



EUROPEAN COMMISSION

Brussels, 26.4.2018
SEC(2018) 209 final

REGULATORY SCRUTINY BOARD OPINION

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}

{SWD(2018) 138 final}

{SWD(2018) 139 final}



EUROPEAN COMMISSION

Regulatory Scrutiny Board

Brussels,

Ares(2018)

Opinion

Title: Impact Assessment / Promoting fairness in online intermediated trade

(version of 9 March 2018)*

Overall 2nd opinion: POSITIVE WITH RESERVATIONS

(A) Context

Online platforms and search engines help many small firms to connect with customers over the internet. Some businesses may depend heavily on access to such platforms. Some worry that platforms abuse their market power over small firms.

A 2016 Commission study listed concerns about online platform trading practices. The European Parliament supported a legislative framework for business-to-business relations that would support consumers and growth.

The impact assessment proposes actions to ensure that online platforms and search engines treat business users fairly and predictably. It also seeks ways to increase transparency and provide business users with more effective ways to resolve disputes.

(B) Main considerations

The Board acknowledges the efforts to clarify the scope of the initiative, to provide more evidence to support the proposal and to better detail the options. It takes note of the extension of the initiative to search engines.

The report still contains shortcomings that need to be addressed. As a result, the Board expresses reservations and gives a positive opinion on the understanding that the report shall be adjusted in order to integrate the Board's recommendations on the following key aspects:

- (1) The scope of the initiative is still not clear enough as to how multi-faceted online platform models will be involved.**
- (2) The design of the options remains unclear, leaving little variation between the options really at stake. The justification for choosing the co-regulatory approach and immediately discarding all other approaches is insufficient.**
- (3) The dependence of the initiative on the effectiveness of the 'flanking measures' is not sufficiently discussed to appreciate the overall expected impacts.**

* Note that this opinion concerns a draft impact assessment report which may differ from the one adopted.

(C) Further considerations and adjustment requirements

(1) The detailed analysis of the various online business models at stake helps to better understand the scope of the initiative. To provide a comprehensive overview, the analysis related to the multi-faceted online platform business models should be included in the core of the report, rather than in the annex. The report should provide more explanation as to the approach taken to identify these online services and include them in the scope of the initiative. It is not evident whether the extension aims at protecting businesses from search engines deliberately de-ranking them in search results, or rather to enable businesses to exploit the disclosed ranking algorithms to artificially improve their position. As the main online search engines already have disclosed information on the rankings, the report should assess to what extent an action on this issue is necessary at the EU level.

(2) The report should clarify the rationale behind the design of the many options. In particular, the report should better substantiate the choice of measures in option 2 and 3, as both options differ only on one single issue. The report should further explain the perceived contradiction between the various calls and invitations on industry (voluntary measures) and legal obligations to comply with the voluntary measures potentially agreed upon, for example, concerning an external independent redress mechanism. The reasoning behind the choice of the co-regulatory approach and the immediate discarding of all other approaches is insufficiently developed and presented.

(3) The report should further detail what ‘*independent flanking measures*’ will look like. It should explain to which extent the effectiveness of the initiative depends on the successful implementation of these flanking measures.

Important parts of the annexed material could be moved to the main text. The addition of a lot of new information has fragmented the main report and the annexes, reducing the informative value of the main report.

The Board takes note of the quantification of the various costs and benefits associated to the preferred option of this initiative, as assessed in the report considered by the Board and summarised in the attached quantification tables.

(D) RSB scrutiny process

The lead DG shall ensure that the report is adjusted in accordance with the recommendations of the Board prior to launching the interservice consultation.

The attached quantification tables may need to be adjusted to reflect any changes in the choice or the design of the preferred option in the final version of the report.

Full title	Regulation of the European Parliament and of the Council on promoting fairness and transparency in online intermediated trade
Reference number	PLAN/2017/1375
Date of RSB opinion	22/03/2018

ANNEX: Quantification tables extracted from the draft impact assessment report submitted to the Board on 9/03/2018

(N.B. The following tables present information on the costs and benefits of the initiative in question. These tables have been extracted from the draft impact assessment report submitted to the Regulatory Scrutiny Board on which the Board has given the opinion presented above. It is possible, therefore, that the content of the tables presented below are different from those in the final version of the impact assessment report published by the Commission as the draft report may have been revised in line with the Board's recommendations.)

<i>I. Overview of Benefits (total for all provisions) - Preferred Option(s)</i>		
Description	Amount	Comments
<i>Direct benefits</i>		
Additional commissions	From EUR 81 to EUR 405 million	Platforms would benefit from those due to increase in businesses' turn-over
Increased turn-over	EUR 0.381 billion to EUR 0.705 billion	Business users
	EUR 0.81 to EUR 4.05 billion per year	Platform economy
Employment	4.7 million jobs to be maintained, with further job creations possible	Estimated number of preserved jobs
Administrative savings	EUR 7,500 per dispute	Savings for business users solving disputes through mediation
<i>Indirect benefits</i>		
Consumer trust	84% of consumers confident buying online cross-border by 2020	Preferred policy package will support further trust of consumers in online economy
Innovation	Increase in R&D&I investment by platforms	Increased competition and ultimately number of start-ups will foster innovation

<i>II. Overview of costs - Preferred option(s)</i>					
		Online platforms		Administrations	
		One-off	Recurrent	One-off	Recurrent
Internal redress mechanisms	Direct costs	0.4 to 1% increase in the cost base for smaller platform companies; 0.03% of total turnover for larger ones .	Limited dispute-settlement costs	Not applicable	Not applicable
	Indirect costs	Not applicable	Not applicable	Not applicable	Not applicable
External	Direct	Depending	Minimal	Not	Not

redress mechanism	costs	on set up by platforms		applicable	applicable
	Indirect costs	Not applicable	Not applicable	NA	Not applicable
Measures to address potential UTPs	Direct costs	Limited one-off costs to implement and communicate changes to T&Cs	Limited costs for communicating changes to T&Cs	Not applicable	Not applicable
	Indirect costs	Not applicable	Not applicable	Not applicable	Not applicable
EU Observatory and online portal	Direct costs	Not applicable	Not applicable	Included in costs of administrative functioning of the European Commission EUR 1 Mln	
	Indirect costs	Not applicable	Not applicable	Not applicable	Limited participation costs in the EU Observatory



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
Ares(2017)

Opinion

Title: Impact Assessment / Fairness in online intermediated trade

Overall opinion: NEGATIVE

(A) Context

Online platforms help many small firms to connect with customers over the internet. Some businesses may depend heavily on access to such platforms. Some worry that platforms abuse their market power over small firms.

A 2016 Commission study listed concerns about online platform trading practices. The European Parliament voiced support for a legislative framework on business-to-business relations that would support consumers and growth.

This impact assessment considers actions to ensure that online platforms treat business users fairly and predictably. It also seeks ways to increase transparency and provide business users with more effective ways to resolve disputes.

(B) Main considerations

The Board notes significant efforts to gather views and evidence from stakeholders.

However, the Board gives a negative opinion, because the report contains important shortcomings that need to be addressed, particularly with respect to the following key aspects:

- (1) The scope of the intervention is unclear. The definition of online platforms or platform services does not create legal certainty for businesses involved in online trade and intermediation.**
- (2) The scale of the identified problems and the single market dimension are not sufficiently demonstrated to warrant intervention at the EU level, in particular in an area where the EU has not regulated so far.**
- (3) The analysis of impacts of the measures is inadequate as regards compliance costs and their distribution, revenue sharing, possible crowding out effects or other unintended consequences. In addition, the levels of the envisaged thresholds for platforms to be captured by the initiative are not sufficiently justified.**

(4) The proportionality of the measures is not well explained and the expected results are not clear. Information obligations are not specific, in particular provisions on transparency on the 'most-favoured nation' clauses. The rationale and costs for the three layers of redress measures are not spelt out.

(C) Further considerations and adjustment requirements

(1) As intermediation by online platforms is wide-ranging and fast-changing, the report has to make clear what is and what is not in the scope of the intervention. The report should more precisely define online platforms and/or their services it intends to regulate in order to avoid legal uncertainty for platforms and businesses entering into contractual relations. The current definition is fairly broad and risk to impose constraints on platforms not involved in unfair trading practices (e.g. payment platforms). The report should test whether the definitions are future proof. This report opts for a regulation, which is directly applicable. The positioning of the initiative in relation to the EU competition law needs to be further clarified.

(2) The report should better demonstrate the magnitude of the problem. In particular, the report should present the available evidence with more caveats, as it mostly derives from stakeholder consultations representing business traders. The report does not indicate whether unfair trading practices are mainly used by major larger players or frequent across platforms or sectors. The analysis should be balanced and take care of possible bias. The initiative will be based on article 114, but the report only identifies fragmentation related to emerging national legislative initiatives. The single market dimension needs to be substantiated. The report should clarify that the initiative does not intend to tackle directly technical issues linked to the operation of platforms. In addition, the report should present a more comprehensive picture of the market structure to support the analysis it contains.

(3) The report should provide a more thorough analysis of impacts and cover more aspects. In particular, the report should discuss in more detail the risks of unintended consequences when introducing the initiative. This should include possible consequences for platform to consumer relations or higher charges to traders. It should also consider the possibility of reduced access to the platform, which is indicated by fear of retaliation by some firms, and an acceleration of vertical integration between platforms and suppliers. As the platform industry is very dynamic and the regulation does not have a precedent in EU legislation, there may be risks of other inadvertent changes in the behaviour of platforms and businesses, competition between platforms or emergence of innovative solutions. These risks may be quite high and should, therefore, be presented in the report.

Moreover, the report should present the criteria for establishing exemptions from the provisions of the regulation and how the proposed thresholds relate to the current and expected market structure and use of unfair trading practices throughout the industry.

(4) The report should address the proportionality of the measures and their effectiveness. Given the network effects of the platforms and their quasi monopsonistic position, some of the transparency enhancing measures may not bring the desired effects, for instance the transparency on the changes to general terms and conditions or the justification for the use of most-favoured nation clauses. The report should indicate the type of information expected under the new disclosure obligations. It could at least refer to best practices in that respect.

Similarly, the report should demonstrate the proportionality of the redress mechanisms. The implications (costs, enforcement) of the reporting on litigations are not explored. The report also needs to justify the recourse to collective redress in business-to-business relations to solve ineffective redress, in particular as this has not so far been deployed at the EU level. The report should discuss the outcomes of the 2013 Commission's recommendation on collective redress mechanisms at national level. On this basis, the report should clarify whether further measures are necessary to strengthen collective redress for platforms at EU level. If so, the report should substantiate the choice of an EU legally binding instrument, such as a regulation, and detail the minimum requirements it intends to propose. The report should clarify how the initiative relates to the pending review of the injunction directive, in particular when addressing business-to-business relations. In general, the vague definition of the scope of the initiative makes the analysis of the proposed solution difficult as regards its effectiveness, efficiency and coherence.

(5) The structure of the impact assessment report needs significant improvement, in particular as regards the presentation and the comparison of the options and their impacts. The split presentation and assessment of “content” and “instrument” options, the awkward discard of the baseline and the lack of clarity in the comparison of the impacts for each option package, create confusion and make difficult to understand the choice of the preferred option.

Some more technical comments have been transmitted directly to the author DG.

(D) RSB scrutiny process

The lead DG shall ensure that the report is adjusted in accordance with the above-mentioned requirements and resubmitted to the Board for its final opinion.

Full title	Regulation of the European Parliament and of the Council on promoting fairness and transparency in online intermediated trade
Reference number	PLAN/2017/1375
Date of RSB meeting	29/11/2017