Position Paper on European Commission Proposal
on promoting fairness and transparency for business users of online intermediation services

The Developers Alliance represents software developers and the companies invested in their success. The Alliance's members include businesses of all sizes that are leaders in consumer, enterprise, industrial, and emerging software development, along with a global network of more than 70.000 developers.

The Alliance represents both platforms - small and big - and their users and is well positioned to provide valuable real-life information and evidence about the level of competition in the mobile app ecosystem and the relationships between all parties involved.

Through various reports[1] the Alliance has detailed how the developer community sees the mobile app economy as a competitive and mature ecosystem, which is facing the typical and predictable challenges that businesses in every industry face.

When it comes to the specifics of the relationship between app developers and online platforms, we also found, through a survey we carried out amongst our European members[2], that developers have an overwhelmingly positive attitude towards platforms and 81% of them believe that this two-way relationship is best handled within the industry, rather than through government intervention. Online platforms play an important role in supporting app developers looking to grow their businesses by lowering barriers to entry, facilitating scaling and expansion, and providing tools to reach new markets[3].

Given those findings, we fear that the proposal from the European Commission on fairness in platform-to-business relationships (P2B) could shake up the predictability of the developers-platform ecosystem and, while it intends to protect and benefit the smaller players, it risks creating uncertainty and having harsh, disproportionate, and unintended consequences.

We would like to flag a few specific points, in particular:

Limited evidence-basis

Whether it's about their impact on society, disruptive power on traditional sectors, or the relationship with their users, platforms are more and more under the scrutiny of legislators.

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[1] Report on Competition in the Mobile App Ecosystem, Autumn 2016;
The Mobile App Ecosystem Remains Stable and Competitive, June 2017

[2] Mobile Developers & Publishers Have Overwhelmingly Positive View of Platforms, November 2017

[3] As a point of clarification, the Developers Alliance published a report in 2016 that included a line that stated "25% of European developers view platforms as a threat", that was used by the European Commission in its Impact Assessment documents. In context, it is important to note that the 2016 results were from asking developers "what are the greatest threats to fair market competition". Thus, developers were pressed to opine on potential, even theoretical, threats, based on the scale of how great that threat is. Some platforms serve outsized roles (e.g., app stores are gatekeepers between publishers and users), but the 2016 results should not be read to say that 25% developers actively view platforms as threats. The 2017 results confirm this.

Instead of trying to understand the specific market dynamics of the digital sector and appreciate its vibrant level of competition, policy-makers are translating their apprehensions toward "powerful" companies into legislation which is not supported by a robust evidence base. In fact, the Commission has only released limited evidence behind its decision to go ahead with this piece of legislation. Such evidence relates to specific industries and specific companies.

Our research, quoted above, and the responses to the public consultation show that developers are satisfied with the current framework and climate[4].

We do not deny the existence of issues in the platform-to-business relations but do not believe that a one-size-fits all solution is proportionate.

Definition of online intermediation services

The proposed Regulation fails to provide a clear and workable definition of what constitutes an "online intermediations service".

The Commission aims to target - among others - app stores, online marketplaces, and social media and extended the proposal's scope to cover non-transactional services such as search engines.

The current language around what constitutes an "online intermediation service", especially the requirement that they "facilitate the initiation of direct transactions", remains ambiguous. This threatens to turn the P2B proposal into a catch-all piece of legislation with provisions that are disproportionate to the aims it allegedly seeks to pursue. The risk is that all kinds of very different online services that billions of consumers use every day (search engines, cloud storage, online payments, sharing economy, etc.) would fall into scope. The most obvious result of this will be higher costs that will limit these companies' growth and success and, ultimately, impact the business users themselves.

Both the Commission's impact assessment and its proposal point to the fact that the determining factor is the intent on the consumer's end to consult a variety of offers and ultimately engage in a direct transaction, whether this happens online or offline. We would welcome this being clarified in the text of the proposal itself.

Transparency requirements

According to our survey, developers believe that platforms, along with other players in this space, can do a better job of being transparent with the processes they set up when it comes to entering into business relationships.

We find that the Commission has found a good balance with the transparency obligations included in the Regulation. We encourage the co-legislators to maintain the proportionate approach adopted by the Commission and avoid strengthening the current requirements, in order to protect proprietary information and reduce the potential for abuse.

When it comes to the data access obligations (art. 7), we believe those should be revised. Those provisions are meant to be transparency obligations which are already covered under Art. 12 -14 of

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[4] See review of 57 responses to the Commission's public consultation on P2B by Paul MacDonnell from the Global Digital Foundation.

the General Data Protection Regulation (GDPR). Adding a new obligation would create uncertainty and result in additional practical complexity for app developers. Would the online platform be required to disclose its access to data practices in a different manner to the GDPR mandate? If yes, this provision would lead to operational issues. If not, there is no need to include this new provision in the P2B proposal.

Dispute resolution mechanisms

The proposed list of dispute resolution mechanisms all risk to be burdensome and expensive. Clearly, smaller players such as digital start-ups, which would qualify as online platforms according to the European Commission's definition, would be the ones that will struggle the most with the cost of compliance.

We see the attempt of the European Commission to reduce such costs for SMEs with the exception included in Art. 9. However, the reasoning behind this decision is unclear. As stated above, all dispute resolution mechanisms risk to be expensive for small companies and exempting them only from one obligation would not favour them. On the contrary, it would create a situation of competitive disadvantage, as smaller platforms will be providing their users with an incomplete set of protective mechanisms compared to their larger counterparts.

Additionally, the Developers Alliance has, on various occasions, expressed its opposition to the inclusion of thresholds in legislation. In our experience, thresholds and exceptions rarely work and, if anything, contribute to creating a ceiling to SMEs' growth. In order to avoid excessive regulatory burden, smaller companies decide not to grow as much as they could. This represents a big obstacle to innovation and risks creating a competitive disadvantage for small players in Europe.

Finally, we believe that just listing the possible dispute resolution mechanisms may lead to confusing implementation. Including guidelines on sequencing of those instruments would help as it would provide all parties involved with a higher level of predictability.

The proposal creates a potential for bad actors to high-jack the system to the detriment of business users who work within the rules and are satisfied with how the system works today.

A stable legislative framework

We support the Commission's idea to monitor the evolution of the online platform economy, also through the EU Observatory on the Online Platform Economy, but we believe it would have been wiser to implement such monitoring measures before proposing legislative obligations. That would have helped policy-makers understand the online ecosystem's dynamics better and, then, assess the actual needs for legally binding measures.

The decision to intervene with a step-by-step approach, at this stage, risks creating an unstable legislative framework, which is extremely damaging for small companies and developers in particular.

In order to succeed and prosper, developers need to work in predictable business and regulatory environments; they need to know the rules of the game and what to expect. Predictability empowers developers because it enables an efficient allocation of time and resources, it reduces the risk of outside investment, and it keeps users happy.

The best approach to encourage improvements and best practices in the relation between platforms and their business users is to observe and talk first-hand with developers and highlight their difficulties, rather than impose onerous and unnecessary legislation.

Conclusions

The mobile app industry is stable, mature, and competitive and offers great potential for success. In 2017, there were 1.89 million app economy jobs in the EU which means Europe overtook the US in terms of total number of jobs created in this economic sector (1.89 million jobs in the EU vs. 1.73 million in the US).[5] The industry is defined by dynamic growth and the rapid progression of technology, which creates challenges and leads to uncharted paths to resolve them. Because of that, it features a degree of trial-and-error, including how and how much platforms communicate.

However, competition and choice mean that developers will use platforms that they work with best, providing incentive for all players, big or small, to strike the right balance and avoid unresponsiveness and bad behaviour. It is against platforms' interest to abuse their power towards their users as there are real consequences to that.

The Developers Alliance supports the European Commission's intention of encouraging better relationships between platforms and their users. We call on the co-legislators to maintain a light-touch approach and avoid over-regulation and unnecessary burden. This will ensure that both developers and platforms of all sizes can continue to work together and reap the benefits of the European Digital Single Market.

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About the Developers Alliance

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[5] http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621894/EPRS_BRI(2018)621894_EN.pdf, p. 5.