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Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

Modernisation of the Single Market
Business-to-business Services

Business-to-business relationships in the online platforms environment - Legal aspects and clarity of terms and conditions of online platforms

Report of an engagement workshop hosted by the European Commission

14 November 2016, 9:30 - 16:15, Brussels

On 14 November 2016, a European Commission workshop on terms and conditions of online platforms took place. The workshop aimed at better understanding the contractual conditions governing B2B relations between online platforms and their business users and focused specifically on standard terms and conditions (T&C) of online platforms applicable to business users. The workshop brought together individual business users of different online platforms, associations representing such business users, members of the academia and government officials. The workshop was organised under Chatham House rules, and this report gives a high-level overview of the key points raised during the discussion.

The discussion was structured around three sets of questions related to:

- 1) (im)balance in T&C
- 2) clarity and transparency of T&C
- 3) redress possibilities and possible solutions of conflicts.

Findings

The participants discussed specific examples of contractual clauses from standard T&Cs of online platforms and particularities of their application in practice. The links with competition law and consumer regulation as well as perspectives of self-regulation in relation to B2B relations were also touched on. The dual role of many platforms as business partner and competitor was an overarching theme that seemed to amplify many of the issues described below as well as their effects.

Imbalanced terms and conditions

According to the participants, online platforms commonly apply standard T&C that most business users have to accept as a whole and **cannot negotiate**. The inability to negotiate T&C is pertinent not only to SMEs, but also to larger business users.

Participants also mentioned that online platforms usually reserve for themselves the right to **unilaterally change** their T&C, and the reasons for such changes are not always clear. Platforms would not always inform their business users when such changes occur and/or what the changes refer to. Business users would, however, be required to accept changes before they continue to use the platform's services, and they would not be given (sufficient) time to familiarise themselves with changes and consider whether to accept them. In some cases the continuation of the use would be considered by online platforms as tacit acceptance of the amendments. A general conclusion shared by all participants is furthermore that changes to T&C are non-negotiable: business users have to accept them in full or terminate the contract completely. Generally, T&C would be changed by online platforms quite frequently. Considering that the contracts are very long and that many business users are simultaneously active on several platforms, it is practically impossible for businesses to read all of them. Furthermore, certain platforms would apply separate sets of T&Cs for the various services they offer to their business users, which would further limit the transparency around their implications for business users.

A number of participants also mentioned that standard T&Cs sometimes contain '**bundling**' clauses that prescribe the use of certain auxiliary services. Specifically, T&Cs may prescribe to use only specific (proprietary) payment systems, a specific data cloud to store content, a specific booking system, a specific communications channel for communication with customers gained via the platform, specific transport provider or contain a list of advertisers that a business user may choose from if it wants to advertise via the platform. In the case of app stores, T&Cs may require that all app related purchases are carried out via the platform or that the app content provided shall be free of charge.

Different participants highlighted that standard T&Cs often contain price-related and non-price-related **parity clauses**. In particular, online travel agencies price parity clauses requiring businesses to offer at the platform a price equal to, or lower than, offered through other (online) sales channels. This would prevent businesses from offering membership schemes, loyalty discounts or from adapting prices for remaining rooms or stock to react to demand or competition. Non-price parity clauses refer to customer service quality and to the information regarding products and services offered. These shall be at the same quality level as the highest quality offered via other distribution channels. In the same vein, some platforms would require that transaction-related data generated via the platform can only be used for advertising and other purposes on the very same platform. In the hotel business non-price parity clauses also require that businesses always offer all remaining rooms over the platform and do not retain allotments for their own use, such that it is impossible not to use the platform for a certain period of time.

Some participants specifically referred to T&Cs related to data, which would sometimes limit the **access to and/or use of data** for business users. T&C generally would not provide for the sharing of data controlled by the platform (including with their business users) and at the same time allow platforms to have access to business and user data. The usage of such data by the platform would not be subject to specific T&C. In many cases, businesses would have limited access to the data generated from their transactions and their customers (data sought for by business users includes aggregate data, statistics, certain analytics, and contact details of customers). To obtain these data, businesses may have to write a request to the platform, while the decision to provide the data ultimately

lies with the platform, which in some cases also chooses to charge fees for the data. The use of such data may be limited to the platform where they were generated.

T&Cs sometimes contain IPR related clauses that some participants considered imbalanced. In some instances, the T&Cs would in this regard for example give the platform the right to copy the apps uploaded by the developers. OTAs reserve the right to use the hotels names in websites, allegedly leading to domain grabbing practices.

T&C related to the **termination or suspension (blocking) of a user account** often do not clearly define the criteria for such blocking and do not provide information on the responsibilities and procedures applicable to the platform itself, including the timeframe for replies and decisions from the platform. Some platforms retain the right to take action against a business user on a mere suspicion or belief of a violation.

Lack of clarity of terms and conditions

T&C of online platforms are often characterised **as generally complex and unclear**. Businesses struggle with lengthy contracts that lack a clear structure. Often, there are a number of additional policy documents that will also govern the business relationship with a platform upon the signature of T&C. They are usually not clearly referred to by the T&C. This significantly affects the **readability, transparency and clarity** of the applicable T&C. In such cases it is difficult or impossible for business users to identify and understand the core issues important for their business relationship.

An additional difficulty is that individual **terms and conditions are drafted ambiguously or vaguely**. Some definitions are left open for interpretation, and standard T&C may even refer to the spirit of T&C, which is not explained further and leaves a lot of room for interpretation by the platform. This practice has implications both for the execution of the contractual T&C, dispute resolution and enforcement. By leaving a lot up to the platform's discretion, vague T&C further strengthen the imbalance in the business relationship. A proper application of the contract becomes more challenging, and its enforcement by courts and alternative dispute resolution (ADR) bodies more difficult or impossible as, for example, ADR bodies lack the basis for interpretation.

Some of the issues central to conducting business over online platforms are missing or left unclear in the T&C. One of the important problems is the lack of clarity with regard to **operational issues**. For example, the conditions and the procedures related to terminating or suspending a user account or delisting a product or service are not transparent and clear or even completely missing in the T&C. Generally, the T&C do not include rules of procedure and direct contact points (i.e. responsible staff - in many cases only a general email address is provided as a contact) that apply after the termination or suspension of an account has taken place. It is not clear whether and at which stage there is a human intervention in the process and who exactly is handling the case. An escalation timeframe and clear description of what a business user can do to rectify breach of T&C or react to a notification by a platform or to a complaint by a different user or consumer are also often missing. The suspensions would often not be lifted in a

timely manner. T&C often do not contain responsibilities of the online platform and rules that apply to the actions of the platform in such situations.

Similarly, rules on (conditions of) **termination of contractual relations and on changes to T&C** are not always clearly stated or may be missing.

Even when the general factors that influence the **fee** paid to the platform and the **ranking** on the platform are stated in standard T&C, it is not clear how exactly they apply in practice. The fees system is not transparent, especially when applied by online market places that are also retailers. Ranking is the main tool for a business user to be visible on the platform and a large share of sales go to the top-rated results. However, T&C do not specify what individual factors used by the ranking algorithm mean and what their weight is, or how they are taken into account by the search algorithm.

Redress procedures and possible solutions

Participants explained that effective redress possibilities would be crucial to protect platforms' business users from unjustified delisting of products, suspension or termination of accounts or, for example, from 'retaliatory' behaviour, including the unjustified influencing by the platform of ratings/rankings of business users' products and/or services. Such actions by the platforms would namely be capable of threatening the very existence of certain business users. In this regard, any redress procedure should overcome two main issues for it to be effective: the lack of speed associated with traditional redress mechanisms (e.g. commercial courts), and the fear of retaliation that would prevent platforms' business users from complaining or initiating procedures.

Redress possibilities however seem to be a weak spot of many T&Cs from the perspective of business users. As noted above, conditions and procedures related to delisting of services and products and termination or suspension of users' accounts are often missing or unclear. In practice, redress mechanisms would moreover either not be offered by platforms or they would be ineffective.

Specifically, as noted above, where a redress mechanism is offered by the platform, there would be no clear procedural rules on the length and stages of the process. Responsibilities of the platform in the procedure would also be unclear, and guarantees of unbiased decision-making would be absent. For example, a platform may not be obliged to provide a prior notification to a business user before taking action with regard to a violation. Reasons for a delisting of a product or termination of an account (e.g. suspicion of distribution of counterfeit products etc.) and the like would not always be explained in detail, or provided at all, and business users may not be informed whether the breach refers to a violation of legal provisions, whether the platform enforces a decision by a regulatory authority or court or whether the platform enforces its own rules and acts at its own discretion. T&Cs would furthermore exclude liability of a platform in case of wrongful suspension or termination of account or where a platform is partially responsible for a termination or suspension – even where such actions have disastrous consequences for a business user, as could be the case in particular for (small as well as

larger) business users that generate a significant part of their turnover online, via one or more online platforms.

Traditional dispute resolution mechanisms, like courts, and ADR bodies are not considered an effective and viable alternative by business users to resolve problems of their business relationships with online platforms. To begin with, references to dispute resolution mechanisms are often missing in standard T&C – in application to business-to-business relationships. Where they are present, they would rarely include ADR, or rather specifically exclude it.

In fact, T&Cs of large international platforms seem to often indicate that law and court jurisdiction of a third country are exclusively applicable to the contract. Turning to such non-EU courts would be a costly and lengthy undertaking. Some platforms retain the right to choose the applicable law and jurisdiction depending on the moot issue at hand.

Further difficulty is that T&C of one and the same online platform may foresee application of different jurisdictions and legal orders depending on a specific activity (for instance, German law applies to auctions, but Austrian law applies to advertising). Large platforms also frequently have different subsidiaries responsible for different activities or operations. As this information is lacking in T&C, for business users it is difficult to identify the legal person who is a proper respondent, which is an important starting step of litigation.

The mentioned lack of clarity of T&C and the lack of obligations of platforms to explain their decisions would also make it very difficult for business users to substantiate a claim. Furthermore, the fact that T&Cs cannot be negotiated would leave, in principle, very little room for business users to successfully challenge platforms' decisions. This combination of circumstances would render the taking of legal actions even less attractive.

As regards possible solutions, different participants mentioned the possibility of introducing an independent dispute resolution body, however highlighting the need for such a body to overcome the abovementioned issues of speed and fear of retaliation.