



Federation of the European
Sporting Goods Industry

FESI COMMENTS ONLINE PLATFORMS AND THE DIGITAL SINGLE MARKET

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FEDERATION OF THE EUROPEAN
SPORTING GOODS INDUSTRY

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Please find below FESI's comments on the EP draft report on *online platforms and the digital single market*.

The report has been drafted by both the Internal Market and Consumer Protection committee - rapporteur Henna Virkkunen (EPP, FI) – and the Industry, Research and Energy committee - rapporteur Philippe Juvin (EPP, FR).

CLARIFYING THE LIABILITY OF INTERMEDIARIES (19-23)

The Rapporteurs recognised that certain stakeholders are dissatisfied with the current rules on liability. The **duty of care** is mentioned by the rapporteurs who support the adoption of both regulatory and self-regulatory measures. Last but not least, the revision of **IPRED is considered** in the report (without clear policy asks).

*21. Considers that the liability rules for online platforms should allow the tackling of issues related to illegal and harmful content in an efficient manner, for instance by respecting the **duty of care**, while maintaining a balanced and business-friendly approach;*

*22. Stresses the need for online platforms to prevent illegal and inappropriate content and unfair practices **through regulatory, effective self-regulatory or hybrid measures**; stresses the importance of online platforms playing a proactive role in tackling illegal and inappropriate content and taking immediate action to remove illegal or inappropriate content if such content slips through preventive monitoring;*

*35. **Calls on the Commission to assess the current Intellectual Property Rights (IPR) Enforcement Directive** , in order to ascertain how to contribute more effectively to the fight against counterfeiting by adopting proactive, proportionate and effective measures;*

FESI position: FESI supports the reference made to the role of intermediaries in the fight against counterfeiting.

We would however appreciate a much stronger language mentioning that the principle of **duty of care** must be one of the **key elements of the IPRED revision**. FESI thus believes that it would be proportionated and reasonable, for online service providers, to carry out a due diligence with respect to the “soundness” of the provided services by **installing a monitoring system and imposing an obligation to actively seek facts or circumstances indicating illegal activities**.

Although the **definition of ‘online platforms’** is mentioned as a point of concern, there is no reference of including them under the term **‘intermediaries’** most notably used when incurring in IP infringing issues.

FESI **supports** the notion of “*regulatory, effective self-regulatory or hybrid measures*” (point 22) and “*adopting proactive, proportionate and effective measures*” (point 35) to effectively fight against counterfeiting, however, there is no direct mention of online platforms incurring in injunctions if these were not respected. FESI would thus support the idea of clarifying that **online platforms could be subject to injunctions** in addition to the **active monitoring**.

Point 23 which “*considers that online platforms should develop more effective voluntary measures*” could aim to be amended to include a **close monitoring of the European Commission also through the introduction of KPIs**.

Potential FESI actions:

- Submit draft amendment on the IPRED and the duty of care
- Submit draft amendment on the definition of ‘online platforms’ to be included under the term ‘intermediaries’
- Aim to include an amendment to clarify that online platforms could be subject to injunctions in addition to active and preventive monitoring of illicit content
- Request to include a close monitoring of the European Commission also through the introduction of KPIs to Point 23.

RESPECTING B2B RELATIONS AND EU COMPETITION LAW (39-43)

EU competition law and the relation between online platforms and their clients (B2B) are addressed in the draft report in a fairly superficial manner.

39. Stresses that, in relation to this specific business model, the traditional reasoning inherent in EU competition law may no longer be fit for purpose;

40. Is concerned about problematic B2B practices by online platforms, such as a **lack of transparency** (e.g. in search results) and possible abuses of the **dual role of platforms as intermediaries and competitors**;

FESI position: while we welcome the decision of the rapporteurs to mention problematic B2B practices, the examples provided might not adequately reflect all the difficulties sporting goods companies are facing when dealing with online platforms. In addition, we would support the inclusion of clear recommendations to improve B2B relations (e.g. regulatory proposals) in the report.

From the perspective of the sporting goods industry, it might be worth mentioning some of the following elements:

- Unfair contractual terms - abusive clauses (e.g. exclusivity, sale conditions)
- Unfair terms and conditions
- Unfair business practices (strong bargaining power *vis a vis* (smaller) clients)
- Misleading commercial practices (e.g. some comparison websites)
- Relationship with payment intermediaries

The provision on EU competition law remains vague. From our understanding, the rapporteurs refer to the concept of dominant position and monopolies and not to the relations between online platforms and industry suppliers. However, caution must be exercised as some MEPs might use this opportunity to challenge provisions of EU competition law which are of relevance to the sporting goods industry (e.g. selective distribution).

Potential FESI actions:

- Submit draft amendment which will include further examples of problematic B2B practices.
- Submit draft amendment urging the Commission to implement regulatory measures to create a level playing field for all economic actors.
- Request clarifications from the rapporteurs on the provisions on EU competition law. Submit draft amendment if necessary.

TIMEFRAME

- Deadline for amendments: 23 March 2017
- Vote in committee: IMCO (11 May 2017), ITRE (TBC)
- Vote in plenary: June/July