

Response to the European Commission Proposal on Fairness in Platform-to-Business Relations

News Media Europe (NME) represents the progressive news media industry in Europe – over 2200 media companies including newspapers, radio, television and internet. News Media Europe is committed to maintaining and promoting the freedom of the press, to upholding and enhancing the freedom to publish, and to championing the news brands, which are one of the most vital parts of Europe's creative industries.

Recommendations

- **NME strongly welcomes the proposed Regulation which seeks to level the playing field for business users and corporate website users in relation to online platforms and is a crucial step in fostering a more open, fair, and inclusive Digital Single Market;**
- **NME regrets that the main weakness of the proposal relates to transparency requirements on rankings, especially as regards online search engines, where more far-reaching transparency measures are warranted to safeguard freedom of expression in the online space and to ensure fairer conditions for news media companies to conduct business;**
- **NME believes that other areas of the proposal where further reflection is warranted include terms and conditions, codes of conduct, and notably access to data, where strong concerns currently exist as regards potential abuses of dominance by certain online platforms within the framework of the implementation of the General Data Protection Regulation, which are likely to exert a lasting and negative impact on the EU data economy.**

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The proposal viewed from the European news media industry

The European news media industry is a modern industry that offers EU citizens news and experiences on all platforms and channels, both online and offline. Our industry innovates and invests in services, products, technology and content which underpin quality journalism in the digital economy. Our products remain, as they always have, a cornerstone of democracy.

However, the rise of online platforms, and especially of social platforms and online search engines, has disrupted the way in which news media companies conduct their business. Such platforms call into question the ability of news media companies to fulfil their role as public watchdog, given the difficult questions that they raise regarding the sustainability of the business and financing models of news media companies.

While a definitive answer to this question remains elusive, it is clear that the European news media industry relies on its successful insertion in the Digital Single Market to realise its democratic, cultural, and economic potential. In that context, we note that the European Commission proposal on Fairness in Platform-to-Business Relations is a crucial step in that direction and in fostering an open and fair Digital Single Market.

Under current EU rules, providers of search engines do not have to disclose any of the parameters used to determine the relative prominence of search results in the rankings they provide. Yet, this is problematic because citizens rely on algorithmic search engines to access news content, based on the understanding that search engines do not act as arbiters of truth, and because news media companies rely extensively on online search engines to distribute their content under fair conditions.

How news content accessed online

Increasingly so, the two main methods of accessing news online consist in, first, accessing news indexed in search engines, and second, accessing news shared on social platforms. The proportion of news content accessed directly through corporate websites is comparatively small.

Evidence of this can be found in the Oxford Reuters Institute's Digital News Report 2018, which finds that 65% (73% for those under 35) of consumers prefer to access news through a side door rather than going directly to a news website. The report finds that the following prominence for each method of accessing news content: 32% for direct access through news website or app, 24% through search engines, 23% through social media, 6% through email, 6% through mobile alerts, and 6% through news aggregators.

More evidence is available in the 2016 Eurobarometer "Internet users' preferences for accessing content online". The websites or apps of newspapers or magazines may be the single most popular way in which people access news in digital format - 42% of all

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respondents turn to them first when looking for news, but the majority of people looking for news – 57% – now turn to other services: 22% mainly access their news via social media, 21% through search engines and 14% via news aggregation services.

In this sense, news content is largely consumed through side-door access, a preferred method of consumers which inevitably creates a form of dependency for news media companies on algorithmic distribution. Such dependency, however, is very likely to be much more pronounced than the above figures would suggest insofar as smaller news media companies, local and regional in scope, are concerned.

Therefore, we strongly believe that additional transparency in search engines is warranted as a safeguard to avoid the discriminatory treatment of news content, which not only could harm the fundamental right to freedom of expression and information, but also in the process harm the fragile transition of the industry towards a more digital and sustainable future within the framework of an open and fairer Digital Single Market.

In addition, we note that certain online platforms also increasingly compete directly with news media companies, not only for advertising revenue, but also for the provision of news-related products and services by way of promoting own products and services over that of competitors. It is therefore important to understand through better transparency whether this is taking place under fair conditions for competition, bearing in mind the dominance of certain platforms in the online search market.

Increased algorithmic transparency should therefore be introduced by providers of online search engines, both to ensure a more free and pluralistic news media landscape, and to ensure a better level playing field with online platforms. This would also allow news media companies to understand how to compete through improved product and service distribution, and ultimately to improve the quality of their content.

We also note that European news media companies also make significant use of some of the news-related products and services offered by certain online platforms. These include, but are not limited to, online search optimisation tools, publishing applications, ranking services, and audience measurement products. Therefore, news media companies also often enter into contractual relationships with online platforms.

However, the dominance and sheer size of certain platforms in key markets for news content distribution makes negotiating fair contractual terms and conditions, and good commercial relationships, very difficult. The position of economic strength of such platforms effectively enables them to prevent effective competition being maintained in the relevant markets by giving them the power to behave to an appreciable extent independently of business users, and ultimately of consumers.

Overall, it is therefore important that fair contractual terms and conditions, and by the same token fair possibilities for redress, are thoroughly addressed in their entirety in

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the proposed Regulation of the European Commission. Taking this into account, News Media Europe believes that the proposal of the European Commission is good overall.

We note, however, that insofar as rankings are concerned, the most pressing issue for the news media industry, that the proposal unfortunately falls short of expectations. Below, we discuss further how this could be addressed in more detail. In addition, other suggestions are made as regards other important aspects of the proposal.

Feedback on the European Commission proposal

As a general point, News Media Europe welcomes the proposal which seeks to address the inherent and difficult differences in bargaining power that companies doing business online, whether through intermediation services or search engine services, face when dealing with large online platforms.

The Commission is right to point out that, effectively, unfair contractual terms and the lack of redress possibilities for the average sized business dealing with such online platforms, which notably includes a very important number of news media companies throughout Europe, can make or break their commercial success. This is consistent with the industry feedback received by News Media Europe.

News media companies are heavily dependent on how their news content is distributed by means of ranking, in online search engines. Article 5 (2) on ranking in online search engines is therefore of key importance for our industry. This core issue from the perspective of the news media industry is addressed first, followed by feedback on a range of other issues including terms and conditions, access to data, and codes of conduct.

Ranking in online search engines under Article 5

News Media Europe believes that the European Commission proposal on Rankings under Article 5 is necessary but not sufficient. To ensure the non-discriminatory indexation of news content by algorithms, and to ensure that news media companies are able to compete under fair conditions, notably based on the quality of their news content, it is essential that more algorithmic transparency is afforded under EU rules.

Currently, news media companies have, of course, some idea of what factors affect the prominence of the indexation of websites and news articles in online search results. This would include inter alia the key words used, previous search history, the popularity of content, and whether certain websites may have remunerated the search engine to obtain a more prominent indexation in search results.

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However, the lack of a more specific understanding of what specific parameters are used to determine ranking, combined with a total absence of understanding of the relative importance of such factors, remains an unfair source of competitive disadvantage for news media, who are prevented from effectively competing on product quality and distribution which, in turn, creates further reliance on search engines.

News Media Europe therefore believes that the current wording would not afford enough transparency for corporate website users in relation to online search engines, which would hamper the creation of better, open and fair conditions for news media companies to compete in the Digital Single Market.

While we welcome the requirements under Article 5 (2) for the main parameters determining ranking to be easily and publicly available with a description drafted in clear and unambiguous language, we have strong concerns that this would still leave online search engines which control the distribution of online news content with too much room to continue operating under opaque conditions.

News Media Europe therefore suggests that the European Commission considers making it clear and unambiguous that the extent of minimum transparency required should be more meaningful, for example by introducing a requirement to provide transparency as regards at least the main parameters that are used to determine ranking, alongside an explanation for the relative importance of those parameters.

This is without prejudice to trade secrets that online search engines may wish to preserve as regards the exact nature of their algorithms. We believe that preserving the integrity of such trade is not incompatible with our suggested approach. It is clear that corporate website users, businesses users, and consumers, all of whom rely extensively on certain online search engines on a daily basis, deserve to be afforded more meaningful transparency, especially in cases where the online search market may be dominated by a single online search engine.

In addition, News Media Europe would encourage the European Commission to ensure that, where the main parameters determining ranking may be affected by the possibility to influence ranking by business users or corporate website users to the provider of online search engine services, that such possibilities and effects on search results should be clearly laid out in the terms and conditions of the provider.

According to the European Commission proposal, such a requirement should in fact apply in relation to online intermediation services, as per Article 5 (1). News Media Europe thinks that it should equally apply to rankings produced by online search engines. This would go a long way to create better competition conditions for the European news media industry.

News Media Europe accordingly recommends amending Article 5 as follows:

Additions in bold
~~Deletions in strikethrough~~

Article 5

Ranking

1. Providers of online intermediation services shall set out in their terms and conditions **at least** the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters.

Where those main parameters include the possibility to influence ranking against any direct or indirect remuneration paid by business users to the provider of online intermediation services concerned, that provider of online intermediation services shall also include in its terms and conditions a description of those possibilities and of the effects of such remuneration on ranking.

2. Providers of online search engines shall set out for corporate website users **at least** the main parameters determining ranking, **and the reasons for the relative importance of those main parameters as opposed to other parameters**, by providing an easily and publicly available description, drafted in clear and unambiguous language on the online search engines of those providers. They shall keep that description up to date.

Where those main parameters include the possibility to influence ranking against any direct or indirect remuneration paid by corporate website users to the provider of online search engines concerned, that provider of online search engine services shall also include in its terms and conditions a description of those possibilities and of the effects of such remuneration on ranking.

3. The descriptions referred to in paragraphs 1 and 2 shall be sufficient to enable the business users or corporate website users to obtain an adequate understanding of whether, and if so how and to what extent, the ranking mechanism takes account of the following:
 - (a) the characteristics of the goods and services offered to consumers through the online intermediation services or the online search engine;
 - (b) the relevance of those characteristics for those consumers;
 - (c) as regards online search engines, the design characteristics of the website used by corporate website users.
4. Providers of online intermediation services and providers of online search engines shall, when complying with the requirements of this Article, not be required to disclose any trade secrets as defined in Article 2(1) of Directive (EU) 2016/943.

News Media Europe accordingly recommends amending Recital 18 as follows:

Additions in bold
~~Deletions in strikethrough~~

Recital 18

(18) Similarly, the ranking of websites by the providers of online search engines, notably of those websites through which undertakings offer goods and services to consumers, has an important impact on consumer choice, **welfare**, and the commercial success of corporate website users, **especially for small and medium enterprises**. Providers of online search engines should therefore provide a description of the main parameters determining the ranking of all indexed websites, including those of corporate website users as well as other websites, **in addition to an explanation of their relative importance and of how the logic of the algorithm works. Such a description should allow corporate website users to understand what concrete steps could be taken to improve their ranking, based on an adequate understanding of the parameters that are used to determine such ranking.** In addition to the characteristics of the goods and services and their relevance for consumers, this description should in the case of online search engines also allow corporate website users to obtain an adequate understanding of whether, and if so how and to what extent, certain design characteristics of the website used, such as their optimisation for display on mobile telecommunications devices, is taken into account. ~~In the absence of a contractual relationship between providers of online search engines and corporate website users, that~~ **Such** description should be available to the public in an obvious and easily accessible location on the relevant online search engine, **even in the absence of a contractual relationship between providers of online search engines and corporate website users.** To ensure predictability for corporate website users, the description should also be kept up to date, including the possibility that any changes to the main parameters should be made easily identifiable. Whilst the providers are under no circumstances required to disclose any trade secrets as defined in Directive (EU) 2016/943 of the European Parliament and of the Council when complying with this requirement to disclose the main ranking parameters, the description given should ~~at least~~ be based on actual data on the relevance of the ranking parameters used.

On the proposed definition of terms and conditions under Article 2

The proposed definition for “terms and conditions” under Article (10) would suggest that unless terms and conditions, within the generic meaning of the term, are not unilaterally determined by the provider of online intermediation services, that such terms and conditions would not constitute terms and conditions, within the meaning of the proposed Regulation, which would make the Regulation non-applicable to the terms and conditions concerned. This would undermine the purpose of the proposal.

To illustrate this, it is useful to think of a situation where an online platform offers a generic set of terms and conditions to a potential business user, and where that same

business user asks for an amendment to one of the terms and conditions, however small. Then, the concerned terms and conditions would no longer arguably be “unilaterally determined by the provider of online intermediation services” since the concerned terms and conditions would be subject to input from a business user. As a consequence, the proposed Regulation could be considered as non-applicable to the terms and conditions.

We therefore suggest amending the definition to reflect this problem by modifying the wording at the end of the sentence of Article 2 (10) to: “terms and conditions means ... and are typically or largely unilaterally determined by the provider of online intermediation services.”. This would ensure a more consistent scope of application.

On the terms and conditions under Article 3

The requirements for the drawing up of terms and conditions are good and proportionate. However, given the ambiguity around what could be considered to be “draft in clear and unambiguous language” as per Article 3 (1a), we would suggest introducing an obligation for platforms to provide, if necessary, a clear summary of the relevant terms and conditions in no more than two pages, of a format to be specified by codes of conduct.

In addition, News Media Europe would recommend adding a provision in Article 3 to ensure that potential commercial losses and prejudice suffered by business users due to the implementation of modification to terms and conditions that are found to be non-compliant by a competent court with Article 3 (1) or Article 3 (3) should warrant compensation by the provider of online intermediation services to the business user. This would strengthen the incentive for online platforms to take terms and conditions more seriously than they traditionally have done.

On differentiated treatment under Article 6

News Media Europe strongly welcomes the introduction of measures for additional transparency as regards favourable treatment by online platforms of own products and services. This is an important step in establishing a better level playing field with such platforms.

Article 6 (1) specifies that it applies where goods and services are offered to consumers “through those online intermediation services by either that provider itself or any business users which that provider controls”.

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We believe this could benefit from a minimum threshold for what can be construed as “control”, which could be set at 10% of voting rights, which would therefore already and likely imply an important degree of control and ownership, going beyond what could be construed as a portfolio investment.

On access to data under Article 7

The news media industry has very deep concerns about access to data held by large online platforms who abuse their dominant position in the market to leverage all data rights whilst essentially and simultaneously pushing all the liability for holding, storing, processing and sharing data towards news media companies with whom they work, all within the framework of new rules under the General Data Protection Regulation.

While certain large and dominant online platforms have a right to contractual freedom which they should be free to exercise, News Media Europe recommends that the European Commission further reflects on how the aggressive behaviour of certain online platforms in the data economy should be reflected in the proposed Regulation.

If the European Commission takes no further steps to ensure that data is shared fairly, the data economy in the EU is very likely to further concentrate and to strengthen the current dominant position of certain platforms thereof. It may therefore be warranted to determine what could constitute fair access to data within the data protection framework that the General Data Protection Regulation affords.

A good alternative would be for the EU competition authority to issue a notice on what constitutes an abuse of dominance as regards the imposition of contractual terms on access to data. News Media Europe stands ready to further exchange views on this issue as the implementation of the General Data Protection Regulation unfolds.

On codes of conduct under Article 13

News Media Europe strongly encourages the European Commission to consider taking on a more central role in facilitating the drawing up of codes of conduct. Ideally, from the perspective of the news media industry, there should be one code of conduct rather than several, as per the wording in Article 13 (2) which is concerned with providers of online search engines.

Experience has unfortunately shown that platforms require stronger regulatory incentives than the ones afforded by soft regulatory tools. This conclusion can be drawn from past and current experiences with online platforms in other areas that include, but are not limited to, hate speech, illegal content, and online disinformation.

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It is therefore imperative that political momentum is lent to the drawing up, implementation, and follow-up scrutiny of such codes of conduct. In doing so, the European Commission should consider going beyond “encouraging” codes of conduct by providing an institutional framework and timeline within which to foster a code of conduct between providers of online search engines.

If the process of drawing up a code of conduct is left to stakeholders alone, we fear that the process may become protracted and lose political momentum with the shift to the new European Commission.

On mediation under Article 10

Out of court settlements should be seen as an important policy instrument to the benefit of all parties involved. We believe the approach suggested by the European Commission is good and proportionate.

For news media companies who are often dwarfed in size and resources by online platforms, it is imperative that online intermediation services bear a reasonable proportion of the total costs of mediation in each case. News Media Europe therefore warmly welcomes the recognition of this under Article 10 (4), where providers of online intermediation services are required to bear in any case at least half of the total costs.

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