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#### COVER NOTE

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From: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 26 April 2018

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of  
the European Union

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Subject: COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY  
OF THE IMPACT ASSESSMENT Accompanying the document Proposal  
for a Regulation of the European Parliament and of the Council on  
promoting fairness and transparency for business users of online  
intermediation services

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Delegations will find attached document SWD(2018) 139 final.

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Brussels, 26.4.2018  
SWD(2018) 139 final

**COMMISSION STAFF WORKING DOCUMENT**  
**EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT**

*Accompanying the document*

**Proposal for a Regulation of the European Parliament and of the Council  
on promoting fairness and transparency for business users of online intermediation  
services**

{COM(2018) 238 final} - {SEC(2018) 209 final} - {SWD(2018) 138 final}

## Executive Summary Sheet

Impact assessment on a Proposal for a Regulation on Promoting Fairness in Online Intermediated Trade.

### A. Need for action

#### Why? What is the problem being addressed?

EU merchants trading online face a series of potentially harmful trading practices where their trade is intermediated by online platforms. Evidence shows that these practices – such as delisting without statement of reasons or sudden changes of Terms and Conditions – can have a significant negative impact on businesses.

When such problems occur, businesses have no effective redress mechanisms available in the EU to resolve problems. This means that European businesses underexploit the potential of the online platform economy, to the detriment of platforms and ultimately consumers especially in terms of cross-border trade. Businesses' turnover is in addition directly impacted by the visibility they get on online platforms and on online general search engines. Ranking practices directly influence websites' visibility and internet traffic received. Opaque ranking practices could have highly negative impact on businesses.

At the same time online platforms face difficulties operating across the single market due to an emerging fragmentation of the single market. This limits sales, in particular cross-border sales, for EU businesses through platforms.

These problems are driven by the increasing importance of online platforms in intermediating transactions between consumers and businesses. Businesses are increasingly dependent on online platforms, and strong, data-driven network effects, together with a significant fear factor, result in an imbalance in bargaining power between merchants and platforms.

#### What is this initiative expected to achieve?

The specific policy objectives are three-fold. Firstly, the proposal intends to ensure a fair, transparent and predictable treatment of business users by online platforms. Secondly, the proposal aims to provide business users with more effective options for redress when they face problems. Thirdly, the initiative aims at creating a predictable and innovation-friendly regulatory environment for online platforms within the EU.

#### What is the value added of action at the EU level?

Online platforms such as Booking.com, Facebook, eBay or Amazon (and many others) connect millions of consumers and merchants across borders in the EU, regardless of their place of legal establishments. The problems underlying the Impact Assessment have a deeply transnational aspect. Even in cases where online platforms start in one national market, those platforms rapidly and easily expand beyond their original market, and indeed many online platforms operate cross-border.

Member States action alone cannot capture the intrinsic transnational characteristics of the problem. The EU added value derives from the fact that uniform rules framing the relation between merchants and platforms are needed for the smooth functioning of the Digital Single Market.

The present initiative aims 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, by improving business user trust and by enabling well-informed policy responses at the appropriate level. It therefore serves to protect the interests of all participants in the online platform ecosystem.

## B. Solutions

### What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?

The Impact Assessment has considered a range of policy options, ranging from pure non-legislative, self-regulatory approaches to fully binding mandatory rules aimed at achieving the policy objectives.

Purely non-legislative policy options considered focused on calls to industry to develop voluntary measures to address the most problematic trading practices, and to establish an industry commitment to improve access to redress for business users via self-regulation. An independent monitoring strategy would similarly rely on industry commitments to report on the effectiveness and evolution of the problems. This option was discarded as unlikely to fully meet the policy objectives.

Amongst the legislative policy options considered, co-regulatory solutions (combining legislative with non-legislative elements) as well as fully binding, mandatory rules without any voluntary components were considered. A fully binding solution would lay down exhaustive mandatory rules prohibiting the trading practices in question, combined with mandatory EU wide dispute resolution mechanism, and obligatory reporting by platforms to a fully-fledged regulatory agency (as has been proposed by a number of Member States). This has been discarded as disproportionate.

The preferred option is a co-regulatory solution addressing issues identified on online platforms and in online general search. Regarding online platforms, the regulatory part combines a set of legally binding transparency obligations on platforms, an obligation to set up internal redress mechanisms, as well as provisions to allow for collective redress for associations representing businesses. This would be combined with a non-binding call to industry to establish an independent mediation body for complaints. Finally, an EU observatory for emerging problems, organised around an EU expert group will also be set up to monitor emerging trends and the evolution of problems. Regarding online general search engines, the preferred option is targeted to address the dependency induced by potentially harmful ranking practices. The measures foreseen are limited to scoped transparency obligation (limited to the single issue of ranking), and to legal standing for representative organisations to act on behalf of their business members.

### Who supports which option?

Business users of online platforms generally support more far reaching, binding rules for the platform economy in order to increase their leverage over the relationships intermediated by online platforms. These include rules on delisting businesses, and transparency on discriminatory practices or ranking of apps, as well as rules on access to data in e-Commerce market places.

Online platforms generally support self-regulatory measures and oppose binding rules as too burdensome on their business models, and disproportionate to the problems at hand. Experts responsible for the Digital Single Market as well as e-Commerce from Member States' administrations have expressed support for a co-regulatory, problem-driven approach, in principle.

Regarding transparency around rankings and data use, platforms would agree with high-level disclosure, but warn of "gaming" and manipulation of algorithms in case of too much transparency. General search engines already provide comprehensive guidance on how to optimize the ranking, but warn of the ineffectiveness of disclosing algorithms, not least in light of many and frequent changes to search algorithms, as well as on the risks to manipulation of search results.

## C. Impacts of the preferred option

### What are the benefits of the preferred option (if any, otherwise main ones)?

The preferred option is expected above all to produce direct economic benefits for EU merchants through additional sales in the digital platform economy, which would also benefit online platforms. The proposal is estimated to be capable of reversing a dampening effect on the online platform economy resulting from a lack of trust of business users. The reversed dampening effect is expected to range between EUR 0.81 billion and EUR

4.05 billion.

Businesses' turnover is in addition directly impacted by the visibility they get on online general search engines. A transparency obligation on ranking in general search would thus allow more predictability for business users. At the same time such obligation would help businesses to develop better informed search optimisation strategies, greater insight in which could lead businesses to access new markets and embrace innovation opportunities offered online, thus also enhancing their competitiveness. This would be particularly beneficial for SMEs and enterprises with no or emerging online presence. Better insight in ranking policies could also help business users grasp innovation opportunities offered online.

The preferred option can also be expected to have a pro-competitive effect between search engines and comparison sites through enhanced transparency, as public ranking policies can provide a greater scope for differentiation by start-ups, new entrants as well as existing players. Competition on quality of products and services among business users dependent on search engines for their marketing strategies could potentially also increase due to greater insight in ranking policies – to the extent such business users' website design are currently sub-optimal for achieving visibility. It is not excluded that the preferred option equally contributes to a more impartial outcome for consumers in the form of higher relevance results being more easily identifiable. A transparency obligation set in EU law would strengthen businesses' ability to use such a provision in court proceedings. Finally, it would also be a helpful complement to enforcement tools under competition law since it would allow greater insight in possible discriminatory behaviours. The additional trust for search engines which would result from the initiative could be expected to counterbalance the limited costs.

Direct social benefits are conceivable in particular for self-employed entrepreneurs or microenterprises doing business via digital platforms, resulting from a greater predictability and transparency online. This includes professional users of collaborative economy platforms (although the boundaries between professional and personal use is set at national level in the EU), but the precise nature and scope of these benefits cannot be quantified.

The preferred option can be expected to either increase employment opportunities or maintain existent ones.

No direct environmental benefits are expected from the measure.

#### **What are the costs of the preferred option (if any, otherwise main ones)?**

The main costs of the preferred option relate to the requirement for online platforms to set-up an internal redress mechanism for business users, as well as one-off legal compliance costs to implement the transparency requirements which in practice means adapting the platforms terms and conditions. These costs vary considerably with size, complexity and number of transactions intermediated, but can amount to 1 FTE in staff for smaller platform, and reach values of ~0.03% of turnover for large platforms, based on industry data. No additional costs are expected for EU merchants trading on platforms. The compliance costs for online general search engines are expected to be rather limited both for bigger search engines (which have provided SEO guidelines that could be usefully re-purposed for business users, or serve in some cases as inspiration for ways to provide meaningful transparency), and for smaller ones (since they would be able to equally draw from existing best practices).

The preferred option has no direct negative impacts in the social or environmental area.

#### **How will businesses, SMEs and micro-enterprises be affected?**

Businesses of all sizes using online platforms to trade will be the main beneficiaries of the preferred option. The particular relative benefits will be strongest for weaker parties such as microenterprises, whose bargaining power in the online platform economy is particularly limited.

Concerning platform businesses, the preferred option would exempt small enterprises (<50 employees) from the obligation to set-up an internal redress mechanism, so as to prevent burdens during the scale-up phase of EU platform businesses. As to the possibility to set an additional threshold exempting enterprises from the entire regulation, the analysis of pros and cons does not allow concluding on the need to add a horizontal exemption to the internal mechanism-specific one.

<b>Will there be significant impacts on national budgets and administrations?</b>
No.
<b>Will there be other significant impacts?</b>
<p>Most notable are potentially significant indirect benefits for consumers, as a result of greater choice and improved trust, as more smaller merchants enter the platform economy, as well as from increased transparency, e.g. in areas such as disclosure of the general criteria which determine ranking mechanisms. Additional indirect benefits can be expected in the area of innovation, as a result of increased turn-over and greater predictability, but also through transparency on modalities of data access policies. Other potentially significant impacts in areas such as fundamental rights and impacts on non-EU platforms have been assessed and not found to be significant.</p>
<b>D. Follow up</b>
<b>When will the policy be reviewed?</b>
<p>The proposed policy is designed to be reviewed after three years in force, and accompanied by a dedicated EU Observatory which will capture and analyse emerging trends in the digital economy, and inform the review of the policy. This is a key component of the policy, to ensure an adaptive, responsive, and future-proof approach, tailored specifically to the dynamic nature of the area.</p>