COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE EUROPEAN COMMISSION’S PROPOSAL FOR A REGULATION PROMOTING FAIRNESS AND TRANSPARENCY FOR BUSINESS USERS OF ONLINE INTERMEDIATION SERVICES

June 25, 2018

The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law (“Sections”) of the American Bar Association (“ABA”) only. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors and therefore do not state the views or policy of the American Bar Association.

The Sections welcome the opportunity to provide feedback on the European Commission’s (“Commission’s”) proposal of a regulation, for adoption by the EU Parliament and Council, for promoting fairness and transparency for business users of online intermediation services (“Proposed Regulation”).

The following comments reflect the experience and expertise of the members of the Sections with competition and consumer protection law in the United States and other jurisdictions, including the European Union (“EU”). The Sections are available to provide additional comments or to participate in any further consultations with the Commission as appropriate.

A. Introductory Comments

The Sections agree with the Commission that online platforms are key enablers of digital trade, and that promoting a predictable regulatory environment can help facilitate online transactions. The Commission’s Proposed Regulation is intended to ensure a fair, transparent, and predictable legal environment for business users, corporate website users, and providers of online intermediation services and online search engines. The Proposed Regulation, if adopted, would prevent unilateral changes in terms and conditions without prior notice, require clear justification for the delisting of goods or services and the suspension of accounts, require disclosures regarding the ranking of goods and services, and clarify conditions of access to and use of data collected by providers. The Proposed Regulation would also create new mechanisms for addressing business complaints in connection with these or other issues.

Regulatory predictability can, however, come at the expense of innovation, competition, and dynamism in the market. Therefore, the Sections support efforts to further assess the impact of the Proposed Regulation and consideration of whether a more tailored approach could address the Commission’s fairness and transparency objectives. In particular, as outlined below, there are potential costs to the Proposed Regulation that may exceed the potential benefits, and there is also a question of proportionality, given the breadth of the Proposed Regulation as compared to the scope of the identified concern. Finally, there is a potential for the Proposed Regulation to have unintended consequences that may harm consumers by facilitating anticompetitive conduct or otherwise reducing competition and entrenching large incumbents.

B. General Comments

In general, the Sections believe that regulation is not appropriate unless and until harm has been identified that exceeds the benefits of the conduct being regulated. Put another way, any proposal for regulation should assess whether the benefits of the regulation exceed the costs of that regulation. In addition, regulations should apply no more broadly than needed to address the underlying concern.

The need for regulatory intervention is not established

The Sections believe that legislation that seeks to regulate an entire industry of online intermediation services is inappropriate absent a showing of market failure or of widespread abuses that merit regulatory intervention. Otherwise, legislation regulating the terms of access to these services may defeat or distort the ability of the market to allocate risks, rewards, and resources. In the absence of such circumstances, regulation could burden competition and chill innovation, producing a less efficient economy and reducing consumer welfare.

As the Commission recognizes, online intermediation services enable transactions between distinct groups of participants. These platforms are characterized by indirect network effects. That is, the value that participants on one side of the platform derive increases with the number of participants on the other side (or sides) of the platform. The Commission correctly observes that “both service providers and their business users have an interest in maximising interactions and transactions with consumers on platforms.”

Online intermediation services must seek to attract different groups of participants (e.g., businesses and consumers) simultaneously, which requires a careful and ever-changing balancing of factors. A challenge for online intermediation services is that increasing benefits to one group of participants will often decrease the benefits or increase the costs to other participants. Therefore, to be successful, online intermediation services must appeal to each group of participants with an optimal mix of prices and terms. Online intermediation services seek to attract businesses in numerous ways, including by offering lower fees, order fulfillment services, an attractive customer base, ease of use, and favorable terms of access. A firm that offered inferior terms of access, for example, would tend to attract fewer businesses, which in turn would lead to fewer consumers. In contrast, a firm that offered overly generous terms of access might attract more businesses, but at the possible cost of driving away consumers unhappy with the quality of the additional businesses and harm to the reputation of the platform.

In a competitive market, which the Commission acknowledges exists, we should expect that successful online intermediation services would offer a competitive mix of prices and terms to each group of participants. The fact that some providers may offer less generous terms of access than others does not necessarily imply a market failure. Instead, it could be part of a competitive dynamic in which providers compete by offering differentiated services to each group of platform participants.

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2 See Executive Order 13563, “Improving Regulations and Regulatory Review,” 76 Federal Register 3821, January 21, 2011, (the regulatory system “must take into account benefits and costs, both quantitative and qualitative”); id. (citing Executive Order 12866, “Regulatory Planning and Review,” 58 Federal Register 51735, October 4, 1993 (agencies must “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs”)).

3 Proposed Regulation Explanatory Memorandum at 5.
As support for the Proposed Regulation, the Commission’s Explanatory Memorandum identifies only that the “dependence of businesses on certain online services implies that the providers of such online intermediation services have a scope to engage in a number of potentially harmful trading practices.” The explanation does not distinguish such services from any other sector of the economy or identify any observed market failure to be addressed by the Proposed Regulation.

Indeed, the Proposed Regulation includes a provision for the establishment of an Observatory on the Online Platform Economy, “which is tasked essentially with monitoring opportunities and challenges for the Union in the online platform economy, including issues related to the application of the Regulation which the Commission now proposes.” The establishment of the Observatory is to be commended as it recognizes that the challenges and opportunities in the online platform economy deserve further study as they may not be fully understood and are continuing to evolve. In a dynamic, rapidly changing and expanding marketplace, this is to be expected. Accordingly, it may be prudent to defer the remaining provisions of the Proposed Regulation until the Observatory has had the opportunity to study the marketplace and provide recommendations for action on the basis of that empirical analysis.

Similarly, no significant market failure is identified in either the Impact Assessment or the Commission’s ecommerce sector inquiry. While the Impact Assessment concludes that the potential exists for unfair practices by platforms, it does not explain why any such unfair practices are more likely to arise in these markets, whether or not they would not be corrected or prevented by market forces, or why the use of existing laws, including competition law, would fail to redress them.

In the Sections’ view, existing tools appear to be capable of addressing the concerns underlying the Proposed Regulation, and to be preferable to regulatory intervention, given the continuing evolution of the market and the impact of market forces as described above. Competition laws are flexible and designed to preserve an open marketplace, and the Sections believe that they provide an effective mechanism for intervention where competition is threatened in markets such as these. As the Commission recognizes, Articles 101 and 102 TFEU already prohibit anticompetitive conduct by online platforms, and European authorities have used competition law to address allegedly harmful behavior of, and the contractual terms used by, online platforms and search engines.

The costs of the Proposed Regulation are not fully examined but appear to be potentially significant.

The Sections are also concerned that the potential costs of the Proposed Regulation may be more significant than the Commission suggests. In this regard, the Sections believe that it is important to consider the welfare of both consumers and businesses. As previously described, online intermediation services connect businesses and consumers and must balance the needs of these disparate groups. Policy makers should consider the effect of the Proposed Regulation on all groups participating in online

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4 Explanatory Memorandum at 2 (emphasis added). The Commission does not explain how to reconcile its claim that businesses are dependent on online intermediation services with the findings of its ecommerce sector inquiry, which found that only four percent of online retailers sell solely in marketplaces. The remaining online retailers sell through their own websites, or through a combination of their own websites and marketplaces. See EC ecommerce sector inquiry ¶ 39(i).

5 Explanatory Memorandum at 2.

6 Executive Summary of the Impact Assessment at 1.

7 The Commission and national authorities have brought competition cases against, for example, Amazon, Google, Expedia, Booking.com, and HRS.
intermediation services. For example, mandating greater transparency and terms of access to businesses, as the Proposed Regulation would do, may decrease benefits to consumers participating in these platforms. In addition, compliance with the Proposed Regulation would result in increased costs for online platforms, some of which will be passed on to businesses and consumers using these services. This may in turn result in fewer consumers and businesses using these platforms.

Actual costs of compliance with the Proposed Regulation may be higher than the proposal suggests. Given the number of businesses that sell through online mediation services, the proposed system could result in a large number of complaints each year, with significant added costs to online intermediation services. Online platforms will have to address and potentially mediate even baseless claims using the required procedures. Indeed, the Commission recognizes the potential impact of such costs on smaller platforms, specifically exempting small enterprises from the requirements of proposed Article 9.

Further, the Explanatory Memorandum and Impact Assessment do not meaningfully assess the potential harm to other platform participants, such as consumers and advertisers. As already noted, the Sections believe that it is important to consider the costs imposed on all participants using online platforms.

There are also other potential costs that do not appear to have been considered. For example, making it more difficult or costly to delist products could result in problematic products (for example apps containing malware, services that violate privacy requirements, illegal or defective products, or products that infringe intellectual property rights) being available to consumers for a greater length of time. This could cause significant injury to consumers and legitimate businesses, as well as harming the reputation of the online intermediation services themselves. In addition, for some platforms, an economically rational response to increased restrictions on delisting may be to apply tighter rules or higher costs at the front end, thereby restricting access to the platform and increasing the costs of market entry for businesses reliant on online intermediation services. This would also lower platform output and reach, limiting choice and market access for both businesses and consumers.

A related concern is that mandating disclosure of search ranking methodologies may lead to firms seeking to “game” ranking systems. This is already a significant issue for search engines, which are constantly working to prevent malware, ad farms, and low quality websites from manipulating their ranking systems. The Impact Assessment acknowledges the potential consumer harm that “wide ranging disclosure of ranking algorithms is generally accompanied by attempts to manipulate rankings (‘gaming’), as business users are incentivized to gain a higher ranking without necessarily improving the quality of the product or service.”

Finally, as developed in Section C more fully below, the Sections are concerned that the Proposed Regulation could have the unintended effect of discouraging innovation and diminishing inter-platform competition.

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8 Under Article 10.4, intermediation services must bear “at least half the total cost” of all mediations, even if the mediation results in a withdrawal of the complaint.
9 Impact Assessment at 15.
The Proposed Regulation should be no broader than necessary to achieve its goals

The Sections observe that the Proposed Regulation does not specifically target the Commission’s stated concerns. The Proposed Regulation seeks to address “the relative market strength of a small number of leading online platforms,”10 “the dependence of businesses on certain online services,”11 and the perceived lack of “market dynamics under fair and balanced conditions.”12 Yet, the Proposed Regulation would apply not only to the largest online platforms, but also to relatively small online platforms and new entrants. As a result, the Proposed Regulation does not distinguish between situations in which a platform has a superior bargaining position, where the relationships are relatively equal, or where participating businesses are actually stronger than the platform.

Because of its current breadth, the Proposed Regulation may inadvertently serve to enhance the market power of some larger businesses that participate in online intermediation services. For example, large businesses or those with particularly popular products may already be in a position to negotiate favorable terms. Such situations are particularly likely to occur with new or smaller online intermediation services. By “regulating away” some potential negotiating power of intermediation services, such businesses may have their bargaining position further enhanced, especially with respect to smaller platforms.

The Commission may wish to consider narrowing the scope of the Proposed Regulation to only those online intermediation services with market power. This would allow the Proposed Regulation to apply to the entities of concern and reduce the potential for enhancing the bargaining position of large business sellers participating in these platforms.

C. Competition Considerations

Although designed to supplement enforcement of the competition laws, the Sections note that the Proposed Regulation creates some tension with competition law principles.

Increased compliance costs may lead to higher entry barriers

As detailed above, the Proposed Regulation is likely to increase the costs to online intermediation services. The compliance requirements of Articles 9 through 12, in particular, have the potential to make managing an online platform more burdensome and complex and add significant administrative costs.

These increased costs and complexity in managing online platforms will tend to increase entry barriers and entrench incumbents. Large incumbents can often absorb regulatory compliance costs more effectively than new entrants. Regulation that protects incumbents will tend to decrease competition; as former FTC Commissioner Julie Brill has noted, “competition law frowns on activities that make entry in a market more difficult.”13 Accordingly, the Commission should carefully consider the potential for the

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10 Explanatory Memorandum at 1.
11 Explanatory Memorandum at 2.
12 Explanatory Memorandum at 3.
Proposed Regulation to discourage entry into online intermediation services and to entrench existing large platforms.

*Disclosure requirements may facilitate collusion*

The Sections are concerned that the Proposed Regulation’s requirements for disclosure of search ranking methodology and contract terms may facilitate tacit or explicit coordination among online intermediation and search services. The Commission’s horizontal merger guidelines recognize that transparency, particularly of “key information,” contributes to the ability of firms to reach terms of coordination.\(^{14}\) Likewise, the U.S. horizontal merger guidelines cite transparency as a factor that increases a market’s vulnerability to coordinated conduct.\(^{15}\)

With respect to search rankings, Article 5 calls for online intermediation services and online search engines to set out “the main parameters determining ranking” and the reasons for assessing the relative importance and ranking of certain characteristics and criteria. These details are at the core of their algorithms and search ranking strategies, the disclosure of which could facilitate concerted action. It is notable that the Commission and the OECD Competition Committee Secretariat have recently raised concerns about the potential for companies to collude through the use of algorithms.\(^{16}\)

Similarly, various provisions, such as Articles 3.1(b) and 8.1, require disclosure of terms and conditions at the pre-contractual stage,\(^{17}\) as well as certain competitively sensitive information related to the use of MFN clauses. While intended to provide greater predictability and clarity to parties contracting with online intermediation services, these provisions may also facilitate coordination by allowing firms to monitor certain conduct of rivals. Accordingly, the Commission may wish to consider whether it could achieve its goals of fairness and predictability for businesses participating in online intermediation services with more limited disclosure requirements.

*Diminution of inter-platform competition*

The Proposed Regulation would limit the ways in which online intermediation services can lawfully compete with each other and with more traditional retailers. The “rules” of a platform, whether related to an internal complaint-handling system (Article 9), provisions for dispute resolution (Articles 10, 11, 12), or even access to data (Article 7), are means of competition. Regulatory intervention that limits

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\(^{14}\) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para. 47, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN (“The more complex the market situation is, the more transparency or communication is likely to be needed to reach a common understanding on the terms of coordination.”)

\(^{15}\) Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines (2010) at 25-26, available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (“A market typically is more vulnerable to coordinated conduct if each competitively important firm’s significant competitive initiatives can be promptly and confidently observed by that firm’s rivals. This is more likely to be the case if the terms offered to customers are relatively transparent”).


\(^{17}\) In addition to the potential for collusion associated with greater sharing of contract terms, there is also a potential inefficiency with regulatory mandates to adopt additional terms. See Wendy Netter Epstein, *Facilitating Incomplete Contracts*, 65 Case Western Law Review 297 (2014) (“[T]here is a growing body of interdisciplinary work in economics and cognitive psychology demonstrating that highly specified contracts tend to stifle intrinsic motivation and innovation.”).
dimensions of competition runs the risk of adversely affecting emerging business models that deliver attractive offerings to consumers. For instance, the Sections believe that the Proposed Regulation’s mediation requirements would discourage platforms from developing alternative and potentially more effective dispute resolution procedures. This harm would be felt not only by online intermediation services but also by businesses that will not reap the benefits of this innovation. At the same time, firms employing other business models will face less competitive pressure from online intermediation services, potentially dampening their own competitive vigor.

_Discouragement of pro-competitive contracting terms_

The Proposed Regulation seeks to promote greater transparency with respect to most-favored nation (“MFN”) provisions. As discussed above, Article 8 requires online intermediation services to publish a description of the “main economic, commercial or legal” grounds for restricting business users’ ability to offer the same goods and services to consumers under different conditions through other means than through those services.

It is widely recognized that MFN provisions can be pro- or anti-competitive, depending on a variety of factors.\(^{18}\) The Impact Assessment recognizes that “the economic literature suggests that MFN clauses can create efficiencies in particular market contexts.”\(^{19}\) For example, a new online platform may seek to attract businesses by offering below-market commissions from sellers but in return seek an MFN commitment.

The Proposed Regulation’s requirement for a detailed justification for the use of MFN provisions may inadvertently discourage the use of these terms in competition-enhancing situations. Furthermore, the Sections believe that current competition law is sufficient to address any anticompetitive uses of MFN clauses by online intermediation services. Indeed, the Impact Assessment acknowledges the “ongoing monitoring by competition authorities regarding MFN clauses.”\(^{20}\)

_Distortion of competition from regulating business models instead of business practices_

The Sections are concerned that the Proposed Regulation applies to a particular business model, rather than to particular business practices. The Proposed Regulation places new restrictions on online intermediation services while leaving first party retailers (both online and offline) unregulated.

Introducing costs on online intermediation services but not on traditional distribution channels will tend to distort competition and disadvantage online intermediation services in the marketplace. In addition, different rules will apply when goods flow from the same supplier to the same customer depending on whether the customer purchases using an online intermediation service or a first party retailer. For example, if an online intermediation service and a traditional grocery store both terminated the same seller of a food product, the seller would have mediation rights for the intermediation service but not the grocery store, even if the grocery store accounted for the bulk of its sales.


\(^{19}\) Impact Assessment at 17.

Similarly, the Proposed Regulation applies to general search services but not to industry-specific “vertical” search services. Imposing new obligations on only general search services will tend to distort competition in favor of unregulated vertical search services. The Commission may wish to consider the approach of the U.S. Federal Trade Commission, which applies its search engine disclosure requirements to both general purpose and specialized search engines.

The dispute resolution procedures may effectively impose a duty to deal

By inhibiting the ability of online intermediation services to terminate business partners, the Proposed Regulation introduces a potential conflict with Article 102 TFEU and case law thereunder. As in the United States, firms in the EU are typically under no duty to deal with particular suppliers, even when the firm has market power.

By hampering online platforms’ ability to remove low-quality or otherwise disfavored products, the Proposed Regulation may unintentionally impose a limited duty to deal on online platforms. As the U.S. Supreme Court has commented, compelling firms, even those with market power, to do business with others “is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for . . . both to invest in those economically beneficial facilities.” In other words, the Commission’s goals of transparency and fairness may come at the expense of innovation and competition. The Commission may wish to further consider the risk of reducing innovation in what it acknowledges is a “fast changing” online ecosystem.

Benefits of adhering to established unfairness principles

As mentioned above, the Sections are aware that the Proposed Regulation is not intended as a competition regulation, but rather is aimed at promoting fairness and transparency. Fairness considerations should not be unbounded, however, and should follow established principles to ensure that regulation will provide a net benefit to society. The FTC’s “unfairness” doctrine, for example, states that:

To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.

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21 Proposed Regulation, Art. 2(5).
23 Guidance On the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009/OJ/C 45/02, ¶ 95; Case C-79/97 Oscar Bronner v. Mediaprint, EU:C:1998:569, ¶ 47. A refusal to deal is not normally abusive unless: (1) the requested relationship is indispensable to compete viably in a second market; (2) the refusal will totally eliminate effective competition in the second market; and (3) no objectively reasonably justification for the refusal exists. See, e.g., Case T-374/94 European Night Services EU:T:1998:198.
25 Explanatory Memorandum at 5.
As noted above, the practices that the Proposed Regulation seeks to regulate, including terms of access, are forms of competition that may benefit consumers. There may also be instances when businesses participating in online intermediation services could reasonably take steps to avoid the harms the Proposed Regulation is intended to address. The Sections therefore urge the Commission to consider whether fairness considerations are an appropriate justification for the proposal and if so, whether the Proposed Regulation could be more narrowly crafted to achieve its intended goals without adverse effects on competition and consumers.

D. Conclusion

The Sections appreciate the opportunity to provide comments on the Commission’s Proposed Regulation. The Sections would be pleased to respond to any questions the Commission may have regarding these comments, or to provide any additional comments or information that may be of assistance to the Commission.