

## Initial Appraisal of a European Commission Impact Assessment

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# Promoting fairness and transparency in the online platform environment

Impact Assessment (SWD(2018) 138, SWD(2018) 139 (summary)) accompanying a Commission proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services

This briefing provides an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above-mentioned [proposal](#), submitted on 26 April 2018 and referred to the European Parliament's Committee on Internal Market and Consumer Protection (IMCO). The initiative is included in the [2018 Commission work programme](#) and also in the [Joint Declaration](#) on the EU's legislative priorities for 2018-2019.

Digital trade is increasingly intermediated by online platforms, which are widely recognised as important drivers for innovation and growth in the digital economy. Currently, more than a million EU enterprises, including SMEs, trade through online platforms to reach their customers. However, the European Commission has expressed concerns regarding the emerging powers of such platforms. For example, EU businesses trading online through platforms face several potentially harmful trading practices or are confronted with unfair contractual clauses.<sup>1</sup>

The aim of the initiative is to create a fair, transparent and predictable business environment for businesses when using online platforms. Platforms in this context should be understood as online platforms whose business model is to intermediate<sup>2</sup> or facilitate<sup>3</sup> transactions between consumers and business users and where a contractual relationship exists between the platform operator and the business user. The proposal covers EU platforms as well as non-EU platforms, as long as they intermediate between business users and consumers located in the EU. Likewise, EU and non-EU online search engines are covered, as long as they allow users located in the EU to perform searches of websites of business users established in the EU (IA, p. 80).

## Problem definition

The IA identifies the following three problems:

### 1. Potentially harmful trading practices

Platforms and general online search engines have increasingly become gateways to market access. At the same time, business users have become more dependent on their contractual relationships with such platforms and online search engines (IA, p. 22).<sup>4</sup> The commissioned [Ecorys](#) study found that nearly half (46 %) of business users have experienced problems with online platforms in the course of their business relationship (IA, p. 11). However, the average business relationship duration does not appear to be indicated.

Platforms benefit from network effects: the more users on one side of the platform (e.g. sellers), the more attractive it is for users on the other side (e.g. consumers) and vice versa. The more successful the platform, the stronger the network effects and the larger the bargaining power (IA, pp. 23-25). The IA identifies several harmful trading practices, which business users face as a result. These practices include sudden, unexplained changes in terms and conditions without prior notice;<sup>5</sup> the

delisting of products and services and the suspension of accounts without clear statement of reasons; issues related to the ranking of businesses or their offers; issues related to data access and use; the discrimination of businesses, and most-favoured nation (MFN) clauses (IA, pp. 10-18).<sup>6</sup>

## 2. The lack of effective redress for business users

When business users attempt to solve the potentially harmful trading practices described above, almost a third of all problems remain unsolved and a further 29 % can only be resolved with difficulty. Reasons for business users not taking any steps at all include notably the perceived ineffective nature of existing redress mechanisms, a fear of damaging the business relationship with the online platform and the difficulty of available procedures. According to the Commission, the fear of retaliation of business users also limits the effectiveness of any existing type of redress, whether judicial or non-judicial (IA, p. 18).

## 3. The risks deriving from emerging regulatory fragmentation in the digital single market

In the Commission's view, the current legal framework at EU and Member State level does not effectively address the problems identified. A number of Member States have already adopted, or are considering adopting, online platform-specific legislation (IA, pp. 19-20; Annex 8.5, p. 92). This may result in divergent regulatory measures, which may hamper online platforms' ability to scale up. Scaling-up is core to platforms' business strategies as it allows for stronger network effects (IA, p. 31).

What are the consequences? The IA estimates the reduction of sales through EU business user platforms, caused by the practices identified above, to amount to between €1.27 and €2.35 billion per year (IA, p. 27). Lack of trust is expected to have further dampening effects on the direct loss in sales. In total, the Commission estimates the reduction in platform turnover by business users to be €3.97 to €15.85 billion per year. Distrust is also expected to affect cross-border sales negatively leading to a more limited choice for consumers (IA, pp. 28-29).

## Objectives of the initiative

The **general policy objective** is to ensure the functioning of the digital single market in accordance with Article 114 TFEU. The IA highlights the inherent cross-border nature of the online platform economy and the increasing role that online platforms play in intermediating access to the digital single market (IA, p. 32). The Commission defines the following three **specific objectives**:

1. Ensuring a fair, transparent and predictable treatment of business users by online platforms;
2. Setting effective and agile redress for businesses, adaptable to the evolving market;
3. Preserving a predictable and innovation-friendly legal environment for online platforms within the EU, without placing undue administrative burden on platforms.

The IA explains how the objectives are linked to the problems identified in an 'objectives tree' (IA, p. 34). The operational objectives are defined after the selection of the preferred option in the section on monitoring, as required by the Better Regulation guidelines. Overall, the objectives correspond to the identified problems, although search engines are not specifically mentioned.

## Range of options considered

The IA considers four policy options, in addition to the baseline option. Under the baseline option, online platforms are expected to expand. The dependency and the relative market strength of online intermediaries over their business partners would increase, in the absence of an effective redress mechanism. Fragmentation of the digital single market would be likely to increase (IA, p. 36).

The Commission discusses the four options and subsequently discards the non-legislative option 1, because pure self-regulation is considered unlikely to be effective. Likewise, option 3, providing for mandatory, binding rules for all aspects, was discarded, since it was considered inappropriate in the fast-moving platform environment. Lastly, option 4, extending existing EU consumer protection rules

to platform-to-business relations, was discarded, because it was considered disproportionate and could negatively impact consumer protection (IA, pp. 40-44).

The IA retains option 2 with its four sub-options 2.a-d. Option 2 provides a co-regulatory approach based on the Commission's [principles for better self- and co-regulation](#). According to the IA, co-regulation would guarantee a predictable legal framework, while simultaneously giving flexibility to industry to decide on voluntary commitments (IA, pp. 44-45). An overview of the different option elements and their effectiveness, cost-efficiency and coherence is provided in Annexes 9 and 10 (pp. 108-123). The table below is taken from the IA. It includes discarded option 1, because the retained options 2.a-d are built upon it.

| Option 1: Non-legislative approach / pure self-regulation (IA, p. 37) |   |
|---|---|
| Transparency  | <ul style="list-style-type: none"> <li>- Industry would be encouraged to develop measures of its choice to address the problematic potentially harmful trading practices identified;</li> <li>- Industry would be encouraged to improve transparency on data policies, differential treatment and auxiliary services;</li> <li>- Structured dialogues would be envisaged with industry aiming to address issues in paid-for ranking, encouraging voluntary standards and private audits.</li> </ul> |
| Redress   | <p>Industry would be called on</p> <ul style="list-style-type: none"> <li>- To improve its internal complaint-handling mechanisms for business users;</li> <li>- To set up an additional external independent redress mechanism at EU level.</li> </ul>   |
| Monitoring  | <p>An EU observatory would be created to monitor issues related to data access and use by platforms and their business users. The sharing of non-personal and personal data would be in full compliance with the <a href="#">General Data Protection Regulation</a> (GDPR).</p>   |

| Option 2.a: Limited scope of legal transparency principles, maximum focus on voluntary industry action (IA, pp. 37-38) |   |
|--|---|
| Transparency   | <p>Option 2.a builds on option 1, and would in addition include legal transparency obligations for platforms on limited issues, i.e. terms and conditions and delisting. This option would comprise, inter alia, the following measures:</p> <ul style="list-style-type: none"> <li>- Improved clarity and availability of terms and conditions;</li> <li>- A reasonable notice period before introducing changes to terms and conditions;</li> <li>- List of the objective grounds for suspension or termination of use of platform;</li> <li>- Explanation for any decision to suspend or terminate the use of a platform;</li> <li>- Industry would be encouraged to explore practical solutions that improve the predictability around the functioning of ranking mechanisms, any preferential treatment of platforms' own products or services, access to data, the use of most-favoured nation clauses, and the verifiability of paid-for prominence in ranking.</li> </ul> |
| Redress  | <ul style="list-style-type: none"> <li>- Legal obligation for platforms to provide internal complaint-handling mechanisms and to list mediation services;</li> <li>- Industry would be called on to set up industry-specific mediation services at EU level;</li> <li>- Industry would be encouraged to develop further the internal complaint-handling mechanism in the form of codes of conduct;</li> <li>- Right for business associations to seek action in court to obtain injunctive relief to ensure legal obligations on redress are complied with.</li> </ul>  |
| Monitoring   | <p>In addition to the tasks under option 1, the EU observatory would monitor issues related to preferential treatment of a platform's own products or services and the use of MFN clauses. Platforms would be required to report on the use of the internal complaint-handling mechanism. The EU observatory would act as a repository in this regard. A medium-term review clause would be considered.</p>   |

| Option 2.b: Co-regulation with horizontal application of legal transparency principles to all trading practices (IA, p. 38)   |  |
|---|--|
| Transparency  | The legal transparency principles would extend to all potentially harmful trading practices in relation to clarity and availability of terms and conditions, delisting, ranking, discrimination, data and MFN clauses. The industry would continue to develop codes of conduct to provide practical solutions to implement these legal principles. |
| Redress   | Same as under option 2.a.  |
| Monitoring  | Same as under option 2.a.  |
| Option 2.c: Horizontal application of legal transparency principles to all trading practices, scope extension to online general search (IA, p. 38)  |  |
| Transparency  | Option 2.c builds on option 2.b. The scope of the legal transparency obligation on the core issue of ranking would be expanded to encompass online platforms as well as online search engines. The industry would develop codes of conduct to provide practical solutions for meaningful ranking transparency in general search.                   |
| Redress   | Option 2.c builds on option 2.a. In addition, business associations, whose websites are indexed by online general search engines, would be granted the right to seek action in court to obtain injunctive relief to ensure that the legal obligation on transparency on ranking in online general search is complied with.                         |
| Monitoring  | Same as under option 2.a.  |
| Option 2.d: Horizontal application of legal transparency principles to all trading practices, scope extension to online general search and targeted legal obligation on email addresses (IA, pp. 38-39) |  |
| Transparency  | Option 2.d builds on option 2.c. This option would add a legal obligation for platforms to give business users the opportunity to ask, in line with the GDPR, for customers' consent to obtain and process their email-addresses after the completion of a transaction and the payment of the commission to the respective platform.               |
| Redress   | Same as under option 2.c.  |
| Monitoring  | Same as under option 2.a.  |

Overall, the range of options considered appears sufficiently broad. It includes a non-regulatory option as recommended by the [Better Regulation guidelines](#). However, the Commission could perhaps have better justified the creation of a new monitoring body (EU observatory), since the Member States were generally opposed to it (IA, p. 82). It is also unclear how all options would achieve the objective of preserving an innovative environment as part of the third specific objective (see IA, pp. 68-69).

**The Commission's preferred option is option 2.c, as highlighted in grey in the table.** It is regarded as the most effective option and about as efficient as option 2.b. It covers the two most important ranking-based originators of internet traffic, namely online platforms and online general search engines. Option 2.c would allow the extension of the expected positive effects of the transparency obligation and of the legal standing provision to online general search (IA, pp. 66-83). Annex 4.2 contains an overview of the costs and benefits of the preferred option.

## Scope of the impact assessment

The Commission comprehensively assesses the economic and social impacts of the retained options (IA, pp. 45-66; Annex 12). No direct environmental impact is expected (IA, p. 60).

**Internal market** – according to the IA, all substantive rules proposed would provide business users with greater legal certainty when using online platforms to trade in the internal market and provide concrete tools to seek redress in case of problems, thus supporting the growth of the digital single market (IA, p. 46).<sup>7</sup> Given the more limited scope of option 2.a, this option is said to carry a greater risk of fragmentation across the Member States as opposed to options 2.b, 2.c and 2.d. The EU observatory would help to build a common EU understanding of the key issues (IA, pp. 47-48).

**Enterprises** – the IA assesses the compliance costs of 1) the implementation of the transparency requirements; 2) the redress mechanisms; and 3) the reporting obligations on the functioning of the internal redress mechanism. The costs under point 1) are considered one-off and, subsequently, regular running costs. Providing transparency on ranking in this fast-moving area implies more significant compliance costs (IA, pp. 48-49). The costs relating to redress mechanisms 2) and reporting 3) are in general expected to be limited (IA, pp. 50-51).<sup>8</sup> The Commission considers it unlikely that platforms would significantly increase their fees. However, supporting evidence for this assumption does not appear to be presented. The IA argues that even if platforms increase fees and transfer the additional costs onto business users, this burden would be limited (IA, pp. 54-55). Businesses' turnover is directly impacted by their visibility on search engines. A transparency obligation on search ranking (option 2.c) would provide for more predictability (IA, pp. 55-56).

**Member State authorities** – in the Commission's view these would not be directly impacted by the co-regulatory options (IA, p. 56). However, the IA highlights that some Member State online platform-specific legislation may raise issues of compatibility with EU law (IA, p. 21; Annex 8.5).

**Innovation and competition** – the IA states that regulatory action could hamper the innovation capacity of online platform ecosystems only 'if it were too interventionist' (IA, p. 57). According to the IA, all retained options were checked against 'coherence with innovation' and none would interfere with platforms' business models. However, experts emphasised that transparency can pose risks as it may expose trade secrets or sources of competitive advantage. They also stated that policy uniformity may prevent new technologies and business models from ever emerging.<sup>9</sup> The IA considers that all co-regulatory options would set a standard for higher service quality (IA, p. 58).

**Employment and social impact** – the IA assesses the impact of the co-regulatory options on social welfare, including employment and related social impact, as being likely to be positive, with 4.7 million jobs preserved and further possible job creation. The increase in turnover for business users realised on platforms is calculated to be between €0.381 to €0.705 billion. The positive impact on the platform economy is expected to be between €0.81 to €4.05 billion per year (IA, pp. 58-59; Annex 4, p. 53).

**Consumers** – as a result of greater transparency, greater choice and quality, consumer trust is expected to increase. Costs for consumers, however, are expected to remain the same (IA, p. 59).

**Impact on fundamental rights** – in the Commission's view, all co-regulatory options fully comply with the EU Charter of Fundamental Rights, in particular Article 8 on protection of personal data, Article 16 on the freedom to conduct a business, and Article 47 on the right to an effective remedy and to a fair trial (IA, p. 60; Annex 12.8).

## Subsidiarity / proportionality

The Commission identifies Article 114 TFEU as the legal basis. The IA explains that the initiative constitutes a core part of the digital single market strategy. The Commission considers EU action necessary due to the intrinsic cross-border nature of online platforms and the risk of further fragmentation of the single market into different, potentially contradictory frameworks. EU action is regarded as the only way to prevent direct harm to businesses in the immediate term, and to

safeguard the single market-potential of online platforms in the medium- to long-term. The added value of EU action would moreover consist in lower compliance costs and enhanced legal certainty (IA, pp. 31-32; Annexes 1.10 and 1.11). All co-regulatory options except option 2.d are considered proportionate (IA, pp. 73-76). No reasoned opinions were submitted by national parliaments by 29 June 2018, the deadline for submission.

## Budgetary or public finance implications

The IA states that national authorities would not be directly impacted by any of the co-regulatory options (IA, p. 56). According to the Commission, the proposal will not have any implications for the EU budget (explanatory memorandum to the proposal, p. 9). The Commission would be responsible for setting up the EU observatory as well as the portal for receiving complaints from business users that have not been able to solve issues with online platforms through available redress mechanisms. The portal would imply one-off costs for the Commission of up to €1 000 000 (Annex 4.1, p. 53).

## SME test / Competitiveness

The IA includes an SME test. This test comprises 1) a preliminary assessment of businesses likely to be affected, 2) a consultation with SMEs, 3) an assessment of the expected impacts on SMEs, and 4) an assessment of alternative options and mitigating measures (Annex 11, pp. 126-127). The Commission also conducted a [Eurobarometer survey](#) on the use of online marketplaces and search engines by SMEs. In responding to this survey, 66 % of EU SMEs explained that their position in search results of general search engines and online platforms has a significant impact on their sales.<sup>10</sup> The IA points out that **SME online platforms** would benefit overall from the growth of the platforms environment and enhanced transparency (IA, pp. 51-53; Annex 12.2). It also examines options on thresholds to exempt small platforms from the initiative, in line with the '[Think Small First](#)' and the [Better Regulation principles](#) (IA, pp. 52-54, 74, 81).

None of the options would create significant costs for **SME business users**, according to the IA. On the contrary, SME users of platforms stand to gain from measures that would provide them with greater ease of doing business and enhanced legal certainty. This includes in particular the measures on transparency and minimum notice periods for changes to terms and conditions, transparency on the reasons for suspension or delisting, and transparency on the criteria for paid ranking results. These measures would lead to savings for smaller business users. With regard to competitiveness, the IA argues that EU-based online platforms would not be undermined by the proposed measures. 'On the contrary, the platform ecosystem may be expected to become more competitive as a result of this initiative ...' (IA, p. 57; Annexes 12.4.2).

## Simplification and other regulatory implications

By creating a clear, transparent and stable legal environment for online service providers and business users, this initiative aims to contribute to the [digital single market strategy](#). The proposal is considered consistent with other EU policies and rules (explanatory memorandum of the proposal, pp. 3-4). This includes the new legal definition of online intermediation services in article 2(2) (IA, p. 4). The proposal complements competition rules and consumer protection law, while leaving the application of those rules unaffected. The [New Deal for Consumers](#) is only briefly cited (IA, p. 4).

## Quality of data, research and analysis

The Commission conducted an extensive fact-finding exercise to assess the potential abuse of power of online platforms. The IA is based on wide-ranging external expertise: several studies were commissioned from contractors, such as [Ecorys](#), [Ernst&Young](#), [VVA](#), and [LSE](#). The Commission also consulted 16 international experts. The IA used surveys and research conducted by the Commission's Joint Research Centre (JRC) (Annex 2, pp. 23-25). Annex 5 elaborates on the analytical models used, including on the model of economic loss. Information is provided regarding the key assumptions. The Commission admits that 'these calculations are rough and only intended to give an approximate figure of the impact. More detailed data and more precise methodologies would be required in order

to produce more accurate estimations' (Annex 5, p. 61). In addition, the IA provides extensive data on the online platforms market and the main market players (see Annex 7).

## Stakeholder consultation

The IA identifies the stakeholders affected by the initiative. These include business users, online platforms, online general search engines, consumers, national public authorities and the European Commission (Annex 4.1). The Commission consulted widely for this IA. It engaged in 55 bilateral stakeholder meetings, in particular with companies and associations. An open online [public consultation](#) was carried out on the regulatory environment for platforms, liability of intermediaries, data and cloud and collaborative economy from 24 September 2015 to 6 January 2016. The consultation received more than 1 036 replies from various stakeholders. Another 10 599 individual contributions were received via one single advocacy association. In addition, a series of workshops and focus groups, as well as surveys and a questionnaire, were organised (Annex 3, pp. 25-46).

Business users generally support the preferred option. Most online platforms would agree that providing an explanation to a business user in case of delisting or take-down of an offer seems to be a reasonable legal obligation, provided their legal obligations to take down illegal content is respected. Online platforms do not see the added value of external dispute resolution. Online platforms and general search engines warn of the risks of manipulating ranking algorithms. Many national experts agree that the terms and conditions play a key role, but views diverged on other topics. Consumers are expected to support the preferred option (IA, pp. 81-82; Annex 4.3).

## Monitoring and evaluation

The Commission plans to monitor the online platforms' economy through the EU observatory, which comprises an expert group and a team of Commission officials (see [Commission Decision C\(2018\)2393](#)). The IA identifies monitoring indicators linked to the operational objectives. The initiative is planned to be evaluated and possibly reviewed three years after entry into force of the regulation (IA, p. 83 and Table 5, p. 84; article 14 of the proposal).

## Commission Regulatory Scrutiny Board

The European Commission's Regulatory Scrutiny Board (RSB) issued a [negative opinion](#) on a draft IA on 1 December 2017. The RSB recommended to: 1) clarify the scope of the intervention; 2) demonstrate the scale of the identified problems and the single market dimension; 3) better analyse the impacts as regards compliance costs and their distribution, and revenue sharing; 4) better explain the proportionality of the measures. In its second [opinion marked 'positive with reservations'](#) of 22 March 2018, the RSB recommended to: 1) clarify the scope of the initiative; 2) better explain the options; (3) explain the dependence of the initiative on the effectiveness of the 'flanking measures'.<sup>11</sup> The Commission describes how the RSB's recommendations were addressed in the final IA report (Annex 1, pp. 4-11). However, it could have better explained why search engines were included in the initiative and the implications thereof, after the first submission, as noted by the RSB.

## Coherence between the Commission's legislative proposal and IA

The proposal seems to follow the preferred option of the IA. Article 10(4) of the proposal stipulates that providers of intermediation services shall bear at least half of the total costs of mediation. It appears this point was not discussed in the IA. It has been argued that this provision might negatively affect SMEs.<sup>12</sup> In addition, the IA indicates a 'reasonable' notice period to inform about changes to terms and conditions. The proposal translates this term into a notice period of at least 15 days in its article 3(3).

## Conclusions

Generally speaking, the Commission has made substantial efforts to build its case for co-regulatory action in the online platform environment. A broad stakeholder consultation was conducted. The Commission based its IA on a wide range of data, analysis and external expertise. However, it admits

that some calculations and estimates are rough. In addition, the IA could have elaborated on how transparency not only contributes to predictability and a greater choice, but can also pose risks for innovation in the online platform environment. Finally, the reason for the inclusion of search engines in the initiative after the first submission to the RSB might have merited a better explanation.

## ENDNOTES

- <sup>1</sup> See T. Madiaga, [Fairness and transparency for business users of online services](#), EPRS, July 2018; [Online Platforms: How to Adapt Regulatory Framework to the Digital Age?](#), Briefing for Policy Department for Economy and Scientific Policy, European Parliament, June 2017; M. Grajewski, [The Platform Economy](#), What think tanks are thinking, EPRS, February 2018; see also the Commission's [inception impact assessment](#) of October 2017.
- <sup>2</sup> These are services offered on marketplaces where a commercial transaction between a customer and a business user takes place (transaction takes place on the platform).
- <sup>3</sup> Online platforms bring together users with the aim of 'facilitating' a commercial transaction (which does not necessarily take place on the platform itself).
- <sup>4</sup> Online platforms and online general search engines are distinct types of online services, the latter indexing websites without necessarily entering into contractual relations with the website users (IA, p.13).
- <sup>5</sup> For example, 20 % of the business users surveyed in the [Ecorys](#) study consider terms and conditions inherently unfair, and 72 % of those gave as the main reason for unfairness the impossibility to negotiate contractual clauses (IA, p. 11).
- <sup>6</sup> Most-favoured nation clauses require the supplier to offer a product or service on an online platform at the lowest price and/or on the best terms offered either through its own distribution channel(s) or on all sales channels (IA, p. 17).
- <sup>7</sup> According to the Commission, this would lead to a positive impact on the platform economy of between €381 and €705 million per year in terms of increased turn-over, and between €810 million and €4.05 billion per year of reversed dampening effect (IA, p. 47).
- <sup>8</sup> The costs of an internal redress mechanism would vary considerably depending on the size of the platform. These costs can be estimated at 0.4 to 1 % increase in the cost base for smaller platform companies, and a one-off cost of 0.03 % of total turnover for larger ones (see IA, pp. 49-50).
- <sup>9</sup> B. Williamson and M. Bunting, [Reconciling private market governance and law: A policy primer for digital platforms](#), Communication Chambers, May 2018, pp. 19 and 27.
- <sup>10</sup> Flash Eurobarometer 439, [The use of online marketplaces and search engines by SMEs](#), June 2016, p. 21 (IA, p. 13).
- <sup>11</sup> It is not clear from the IA what these flanking measures are. The Commission deleted the reference in the final IA report (IA, Annex 1, p. 5).
- <sup>12</sup> See Dutch Ministerie van Buitenlandse Zaken, [Fiche 8: Verordening inzake relatie tussen platforms en bedrijven](#), attached to Kamerbrief inzake informatievoorziening over nieuwe Commissievoorstellen, 1 June 2018, p. 5.

This briefing, prepared for the European Parliament's Committee on Internal Market and Consumer Protection (IMCO), analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal.

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