



Federation of the European  
Sporting Goods Industry

FEDERATION OF THE EUROPEAN  
SPORTING GOODS INDUSTRY

House of Sport

Avenue des Arts 43  
1040 Brussels, Belgium  
Email: [info@fesi-sport.org](mailto:info@fesi-sport.org)  
Tel: +32 2762 8648  
Website: [www.fesi-sport.org](http://www.fesi-sport.org)

## FESI POSITION PAPER ONLINE PLATFORMS

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FESI, the Federation of the European Sporting Goods Industry, has followed with great interest the debate in the IMCO committee and at Council level on the proposed Regulation promoting fairness and transparency for business users of online intermediation services.

The vast majority of sporting goods companies are working on a daily basis with online retailers. While the impact of online sales on their overall turnover varies from one company to another, they all benefit from having access to a wider audience. In 2014, online purchases accounted for 18% of the European sports market's total turnover.

However, it remains of paramount importance to ensure a level playing field in the digital environment, especially for medium-sized to smaller companies who are more vulnerable to unfair commercial practices. FESI thus strongly believes that the inclusion of stronger obligations will by no means impede innovation or hamper consumer choice but will allow companies and consumers to make the best out of the numerous opportunities the digital environment has to offer.

Ahead of the next trilogue meeting, the sporting goods industry would like to share its comments on the following elements of the proposed Regulation.

### IPR

FESI initially supports the Commission proposal that online platforms must inform business users without under delay if they are delisted (article 4). However, should EU legislators wish to implement a 15 day-notice period, it is however key to ensure that proactive actions to remove illegal content (e.g. counterfeit offerings, copyright infringements, etc) are exempted from this rule – as set forth in the IMCO report (article 4.1b).

In addition, FESI remains under the impression that a stronger wording could and should be used to reinforce online platforms obligations to fight against the online sale of counterfeit products

and other criminal and illicit practices. FESI would appreciate the inclusion in the final text of requirements asking platform owners to:

- outline clear Terms of Service prohibiting the use of a platform to sell or otherwise trade in counterfeit or IP rights in general infringing products or services,
- encourage stronger enforcement of the Terms of Service between platform owners and traders, with increased cooperation between service providers and rights holders,
- adopt automated risk management tools appropriate to the business to identify high-risk behaviors and potential red flags (e.g. proactive measures which detect and withdraw illegal offerings from their listings).

#### **NEGOTIATING TERMS AND CONDITIONS AND ENSURING A LEVEL PLAYING FIELD**

Transparency should be the rule regardless of the type of contract. §12 and article 2 of the Commission's proposal would lead to the paradoxical situation whereby the more business users negotiate with a platform, the more they risk forfeiting the safeguards of this Regulation. Users would therefore be deterred from negotiating more advantageous terms and conditions with a platform. Furthermore, if the regulation is to apply only to individually negotiated contracts, there is a risk that platforms may adapt their practices by individualizing their terms and conditions to avoid falling in scope of the Regulation.

FESI would thus strongly support the wording included in the IMCO report (whereby individually negotiated terms and conditions by the parties also fall in the scope of the Regulation).

#### **FOSTERING HEALTHY COMPETITION IN EUROPE'S DIGITAL ECONOMY**

Online platforms are sometimes selling similar or even identical products as other economic operators using the respective platform – thus directly competing with them. In those instances, it is key to ensure that business users receive fair treatment and that platforms do not misuse their in many cases dominating market position to the detriment both of business users, but also of EU consumers.

In that context, FESI especially welcomes the inclusion by the EU legislators of stronger transparency obligations around the commercial use of data generated by the online sales transactions of products. While compiling data help business better understand new trends and change in consumers' behaviour – providing them with the possibility to adapt selling practices to the benefits of consumers – online platforms have access to information about a company that normal competitors do not. This must be closely regulated, especially when the online service provider is also directly selling similar or even identical products.

FESI also supports the inclusion of an obligation for platforms to not only inform business users, but also to set out a description of the technical access to any personal data or other data generated from business users. The online data which is generated as a consequence of a transaction on a platform is key for customer value creation. Today there is an asymmetry as

platforms have access to a vast amount of seller and consumer data, yet have no obligations to share this data with the seller. We therefore support the EU Parliament proposal on Art. 7(2b) as it will help to foster healthy competition amongst actors to the benefit of consumers.

The sporting goods industry is supportive of the strong transparency obligations on differentiated treatment included by the legislators. This is even more important when marketplaces conduct their own retailing activities in parallel of the services they offer to business users. In that context, FESI welcomes the proposal of the IMCO committee to develop a list of commercial practices to be regarded as unfair in all circumstances (article 6a). The development of such list will provide economic operators with clear legal certainty on practices that cannot be tolerated at EU level. To cope with the development of new unfair commercial practices, it is however key to ensure that the Annex of the Regulation can be easily updated whenever required.

### ONLINE TRANSPARENCY

Consumers on online marketplaces often have little visibility on whom they are dealing with when they buy online: the nature of their contracting party (i.e. private individual or professional), whether they are the marketplace operator or a third-party seller, when it comes to branded products, their link – if any – to the brand and the legal regime governing the transaction. This causes concrete risks for consumers in terms of security of their payments, after sales service, warranty claims and enforceability of their claims in general. Providing further transparency to consumers will also be in line with the currently discussed regulatory proposal on the modernization of EU Consumer Law.

Last but not least, FESI welcomes the inclusion of stronger transparency obligations regarding the parameters platforms use in their search rankings (article 5). The sporting goods industry especially welcomes the wording adopted by the IMCO committee which includes the obligation to disclose close to each ranking whether and to what extent it has been influenced by differentiated treatment. Product ranking (or product placement in brick and mortar stores) is one of the key factors influencing purchasing decisions (with brand name, packaging, reputation and price). It is thus fair that both business users and consumers have a clear understanding of the reasons, why products are ranked in a specific way.

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***Founded in 1960 FESI - the Federation of the European Sporting Goods Industry represents the interests of approximately 1,800 sporting goods manufacturers (85% of the European market) through its 12 National Sporting Goods Industry Federations and its directly affiliated member companies. 70-75% of FESI's membership is made up of Small and Medium Sized Enterprises. In total, the European Sporting Goods Industry employs over 650,000 EU citizens and has an annual turnover of some 66 billion euro.***