that perspective, Ecommerce Europe welcomes the suggestions of Rapporteur Schaldemose obliging business users to engage in mediation in good faith (Article 10.4 and 10.4a) allowing, on the one hand, online intermediation services not to engage in mediation where a business user does not act in good faith and, on the other hand, providing for an exemption on the 50% costs rule in cases where the mediator determines that the business user has not acted in good faith.

c. Judicial proceedings by representative private and public organizations

To tackle the problem that individual business users, for various reasons, cannot take individual court action against providers of intermediation providers or search engine services, Article 12 of the Proposal provides for a right for representative non-profit organizations or associations and public bodies set up in Member States to take action before national courts in the Union, to stop or prohibit any non-compliance by providers of online intermediation services or online search engines with the requirements of the proposed Regulation. This right will be without prejudice to the rights of business

users and corporate website users to individually take action.

Ecommerce Europe does not support the provision in Article 12 of the Proposal as we do not see - by absence of a proper assessment and without any request from the involved market parties - any need for public bodies to interfere in a purely Business-to-Business relation that is basically ruled by non-mandatory legal provisions and contractual freedom. If there should be any representative action, this should be restricted to representative business organizations or associations. Consequently, Ecommerce Europe does not support the suggestion of Rapporteur Schaldemose that public bodies should be set up or nominated in all Member States in order to ensure that the provisions in this Regulation will be enforced throughout the Union.

As Ecommerce Europe generally favors a uniform EU Single Market, it cannot support the provision in Article 12, which does not provide for the essential uniformity by leaving the decision up to the Member States on which entities would be entitled, thus leading to a diverse pattern of collective redress all over the EU.

Furthermore, the provision in Article 12 does not provide for rules on jurisdiction and applicable law in cross-border representative court actions. Parties involved need the necessary certainty on jurisdiction and applicable law in cross-border cases.

Finally, Ecommerce Europe believes that the character of the provision in Article 12.3 of the Proposal is unclear, where the representative court action right is stated to be without prejudice to the rights of business and corporate website users to take individually action before competent national courts. For instance, does it provide for an opt-out or opt-in mechanism and what will be the effect of the outcome of representative court action on the individual court action and vice versa?

Considering the many unsolved questions, the lack of clarity of the provision of Article 12 and the fact that there is absolutely no proven need for injunction actions by public bodies and the fact that involved market parties never asked for such a collective redress mechanism, Ecommerce Europe strongly advises policymakers to reconsider this provision taking into account the concerns mentioned above.

5. Codes of conduct

As Ecommerce Europe generally supports self-regulation, it consequently supports Article 13 of the Proposal encouraging the drawing up of Codes of conduct for providers of online intermediation services or search engine services, taking into account the specific features of the various sectors in which online intermediation services or search engine services are provided for.

6. Entry into force and application

In the view of Ecommerce Europe, six months from the day of the publication of Regulation on the EU Official Journal is far too short for businesses to properly implement the new provisions into their complex business and contract models. That is why Ecommerce Europe pleads for a transition period of at least one year.

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