EUROPEAN COMMISSION
Directorate-General for Communications Networks, Content and Technology

Digital Single Market
**E-Commerce and Platforms**

# Unfair platform-to-business trading practices – effective dispute resolution and the fundamental right to conduct a business

## 6 July 2017, 9:30 - 14:00, Brussels
## Report of a workshop hosted by the European Commission

On 6 July 2017, the European Commission held a workshop to inform its actions on unfair contracts and commercial practices in platform-to-business relations that were announced in the Communication on the mid-term review of the Digital Single Market Strategy (COM(2017) 228 final). The workshop revolved around topics of transparency, fairness and dispute resolution and sought solutions which could take the form of industry-led codes of conduct, a legislative instrument or combinations thereof.

The Commission services specifically aimed to gather experts' views on how to design a possible dispute resolution instrument capable of meeting digital-specific challenges around, amongst others, the need for speed & anonymity, the required information gathering & analytics capabilities as well as around jurisdiction in the context of global ecosystems.

The participants consisting of dispute resolution, e-commerce or platform experts from EU Member States as well as academics built on their experiences with existing alternative dispute resolution mechanisms, some examples of which were specifically presented during the workshop. The participants were in addition asked to reflect on whether, and if so how, dispute resolution can constitute an effective means to ensure that the respective fundamental right to conduct a business of, on the one hand, operators of online platforms and, on the other, third-party business users of online platforms are duly respected. The workshop was organised under Chatham House rules and this report gives a high-level overview of the issues raised during the discussions.

The workshop began with an introduction on platform-to-business relations by a representative of the European Commission, based on the fact-finding exercise on platform-to-business relations, explaining the type of problems that businesses face on platforms and the lack of effective redress mechanisms to solve them. After the commission's overview the floor was given to three experts, each of them giving a presentation of an existing alternative dispute resolution mechanism. The presentations were followed by a Q&A session. The next part of the workshop was divided into two participatory sessions: (1) a round table discussion on fairness standards and the fundamental right to conduct a business and (2) split-table discussions to explore basic characteristics of a platform-specific dispute resolution mechanism and rules of procedure, as well as organisational aspects. Discussions of the split-table sessions were reported back for a wrap-up by which to end the workshop.

Online commerce networks that use block chain-based cryptocurrencies were presented as an example of where alternative dispute resolution mechanisms can emerge in the absence of a centralised authority. A payment is stored behind a multi-signature address

that requires two keys, one of the seller and one of the buyer, to release it to complete the transaction. In case of a dispute a third key is given to an anonymous arbitrator who decides to whom the assets belong. Arbitrators typically take a commission of their services. These arrangements based on multi-signature address are called smart contracts.

Alternative dispute resolution mechanisms are also pursued within traditional legal systems. An example was given of a new forum to settle international commercial disputes in a special chamber of a national court. This would be an alternative to arbitration offering predictable fixed fees, designated judges and application of the local procedural law in a process conducted entirely in English. An alternative dispute resolution mechanism can also be tiered as in one example that was presented: the process starts with mediation and is followed by the actual dispute resolution if needed. This can take place in a "virtual meeting room" which refers to fully online procedure that enables each participants take part flexibly. All in all, digital solutions were presented as a means for more efficient dispute resolution.

A round table discussion on fairness standards and the fundamental right to conduct a business took place after the presentations. According to the European Commission's P2B fact-finding exercise existing practices are not adequate for preventing many of the practices that businesses suffer on platforms such as unfair delisting, freezing of assets, restricted access to data or non-transparency of search rankings.

Questions such as should platforms publish their search ranking algorithms or should platforms refrain from competing on their own market place were discussed. In the case of algorithms their role as a source of competitive advantage was brought up. As they are a part of a service provided to customers they could be seen as trade secrets. Some member state's representatives emphasized the importance of distinguishing between on- and offline platforms. It was noted that SMEs need fast and easy redress mechanisms for ensuring fairness and they should also be duly notified to be able to recognize possible unfair treatment. Platforms presenting themselves as merely intermediaries and the one-sided power balance in favour of customers and platforms were also mentioned as possibly raising issues on the business-side of the market. Generally, raising the need for fair treatment for SMEs was welcomed. Some Member States' experts specifically supported the idea of establishing an alternative dispute settlement mechanism, whereas others called first for the Commission's evidence on P2B practices to be published and for further discussions on the topic.

During the split-table session participants explored design characteristics for a possible P2B (alternative) dispute resolution mechanism, which were subsequently gathered by Commission representatives and reported back to the group. Key characteristics that any dispute settlement mechanism would need to exhibit in order to be effective can be grouped along the following main themes:

- EU-wide mechanism would have more leverage than fragmented national solutions

- Flexibility of possible regulation, co-regulation with platforms and flexible implementing for EU Member States

- Finding the right balance between transparency (establishing sort of case-law) and confidentiality (protecting trade secrets)

- The cost, speed of proceedings and language of the process, ensuring the capability of SMEs to effectively use the mechanism

- The independence of the adjudicator

- The difference between technical and substantial problems

- The balance to be struck between a decentralised and centralised architecture

- Evidence gathering-capabilities versus the burden of proof

- Need to provide for anonymity, and collective redress as a possible solution in this regard

- Need for clarity on what rules would be applied was emphasized. On the one hand, businesses are said to require clear rules to overcome fear of retaliation that could hold back complaints. On the other hand, some of the Member States' experts questioned the need for parallel B2B regulation if no clear platform-specific market failure could be demonstrated

- Need for binding decisions and the power for the dispute settlement mechanism to convene parties, while respecting parties' fundamental right to access justice (dispute settlement to exist in parallel to existing judicial systems).