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Digital Single Market
E-Commerce and Platforms

Unfair platform-to-business trading practices – Focus group with business users

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Report of a workshop hosted by the European Commission

On the 7th of September 2017, DG CNECT and DG GROW together with the EU Policy Lab organised a workshop with businesses active on internet platforms. The purpose of the workshop was to explore, with the invited businesses, the potential solutions to the problems arising in relations between platforms and businesses.

The main specific problems identified could be grouped around the following topics: (de) ranking, delisting on social media platforms, access to and use of data, lack of contact person to solve issues encountered by businesses, extra-EU Court jurisdiction, unfair refund policies, fraudulent end-users, platforms' strong positioning on the market, fear of retaliation, T&C (sudden and frequent changes, issues related to translation of the original T&C), brand-bidding (online travel agencies buying Google Adds using a hotel brand to take over the search results), price-parity clauses, discrimination when platforms compete directly with their business users.

Participants selected four issues identified to explore in more detail: two of them related to the transparency on ranking and delisting decisions (in e-commerce and apps), while the two others addressed access to customer data (e-commerce) and price parity (online travel agencies (OTAs)). The round tables organised around these four topics resulted in the design by participants of the following dispute resolution possibilities.

Case 1: Access to Data (e-commerce market places)

This anticipates a new rule that platforms must transfer data to business-users (customer name, address, telephone number, email and source (e.g. Instagram, Facebook etc. payment details were of no interest)). This would require the platform to obtain the consent of the consumer for the transfer of personal data to the business-user and for the business-user to agree, within the T&Cs, that they will use it purely for information purposes (i.e. not to circumvent the platform).

If the platform does not comply with the rule for all business-users on the platform, the first step would be for the business-user to complain to the platform and demand access. If the platform does not provide access, the options for a business user are:

1. Leave the platform.
2. Make a complaint to a 'business-protection organisation' (similar to a consumer protection organisation that is not necessarily a business association). The complaint can be directed to either an industry body, who issues a notice of non-compliance to the platform and demands it complies with the rule, or to an EU level Agency/government body, who similarly issues a notice of non-compliance but who has the ability to impose a fine or a penalty in the case of non-compliance with such notice.
3. Go to the civil courts, with the option for business-users to join a class action, which could lead to a judgment that could also impose a fine or penalty.
4. Go to mediation or arbitration, the result of which would be a recommendation. If the platform failed to comply with the recommendation, then it would be open to the business-user to resort to the civil courts in the manner set out at 3 above.

Case 2: Transparency in ranking of apps (app stores)

A package of solutions was proposed to address the issue, composed of different aspects:

1. The link between the consumer protection and business regulation was stressed. App developers expressed the view that consumers should be educated to understand criteria used for ranking. This would allow them to notice non-transparent and unfair ranking and act against it. The participants believed that consumers should put more pressure on the app stores to release a set of objective criteria. Consumers should also be empowered to have influence on search results in an app store, by being able to set different filters (for instance 5 star rating etc.) – currently major app stores do not offer this.
2. Definition of clear ranking criteria. There are no published rules how the ranking is done and what are the criteria. The developers and consumers have to guess what elements/criteria impact the ranking of an app. Given that there are no transparent criteria for ranking, it is not possible to complain about them. The consumers should know whether search and ranking is influenced by paid advertising, as there were cases where some apps got de-ranked from one day to another, due to other app developer were presumably paying for marketing. Platforms are hiding behind secret algorithms that cannot be divulged to public.
3. The participants agreed that search functions of app stores are very basic – useful mainly if consumers are already aware of a particular app and looking up its name directly. The ranking in app store can make or break a business. The fact that there are millions of apps available and the construction of app stores do not allow consumers to clearly define search criteria, makes it difficult for a great number of developers to become visible and sell their apps.
4. Competitive ranking sites could be established that would combine all apps as well as clear and open search criteria. This would allow comparing different platforms' ranking methodologies and defining industry-agreed clear ranking criteria.
5. Platforms should inform their business users of the reasons having led to their de-ranking. App developers do not get any notifications about ranking, and therefore may be unaware of the fact that their position is going down. It would be in particular useful that app stores send a notification, as sometimes a fall in ranking can be due to a bug or a mistake in a feature the developer is unaware of. In such cases, it would be useful to establish a procedure to challenge the correctness of the ranking.
6. Legislation is needed to set up contact/support function to deal with errors in ranking algorithms. This function should be coupled with individualized support to improve ranking.

Case 3: Price Parity (OTAs)

The hotel's sector discussion aimed to design a redress mechanism by using price parity as a test issue. The purpose of such a redress mechanism was, in the view of the participants, to ensure that hotels have the ability to set the price for the accommodation they are proposing, thus preserving the sector's freedom of contract.

A package of solutions was designed to address the issue, composed of different instruments: i) a legal ban on price parity clauses, ii) an education campaign aimed at the final customer to raise awareness about the existence of the issue and the platforms' role and benefits, iii) a redress mechanism built around several criteria (see below). The participants stressed that even in cases where price parity clauses were banned; this has not been an efficient measure since businesses would still fear retaliation for refusing to comply with the price parity requirement, i.e. platforms using practices such as de-ranking, "dimming" etc. Business users therefore argued that price-parity bans should be accompanied a transparency principle which would allow clearly showing

the extent to which commissions paid by hotels influence the search/ranking results displayed by platforms.

Businesses expressed the view that for those instances in which price parity issues can't be solved on a bilateral P2B basis an external body should be created. This body should fit a series of criteria, such as being independent, affordable in terms of costs, accessible, confidential; have a clear and transparent (accountable) functioning. The body should be a newly created one, as the issues it would deal with are themselves new, and have a light structure to be able to efficiently concentrate on specific P2B issues. Some participants expressed the view that such organism would be competent for all platform-related issues, i.e. B2C and B2B. In addition to acting upon received complaints, an external redress body should also monitor the market and be able to start its own research/investigation. According to the participants, such a mechanism should be set by the European Commission and financed by platforms. The question was left open as to how exactly to ensure its independence (composition) in this case.

Case 4: Sudden Delisting

Business users expressed the view that the lack of information about the grounds on which content has been delisted is the core of the problem. Without the knowledge of why delisting took place business users cannot remedy the situation.

Business users generally argued that transparency in the delisting process would address many of the issues raised. Once the reasons for delisting are understood and a chance is given to business users to address the problems, disputes with online platforms could quickly be settled. Business users' general concern is that the platforms' terms and conditions are often vague as to the grounds for delisting. Moreover, frequently business users are either not informed that their content has been delisted or the information is vague and does not allow them to take action to remedy the situation. Business users express therefore the view that transparency coupled with an effective internal dispute resolution should address the vast majority of cases. Quick, external dispute resolution would in their view be useful in cases related to the legality of content, e.g. copyright, and in those rare cases where internal dispute resolution will not work.