

INCEPTION IMPACT ASSESSMENT	
TITLE OF THE INITIATIVE	Fairness in platform-to-business relations
LEAD DG – RESPONSIBLE UNIT	CNECT.F.2/GROW.E.4
LIKELY TYPE OF INITIATIVE	Legislative or non-legislative proposal
INDICATIVE PLANNING	Q4 2017
ADDITIONAL INFORMATION	https://ec.europa.eu/digital-single-market/en/business-business-trading-practices

A. Context, Problem definition and Subsidiarity Check
<p>Context</p> <p>Online platforms drive innovation and growth in the digital economy. They play an important role in the development of the online world and opening new market opportunities, notably for SMEs. Almost half (42%) of SME respondents to a recent Eurobarometer survey on online platforms use online marketplaces to sell their products and services. 82% of those firms that sell online rely on search engines to promote their products and/or services.</p> <p>Online platforms offer major new efficiencies in accessing global consumer markets. As the main interface for millions of firms to access markets and customers, they provide the virtual infrastructure for businesses to function in the platform economy.</p> <p>As announced in its May 2016 Communication (COM(2016) 288), the Commission has collected facts on platform-to-business practices in the online platform environment. It used indications that the increased reliance on online platforms has created new dependencies for businesses in the digital economy. Evidence points to trading practices with the potential to create high-impact damage, especially for smaller businesses. These trading practices are detailed below.</p> <p>On the basis of preliminary evidence, in the May 2017 Mid-Term Review of the Digital Single Market Strategy (COM(2017) 228), the Commission announced that it will prepare actions to address the issues of unfair contractual clauses and trading practices identified in platform-to-business relationships, including by exploring dispute resolution, fair practices criteria and transparency. These actions will be finalised by the end of 2017 and could, on the basis of an Impact Assessment and informed by structured dialogues with Member States and stakeholders, take the form of legislative measures.</p> <p>Problem the initiative aims to tackle</p> <p>This inception impact assessment concerns a possible initiative to address unfair platform-to-business (P2B) trading practices by online platforms, in order to safeguarding a fair and innovation-friendly business environment.</p> <p>Online platforms drive innovation and growth in the digital economy. They create new market opportunities, especially for SMEs and offering easy, borderless access to millions of potential customers.</p> <p>At the same time, online platforms are now the main gateway to markets for the majority of smaller businesses in the digital economy – be it online market places for small sellers, app stores for game developers, or online travel agents for hotels. Many small but also some larger businesses have come to depend on platforms that provide such easy access to customers and markets.</p> <p>This dependency entails a certain imbalance of bargaining power between online platforms and their business users, causing friction in platform-to-business relationships and giving scope to unfair behaviour on the part of platforms. Preliminary results of the Commission's fact-finding indicate that some online platforms engage in harmful trading practices to the detriment of their business users. The main issues identified so far are:</p> <ul style="list-style-type: none"> Businesses cannot negotiate terms and conditions, which are subject to unilateral and frequently unannounced changes.

- **Removal ('delisting')** of products or services (e.g. from e-commerce websites, social media or app stores) and in some cases **unilateral account suspensions** without prior notice and without any effective possibility to contest the platform's decision (including those that result from a lack of a clear statement of reasons).
- Business users also face a general **lack of transparency of platforms' practices, notably concerning search and ranking and advertising placements**. Search and ranking results may be biased, while the access to special deals is sometimes only made transparent for specific business users.
- Some platforms may **favour** own products or services¹, or **discriminate** between different third-party suppliers and sellers, e.g. on their search facilities or by capitalising on superior data access. The general inability for business users to verify the existence or absence of such discriminatory practices also leads to uncertainty that can in itself be harmful. In addition, discrimination can take the more visible form of tying business users to the platforms' exclusive auxiliary services (e.g. payment services or advertising exchanges).
- Business users to some extent **lack access to and/or the ability to transmit or port certain types of data, both of a personal and non-personal character**. For example, many business users do not have access to the contact details of their customers whom they serve via platforms. As a result, they are unable to interact with their customers outside of the platform, e.g. for targeted marketing initiatives, or to move their customer base to another platform. Other business users are contractually limited in their ability to use data generated through a specific platform to improve their activities on other platforms.
- **Meaningful or effective redress is lacking** for all the above issues. Internal platform escalation procedures or quick, accessible or mandatory external dispute settlement mechanisms are reportedly unavailable or ineffective. Whilst business users have access to EU courts if the defendant online platform is deemed to be domiciled in the EU (under Article 63 of the Brussels I Regulation), this is not always the case and applicable law and jurisdiction outside the EU (typically in the US) discourages EU businesses to follow-through with of legal recourse.. Finally, a dependency-induced fear of commercial retaliation has been widely reported as an additional relevant factor that limits the accessibility of possible existing redress mechanisms.

In light of the increasing dependency of businesses users on online platforms to reach markets, these unresolved issues can have **significant direct negative effects on a large number of EU business users**, some of which may choose to disengage from online platforms. Where they hamper the business users' ability to reach markets, these issues can also **indirectly harm consumers** by leading to a more limited choice of products and services. In addition, the prevalence of these issues could have significant negative effects on the **viability of the wider platform business model** and the innovation that their ecosystems drive, including on potential new entrant platforms.

Finally, the fact that potentially harmful P2B trading practices can occur has led several EU Member States to adopt, or to consider adopting, regulation to rebalance the relationship between platforms and their business users. **Increasing fragmentation** can in this regard jeopardise the goals of a truly digital single market and hamper the emergence of new online platform firms.

In designing options packages of specific measures to tackle the above problem, the Commission will start from the observed lack of effective *operational* (rather than merely legal) redress against unfair platform-to-business relations that business users of online platforms currently face, given the horizontal nature of this particular problem. One important implication of the latter finding is that, regardless of their nature (i.e. legislative or non-legislative), 'fairness' rules cannot constitute a viable *standalone* option to provide operational relief.

Subsidiarity check (and legal basis)

This initiative constitutes a core part of the Digital Single Market strategy. Its legal basis will be determined by the type of measures to be proposed, but will likely include Article 114 TFEU (Title VII Common rules on competition,

¹ In a number of cases platforms both provide the online market place, and are also sellers on their own market place. Examples include App Stores – where Apple or Google also provide apps with comparable functionality to apps competing for business; or Amazon which provides a market place for third-party sellers while also selling itself.

taxation and approximation of laws).

While the domain is not an area of exclusive competence of the EU, the intrinsic cross-border nature of online platforms imply that **the objectives cannot be reached effectively by Member States alone**. Leading online platforms such as Facebook, Twitter, and eBay, are legally established in one Member State, but provide access to almost the entire EU population, both from their place of normal residency as well as while travelling across the EU. Importantly, a platform such as Facebook is for example used for commercial communications by 90% of the respondents to the Commission's fact-finding on platform-to-business relations.

The objectives of the initiative can be better reached at Union level so as to avoid a further fragmentation of the Digital Single Market into 28 different, potentially contradictory frameworks – including the resulting jurisdictional issues. Preliminary evidence gathering has identified this as a key source of inefficiency as well as a limitation for EU competitiveness in line with Article 173(1) TFEU.

B. Objectives and Policy options

Objective: the overall policy objective is to ensure a fair and innovation-friendly platform economy. More specifically, the aim is (a) to optimise the innovation and growth potential of online platform ecosystems, by securing a predictable business environment for firms depending on platforms and thus enhancing the general level of trust of all (potential) users; (b) to limit direct negative effects of problems arising in platform-to-business relationships; (c) to prevent, ex ante, abuse of dependencies in the platform economy; (d) to reduce burdensome compliance costs derived from legal fragmentation, which could jeopardise the functioning of the Digital Single Market, and; (e) to facilitate the emergence of new online platform firms, including by reducing barriers to entry and by ensuring a level playing field.

Baseline (No EU policy change, option "0"): EU action would continue to be limited to possible ex-post enforcement of the existing competition and consumer protection frameworks in targeted cases. Since the bargaining power of business users vis-à-vis online platforms is unlikely to structurally increase in the foreseeable future, business users would continue to face the trading practices listed above. Given the growth of e-commerce in general, and the continued rise in online platforms, the dependency can even be expected to increase, and the number of businesses exposed to unfair trading practices would similarly increase. Moreover, business users would use online platforms less effectively than in a trusted and fairer environment, which would dampen the expansion rate of online platform markets as well as opportunities for new entrant platforms. Lastly, no policy change at EU level could also trigger alternative interventions taking place at MS-level.

Alternative options to the baseline scenario:

The Commission will explore several packages of specific measures to address friction in platform-to-business trading practices. The packages will be designed to be gradual in their level of intervention and scope, ranging from exclusive soft action to comprehensive EU-level legislation. Options for legislative packages (options 2 and 3) could combine measures of varying levels of policy intervention so as to address each individual problem identified above in the most proportionate and efficient way.

The preliminary options for packages of specific measures that will be explored can be presented as follows:

(1) Option 1: EU soft law action to spur industry-led intervention

Under this option, EU soft law would promote industry action on transparency, fairness and effective redress and to ensure enhanced monitoring of platform ecosystems. Such industry action could include the (enhanced) monitoring of, and statistical reporting on, online platform ecosystems; awareness raising among professional users of online platforms around existing legal, commercial and technical tools to help address certain unfair P2B trading practices; developing voluntary standards, including on contractual terms and conditions; developing trust marks; providing for (more) effective platform-internal escalation procedures; and the introduction of general platform-to-business fairness principles. In certain sectors and/or under certain circumstances the industry action could also foresee the structural or legal separation of online platforms' intermediation activities from auxiliary services.

(2) Option 2: Targeted EU legislative instrument combined with industry-led action

Under this option, a targeted EU legislative instrument with varying degree of policy intervention (see sub-

options below) would be combined with industry-led action. It would apply in parallel with the (EU) competition rules, which prohibit, *inter alia*, abusive behaviour by platforms that are found to be dominant on the relevant market(s) where they operate.

As a first sub-option, the EU legislative instrument could be limited to establishing a high-level obligation for online platforms to ensure access to effective (internal and/or external) redress for their business users, accompanied by EU soft law action to spur industry-led intervention that could include all or some of the elements listed above in option 1.

As a second sub-option, in addition to redress, the EU legislative act would also provide a minimum required level of transparency, coupled with EU soft law action to spur industry-led intervention.

In a third sub-option, the EU legislative act could establish a new independent dispute settlement mechanism to ensure effective redress and provide for high-level principles on transparency and fairness to be codified by industry. The transparency and fairness principles could include requirements for transparency and information provision, rules on data access and use and non-discrimination. The codification by industry could take the form of codes of conduct and/or standards.

Lastly, as a possible fourth sub-option, in addition to the elements in the previous elements, the EU legal instrument would also introduce a ban of specific problematic "P2B" or "B2B" commercial practices.

(3) Option 3: EU legislative instrument providing detailed principles.

Under this option, the EU legal instrument would establish a targeted and detailed regulatory framework for platform ecosystems coupled with an EU-level regulator. Such EU legislative intervention would introduce comprehensive rules on redress mechanisms to tackle specific P2B problems. Such instrument would also result in comprehensive rules on requirements for transparency & information provision, data access/use, access to justice, discrimination as well as on due process. It would apply in parallel with the (EU) competition rules, which prohibit *inter alia* abusive behaviour by platforms that are found to be dominant on the relevant market(s) where they operate.

In any of the three options outlined above, in cases concerning processing of personal data such as transmission of personal data between platforms and business users the rules of the GDPR should be complied with.

The design of the above options can be adjusted and further refined during the Impact Assessment process, and additional or alternative options can also be introduced.

C. Preliminary Assessment of Expected Impacts

Likely economic impacts

An effective principles-based and technologically-neutral intervention to limit the scope for unfairness in online platforms' P2B relationships would safeguard, and even enhance, the trust that third-party businesses have in online platforms, as well as the predictability of their trading environment. This would therefore support the continued development of the online platform business model, including in areas where these solutions currently remain largely absent. This would not only be to the advantage of the businesses involved, but also of consumers who would have access to a larger choice of products and services. In turn, as the Commission explained in the Communication on online platforms, these firms will foster digital value creation that will generate economic growth in the EU's Digital Single Market.

At micro-level, the initiative would aid the ability in particular for micro-enterprises and SMEs across a wide range of sectors in all Member States (e-commerce, entertainment, advertising, etc.) to scale up or innovate, as the increased stability and legal certainty improves their (innovation) potential as well as their – related – access to capital. In addition, the improved position of individual companies vis-a-vis online platforms in relation to access to and use of data could crucially speed up the development of data markets in the EU, with important positive economic impacts across the board in the EU's Digital Single Market. Finally, improved fairness and transparency by existing platform firms would also lower barriers to succeed for new entrant platforms, as opportunities to compete on the merits increase.

All these potential impacts will have to be elaborated in the impact assessment.

Likely social impacts

The possible (positive) impact of the policy options on overall job creation should be verified, noting that the aim of any intervention would be to support the beneficial online platform-model by reducing frictions in B2B relations. The associated impact on entrepreneurship is particularly relevant in this regard.

EU action in this field could prove the trading environment for micro-traders, including those located in more rural communities or those selling small quantities of traditional goods and services that are not normally accessible, by

<p>improving the legal standing of these small traders when they engage with online businesses.</p> <p>On a more general level, the furthering of the online platform economy would contribute to the availability of content and services for consumers and citizens – with online platforms already facilitating access to information in particular for younger generations and across borders (cf. report on 2015 public consultation on EU Citizenship) – and could therefore (positively) impact education, culture and youth.</p>
<p>Likely environmental impacts</p> <p>The possible impact of the policy options on the environment will be assessed in the Impact Assessment. Given the variety of sectors covering fully digital transactions (e.g. app stores), tourism activities (online travel agents) or sales of goods (e-commerce market places), the environmental implications are also diverse. For example, further development of the online platform business model might lead to increased online trading of physical products followed by an increased amount of deliveries of these products to customers, with potentially negative impacts for example on pollution. However, a downward pressure on prices and larger volumes might lead to optimisation of delivery operators' logistics processes, which could reduce the environmental cost per parcel and minimise negative impacts. More e-commerce in both physical and intangible products might also contribute to fewer individual car journeys, which would further mitigate the environmental impacts.</p>
<p>Likely impacts on fundamental rights</p> <p>The impact assessment for any intervention in this P2B space would need to closely assess possible impacts on the fundamental right to freely conduct a business, as protected by Article 16 of the Charter of Fundamental Rights of the European Union (the 'Charter'). However, as any of the options above would only be taken with a view to resolving a proven 'market failure', they should likely be seen to protect this right to freely conduct a business for professional users of online platforms. Indeed, online platforms may currently facilitate market access for a large number of individuals seeking to conduct a business, and enhanced protection for the latter group would reinforce the respect for the fundamental right to conduct a business. It is nonetheless crucial that the option retained does not go beyond what is necessary and proportionate to restore the effective functioning of the 'platform markets' in question, so as to achieve an optimal balance between the possibly conflicting rights to freely conduct a business enjoyed by online platforms on the one hand, and their users on the other.</p> <p>The right to conduct a business is closely linked to the right to an effective remedy held in Article 47 of the Charter, as the former cannot be effective in practice without the latter². Importantly, this right to an effective remedy has been recognised to exist on a standalone basis for legal entities.³ The impact assessment will therefore also need to have close regard for any positive or negative impact on this particular fundamental right; an effective alternative dispute resolution mechanism would in this regard for example significantly reinforce the respect for a large swath of Europe's SMEs to conduct a business – including by having effective access to justice.</p> <p>The impact assessment for any intervention in this P2B space should also duly take into account the impact on the right to protection of personal data (Art. 8 Charter) and the right to privacy (Art 7 Charter). In particular, the possible increase in transmissions of personal data between different controllers (platforms and business users) must be assessed.</p>
<p>Likely impacts on simplification and/or administrative burden</p> <p>The impact assessment will have due regard for the comparative impact/benefit of the various policy options outlined under B., above, in terms of administrative burden for companies and cost of oversight for regulatory authorities.</p>
<p>D. Data Collection and Better Regulation Instruments</p>
<p>Impact assessment</p> <p>An impact assessment is being prepared to support the preparation of this initiative and to inform the Commission's decision.</p>
<p>Data collection</p> <p>A year-long comprehensive assessment of online platforms has already been conducted, which included a comprehensive public consultation that yielded over 1000 responses from a wide variety of relevant stakeholders. This assessment allowed deriving important insights in the importance and economics of online platforms. It also produced a body of anecdotal evidence on potentially unfair behaviour occurring in platforms' P2B relationships.</p> <p>The Commission also organised an independent study on platform-to-business trading practices (Business-to-Business relations in the online platform environment - FWC ENTR/300/PP/2013/FC-WIFO), which comprised two dedicated surveys of a total of 3 787 business users of different types of online platforms, over 50 in-depth</p>

² http://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf.

³ See case C-279/09.

<p>interviews with both business users and platforms, as well as comprehensive case studies.</p> <p>An additional study (SMART 2017/0041) is on-going to collect additional evidence on platforms' legal terms and conditions and related trading practices.</p> <p>In addition, the Commission will further explore the issue of data access and portability in the online platform environment – including through a dedicated study that will build on the results of both the Commission's platform-to-business fact-finding as well as its public consultation on 'Building the European data economy'. This study includes an analysis of potential solutions to the issues identified.</p> <p>The Commission services will also further analyse the impact of friction in platform-to-business relationships in close cooperation with the Joint Research Centre (Institute for Prospective Technology Studies as well as Policy Lab). This complements on-going desk research on existing business-to-business or 'platform-specific' legislation in the 28 Member States to get clear evidence on the degree and impacts of existing legal fragmentation across the Digital Single Market.</p> <p>Finally, the Commission will ensure that it takes into account all relevant data that is available to it, covering different policy areas including justice (e.g. various on-going studies on online platforms), and innovation (e.g. the work on 'Building a European Data Economy' looks into data access issues, including in relation to online platforms). As part of its competition e-commerce sector inquiry the Commission also reviewed in detail the commercial relations between online market places, manufacturers and retailers.</p>
<p>Consultation strategy</p>
<p><i>Public consultations</i></p> <p>In addition to the 2016 public consultation on online platforms which yielded 1036 responses, the Commission organised targeted surveys of both online platforms and 3 787 of their business users on platform-to-business trading practices. As part of its efforts aimed at building and EU data economy, the Commission has also consulted the public on data access and portability issues in the online platform environment.</p> <p><i>Stakeholder workshops</i></p> <p>The Commission has held a series of structured stakeholder workshops on the respective topics of data, legal terms & conditions and transparency, as well as the use of algorithms. This exercise will be followed by expert meetings on dedicated topics, including on the EU fundamental right to conduct a business.</p> <p>In addition, a structured dialogue with Member States is on-going, notably through the e-Commerce expert group (established through Commission Decision 2005/752/EC).</p> <p>The present Inception Impact Assessment will further be open to public comment.</p>
<p>Will an Implementation plan be established?</p>
<p>If any of the options 2 or 3 is retained, an implementation plan (Staff Working Document) will be prepared to assist Member States in the application of the legal instrument in question.</p>