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IMPACT ASSESSMENT

ANNEXES

Accompanying the document

Proposal for a Regulation of the European Parliament and of the Council

on promoting fairness and transparency for business users of online intermediation services

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1. AMENDMENTS TO THE IA FOLLOWING THE RSB OPINION

The following table summarises how the comments of Regulatory Scrutiny Board have been addressed following its final opinion.

1.1. Summary of amendments following the RSB opinion of 22 March 2018

(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.	The relevant explanations have been moved from the Annexes to the main report in Section 1.3, with additional explanations on how they have been identified. Footnote 16 explains the approach taken to identify the platforms. The aim of option 2c and its extension to search engines is clarified in Table 1, and in the impact section 6.
(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 design of the options has been clarified in Section 5.2. Regarding the choice of measures in options 2 and 3, the new Section 5.4.2 (which substantiates why option 3 has been discarded) also allows better understanding of the choice of measures between options 2 and 3. However, given that options 2 and 3 strongly differ on the implementation instrument - co-regulation versus full regulation, it is our understanding that what the Board meant in its opinion is that "the report should better substantiate the choice of measures between options 2b and 2c". These two co-regulatory options indeed defer only on a single issue. The choice of measures between 2b and 2c has therefore also been further explained in Section 5.2. In addition, for the sake of completeness, this has also been done for options 2c and 2d (end of Section 5.2). Finally, a short summary overview of all four co-

	regulatory options has been added in Section 5.5.
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.	Section 5.2, Table 1 (Option 2), 6.2.1.1 and 8.1.2 updated to refer to external organisations that can provide industry-specific mediators, rather than external redress mechanisms, which is used to refer to an external venue for redress similar to the SCI. Section 5.4.1 emphasises the difference between a pure voluntary approach and the adoption of voluntary measures. Section 8.1 emphasises that the voluntary measures are supplementary to already effective tools, which will enhance the implementation of the Regulation so it is sensitive to industry's needs. Sections 5.4.1, 5.4.2 and 5.4.3 have been developed to substantiate the discarding of Policy Options 1, 3, and 4.
(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 reference on independent flanking measures has been deleted. There is no direct relation between the effectiveness of the initiative and broader, data-related initiatives under the data economy package, although data-sharing will be examined in the observatory, as explained on page 41. • Summary table on impacts has been moved from the annexes to the main IA report as Section 6.9. • Annex 12 on the comparative analysis of the retained options has been moved to the main IA report as Section 7.1.
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	

1.2. Summary of amendments following RSB opinion of December 2017

RSB comment	**Amendments made to the IA**
(1) As intermediation by online platforms is wide-ranging and fast-changing, the report	The revised IA clarifies the scope of the intervention and the definition of the types of

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.	online platform services which fall in the scope. The IA also explains the rationale behind the proposed definition of scope and demonstrates that it is futureproof (Annexes 1.4 and 1.2). Examples of services falling in/out of scope are provided in Section 1.3 and Annex 4.1.1, 4.1.2). The work on the definition of the scope is informed by the drafting of the legal instrument. A legal definition of online intermediation services that reflects the precise scope has been developed. It is to be noted that the EU has a proven track record on developing similar horizontal and technologically-neutral legal definitions (information society services in ECD and online market places & search engines in NIS Directive). Further analysis has been carried out to ensure that the P2B scoping definition is compatible with other EU policy initiatives and existing legislation (cf. table on comparison of definitions in Annex 8.3 on EU acquis (table) as well as in Section 1.3 (*IA Scope*). As regards scope, detailed discussions with all relevant Commission services have taken place that confirmed that the initiative should cover social media, e-commerce market places and app stores, whereas payment services, advertising services and B2B platforms are out of scope. In addition, the inter-services discussions covered the appropriateness of extending the scope of the initiative to online general search engines. Based on available evidence and building on the existing legal definition of *online search engines* in the NIS Directive, a targeted extension of the initiative has been judged possible. This extension would not cover all issues but be limited to the issue of ranking in online general search engines and to the enforcement provision on legal standing for representative bodies of online general search engines. This has been reflected as a co-regulatory sub-option (option 2c). The legal context of the initiative as well as its complementarity with competition law and

	parallel initiatives tackling unfair business practices in the off-line world (the food supply chain) has been clarified (cf. Introduction Section 1).
(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.	The revised IA further clarifies the scale of the problems and the need for intervention (problems (section 2.1), drivers (section 2.2), consequences (section 2.3). A substantiated overview of the problem definition can be found in annex 1.7. The presentation of the problem statement has been revised to clarify the intervention logics. The revised IA explains how self-selection bias in the evidence-base has been controlled for. The revised IA clarifies that the P2B issues encountered are common to the entire sector and not only to big platforms. The single market dimension has been specified throughout the report (but mainly in Sections 2 and 3, annexes 1.8 and 1.9) to highlight more clearly the cross-border digital single market aspects of the underlying problem. Mainly, the revised IA clarifies the risk of an artificial legal re-fragmentation of the naturally cross-border online platforms market. Section 3 has been substantially revised, including also additional arguments why the solution must also be of an EU-wide nature. The market structure has been developed in more detail to better demonstrate the dynamics of the platform economy (cf. Section 2 and Annex 7). The same section has also been expanded to online general search engines. The revised IA also further qualifies the objectives (cf. Section 4) to allow better understanding of the inter-linkage with the problems identified. The revised IA clarifies that purely technical issues are not covered by the initiative.

(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.	The impact analysis has been extended in terms of impact on consumers, growth, cost-benefit analysis, competitiveness and competition (Section 6 with further substantiation in Annex 13). The revised IA more thoroughly assesses potential risks, and highlights why the initiative will not negatively impact smaller market players, be they platforms or SME business users. A more thorough explanation of the impact on SMEs has been included at Annex 11 using the SME test. It also substantiates why consumers will not be negatively affected by the initiative, as the underlying model indicates the net effect points to preserving or and even improve their benefits from the platform economy. A summary of impacts for all options is presented in the table of Annex 13.9. An analysis of thresholds has been introduced (Section 6.2.1.3). It covers a number of questions: For which measures are thresholds needed? If they are needed, how should they be set? Which measurements or proxies can be used to determine their level and to verify compliance easily? The analysis leads to the conclusion (in section 8.3) that small enterprises (i.e. those employing less than 50 persons) should be exempted from the obligation to have an internal redress mechanism, while the question whether a global microenterprise exemption is needed is left open.
(4) The report should address the proportionality of the measures and their effectiveness. Given the network effects of the platforms and their quasi monopolistic 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	The overall rationale and proportionality of the package of measures has been set out in more detail in Section 8.1. of the revised IA, which now clarifies that the focus on bilateral conflict resolution and the use of collective redress is geared towards the particularities of the online platform economy. Sections 8.1.1 and 8.1.2. of the revised IA and Annexes 1.2 and 1.3 clarify that the collective redress provision is an enforcement measure inspired by existing CJEU case-law that is exclusively

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.	meant to ensure the enforceability of the proposed Regulation, rather than to provide a third layer of redress for *individual* business users. To reflect this purpose, collective redress will also be limited to injunctive (rather than compensatory) relief and therefore not imply additional costs. It shall also be aligned with the quality criteria in the 2013 Commission Recommendation on Collective Redress. Section 8.1.2. clarifies the complementarity between this specific provision on collective redress and the approach taken in the Injunctions Directive, which is limited to the private enforcement of consumer protection legislation. The proposals for the legal text revising the Injunctions Directive and the proposed legal text for this Initiative have been aligned in consultation with DG JUST and the Legal Service. See also further evidence introduced in Annex 8 confirming that problems encountered at Member State-level in relation to collective redress relate to *compensatory* redress and that legal standing to bring injunctive actions for organisations representing SMEs is an established phenomenon in the area of unfair trading practices in all EU Member States. To make the nature of the type of collective redress measure proposed clearer throughout the revised IA, it is referred to as legal standing for representative bodies or collective interest litigation. The substantive progress made recently with other services on the legal instrument has been translated into the formulation of real-life inspired, principles-based yet effective information obligations in Section 8.1.1. of the Impact Assessment report. It has in addition been clarified in the same section that the information obligations only apply to the extent online platforms *unilaterally impose* general terms and conditions, which

	reflects the imbalance in bargaining power. Section 8.1 and Annex 1.11 explains in more detail how the targeted transparency measures are justified notwithstanding the strong position of "incumbent" platforms, as these obligations serve multiple purposes, including providing predictability for business users, to enable effective monitoring and to play on important reputational levers (which effect is reinforced by the dedicated monitoring function). Finally, Section 8.1.2. clarifies that the disclosure obligations are limited to the minimum required for effective monitoring.
(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.	The structure of the IA has been corrected to comply with the Better Regulation guidelines and toolbox: – the overview of options is in Section 5 (options tables have been simplified; the more exhaustive ones have been put in Annexes 9-10); – impacts are assessed in Section 6 (further substantiated analysis can be found in Annex 13); – a comparison table has been included in "Comparison" section 7 (the underlying in-depth analysis criterion by criterion for each option is available in Annex 12); – the baseline scenario is considered and used as a basis for analysing and comparing the options; – the list of retained options in the IA has also been *expanded* to reflect the broader range of options that are considered within the preferred co-regulatory design. This range now includes in addition to the two options initially presented to RSB: (a) an option (2a) that leaves transparency on the more complex issues of ranking, discrimination, data and MFNs *fully* to self-regulation, and (b) an option (2c)

	considering the appropriateness of including online general search engines in the scope of the initiative. This broader range of co-regulatory options is now dealt with exhaustively in section 5 (options), section 6 (impacts) and section 7 (options comparison).

1.3. Summary of amendments after the second submission

A comparison of definitions against the Digital Taxation and Consumer Rights Directive Proposal

Legal instrument /draft	Definition	Platforms in scope	Platforms out- of - scope
DRAFT PROPOSAL Art. 3(1)(a) of Council Directive establishing a Digital Services Tax (Digitax)	***Multi-sided digital interface*** **-** *the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which facilitate the provision of underlying supplies of goods or services directly between those users, irrespective of where the transactions are ultimately concluded* Although borrowing from the definition of *online intermediation services* in the P2B initiative, this definition of *multi-sided digital interfaces* has a slightly broader scope (as it includes B2B & C2C/P2P platforms) in light of its purpose which is to identify taxable revenues, rather than contractual imbalances in bargaining power. Whereas pure C2C/P2P platforms are frequently provided for-profit, which can be subject to the digital service tax, they do not exhibit the harmful commercial issues targeted by the P2B initiative. The definition in the Digitax proposal will therefore *include* online intermediation services for the purpose of levying the digital service tax (DST), but not conflict with the definition used in the P2B initiative. The slight difference in intended scope between the respective proposals is implemented in the Digitax proposal by defining the term *user* as *any individual or business*, as opposed to using the separate definitions of *business users* and *consumers* in the P2B proposal. Apart from this, the definition of *multi-sided digital interface* will be aligned with the definition of *online intermediation services*, both of which target the intermediaries' role in facilitating direct transactions between their users.	B2B, B2C, C2C/P2P online platforms for the purposes of levying the digital services tax (DST)	All online platforms below this turnover threshold: > EUR 750 million global revenues; and > EUR 50 million EU taxable revenues
DRAFT PROPOSAL Art. 2(19) of Directive 2011/83/EU (Consumer Rights Directive - revised CRD)	***'Online market place****' means a service provider, as defined in point (b) of Article 2 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), which allows consumers to conclude distance contracts on the online marketplace's online interface* This definition identifies one specific type of online intermediation services for the purpose of tackling the targeted issue of private providers in the collaborative economy not identifying themselves as such vis-a-vis buyers – resulting in the latter not being aware that the CRD protections do not apply. This notwithstanding the conclusion of a contract on the platform's interface, which can give the impression that a contract is in fact concluded with a trader (i.e. the platform). The obligation that the revised CRD will impose on online market places by means of this definition is accordingly strictly meant to protect consumers, not businesses. The P2B proposal at the same time explicitly sets out that online market places are one type of online intermediation services, with the latter definition clearly going beyond for a different purpose (to protect businesses). The concurrent application of *online market places* and *online intermediation services* therefore will not involve any potential conflict.	Goes beyond "intermediation" as any service providers' website could be covered All B2C and C2C/P2P online platforms as well as any website used to offer services (i.e. app stores, e-commerce market places, OTAs, webshops, to the extent they allow online contract conclusion)	B2B online platforms

1.4. Mandatory rules - enforcement

In relation to measure 5 (Section 8) on *"formulating the legal transparency and redress obligations as **mandatory rules** to the greatest extent possible **as a key element to improve the chances of enforcement** of the proposed targeted legal obligations in EU courts notwithstanding the exclusive choice of law and forum clauses included in the contracts between online platforms and their business users that frequently designate non-EU courts*", it is important to note the explanation which follows in the next paragraph.

This provision is in line with Article 6(c) of the Hague Convention[1] or as overriding mandatory provisions according to Article 9 of Rome I Regulation and Articles 6(1), 6(4) or 26 of the Rome II Regulation Rome II)[2] and the judgments of the Court of Justice.[3] Even if this would leave EU Courts needing to decide which law should be applied by reference to the domicile of the defendant because of Article 4 of the Brussels 1 Regulation, for example, the proposed legal instrument would be likely to apply to the online platforms targeted in this initiative.

This would be based on either (a) satisfaction of criteria in Article 63 of the Brussels 1 Regulation that captures the European online platforms and as such, would mean the rules in the proposed legal instrument would apply as it is EU law, or (b) based on national residual jurisdiction rules, which usually rely on the nationality of the parties, presence of the defendant within the Member State, the location of assets, where business is done, and the domicile of the claimant, would apply for those platforms who have headquarters in the US but have at least some presence and assets in the EU, as well as the fact the business user is domiciled in the Member State and the business occurs in the Member State determining the case, to fulfil this criteria.[4]

1.5. Compatibility with other EU instruments on redress

The draft legislative text proposes quality criteria fully in line with the Commission's collective redress Recommendation of 2013.

The associations that can bring collective interest litigation will be verified at the time the action is brought on an ad-hoc basis, rather than by means of pre-designation of qualified representative bodies. Pre-designation can be a safeguard against frivolous damages claims.

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1 "giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seized".

2 "Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation".

3 Court of Justice of 12 June 2014, Intel –v- Commission (T-289/09) at paragraphs 243 and 244, confirmed in the judgment of the Court (Grand Chamber) of 6 September 2017 in case C-413/14, and of the Court of Justice of 9 November 2000, Ingmar (C-381/98), paragraph 25.

4 Study on Residual Jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations), Service Contract JLS/C4/2005/07-30-CE)0040309/00-37, General Report (final version dated 3 September 2007) prepared by Prof. Arnaud Nuyts, Liederkerke, Wolters, Waelbroek, Kirkpatrick in collaboration with Katarzyna Szychowska, Unit for Private International Law, Universite Libre de Bruxelles).

However, as the Report[5] on the Commission's collective redress Recommendation of 2013 found, fears regarding abusive litigation driven by profit interests of third party funders appear to be unfounded, particularly where the associations that can bring a claim are required to be non-profit.

Such abusive litigation is also arguably more likely to arise where damages could be awarded whereas this initiative is limited to injunctive (rather than compensatory) relief on the targeted legal obligations proposed here, as opposed to the aim of securing mass enforcement of the consumer protection acquis that the Injunctions Directive aims to facilitate. As the platform economy is still evolving, there are fewer representative bodies than exist for consumers and the population of business users is smaller than the class of consumers who could benefit from improvements to the Injunctions Directive. These differences justify this minor variation between approaches for this initiative and the approach in consumer law, which favours pre-designation.

1.6. Definitions and Scope: A precise, future-proof and evidence-based approach

The Impact Assessment covers those online platforms in relation to which each of the three **interlinked** parts of the problem that this initiative aims to address apply: unilateral trading practices, a lack of effective redress and risks deriving from emerging regulatory fragmentation. It is also these online platforms that exhibit most strongly the drivers underlying the problem.

Online platforms that have managed to build an important consumer-base consisting of private individuals that can single-home for a specific purpose (e.g. hotel booking, fashion purchases, app downloads, or connecting to a specific network of people) today already account for a significant share of the overall market (i.e. including online as well as offline sales channels). These firms can therefore constitute a crucial gateway (possibly one of several) to consumer demand for a large number of, in particular, small businesses.

This dependency-situation is characterised by the **existence of a direct contractual relationship** between the online platforms and each of their business users as well as their consumers, reflecting the intermediaries' degree of control over the *initiating* of transactions that they intermediate (i.e. they can demand to be compensated, and impose the legal terms).

Whether the transactions between businesses and consumers that these online platforms intermediate are ultimately *concluded* directly online, on their market place, or through other means (e.g. offline for hotel or restaurant booking platforms or on businesses' own websites for comparison websites that may re-direct but track consumers) does not affect their gateway-position.

As a result of this definition, certain categories of platforms such as B2B platforms, payment intermediaries, and programmatic advertising exchanges (used to serve digital ads on the wider Internet) are out of scope.

Payment processing constitutes an activity that is inherently auxiliary to the supply of goods and services and this can never be used on a standalone basis to *initiate* transactions (i.e. consumers do not use payment intermediaries as the starting point for finding any goods or services provided by third parties). Payment intermediaries are therefore, excluded.

[5] Report from the Commission on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Members States concerning violations of rights granted under Union Law (2013/369/EU) (forthcoming).

Online platforms that aim to intermediate transactions between businesses (i.e. B2B platforms) do not exhibit a similar dependency of the provider-side of the market at present. These B2B online platforms are characterised by a different dynamic: both sides of the online platform tend to constitute large and savvy firms that do not easily bind themselves into imbalanced contractual relationships. A Commission study from 2006 in this regard already observed that businesses' awareness of risks involved with online intermediation constituted one of the main factors altogether holding back the development of large-scale B2B e-markets.[6] To the extent these exist today, B2B intermediary platforms such as cloud app stores for professional clients exercise less control over intermediated transactions as the B2C online platforms targeted by this initiative do; they for example do not take commission and the B2B cloud app store is rather ancillary to the core provision of Customer Relationship Management services.

Advertising exchanges are a particular category of B2B platforms, where advertisers and publishers of ad space (e.g. website owners) are the immediate clients. Although programmatic advertising inherently involves presenting businesses' ads to consumers with a view to concluding transactions, this constitutes a derived form of intermediation that is not covered by this Impact Assessment. Indeed, programmatic online advertising typically involves multiple types of consecutive online intermediation services used to deliver the advertisement, such as online ad serving tools or online advertising exchanges. In these cases, the consumers do not use the online intermediation services that they enter into a contract with (e.g. the general search service) for the specific purpose of finding the relevant advertisements and they cannot choose which advertisements they see.

The Impact Assessment accordingly takes a future-proof *activities*-based approach to scoping the relevant online intermediation services that it covers. Indeed, the category of "online B2C e-commerce market place" that enables B2C transactions to be initiated as well as concluded directly online covers a range of online platform services regardless of their fast-changing designs, including traditional online market places, direct "buy-now" buttons integrated with social media, e-commerce chat bots incorporated into interpersonal communications services[7] as well as voice-activated software application stores[8]. Such an *activities*-based approach is consistent with the regulatory approach of the E-Commerce Directive[9].

The general concept of online intermediation services encompassed by the scope of this initiative is also agnostic to the CJEU *Uber* judgment, which concerns one specific type of service provided by the company Uber. This specific service, but not other intermediation services that Uber may provide, will no longer qualify as an online intermediation service on the basis of strict criteria used to establish *control* by Uber over the underlying service.

By designing specific legal definitional elements, a precise scoping of "online intermediation services" that are capable of exhibiting the dependency-related problems that this Initiative aims to address is possible. It is noted in this respect that existing legal definitions used in EU law in the area of digital do not capture the distinguishing *intermediation*-element that this initiative targets. For example, Art. 2(5) of Regulation 2017/1128 on cross-border portability of online content services in the internal market targets online services that buy and resell

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6 Legal Study on unfair commercial practices within B2B e-markets, ENTR/04/69 of May 2006.

7 Definition refers to the European Commission's proposal for a Directive establishing the Electronic Communications Code.

8 For example, Amazon hosts thousands of voice-activated and delivered software applications ("Skills") as part of its Alexa voice service.

9 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

digital content (e.g. subscription-based Video-on-Demand services), rather than intermediating access between consumers and the producers of such content.

At the same time, whereas Art. 4(17) of Directive 2016/1148 concerning measures for a high common level of security of network and information systems across the Union does define online market places, this definition is both too broad as well as too narrow for the purposes of this initiative. It namely covers both B2B and B2C transactions, and extends far beyond intermediary platforms (to cloud services providers).

At the same time, its scope of application is limited to those digital services where contracts can be *concluded online*, whereas EU businesses actually depend also on online intermediation services that enable the *initiating*, but not necessarily the conclusion, of transactions online (e.g. business pages on social media, which are crucial for attracting "offline traffic", building on important consumer review systems).

The legal definition of online market place being explored in Art. 2(19) of the draft revised Directive 2011/83/EU on consumer rights equally fails to capture the intermediation-element, as it would extend to contracts concluded on any regular retailer's webshop ("*online marketplace means a service provider, as defined in point (b) of Article 2 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), which allows consumers to conclude distance contracts on the online marketplace's online interface*"). Finally, the upcoming EU proposal for a Regulation on crowdfunding is highly narrow in scope, and merely defines *crowdfunding platforms* as "*an electronic information system on which crowdfunding services are provided*".

As described in more detail in section 8.2, the legal definitional elements of "online intermediation services" do allow this precise scoping of online intermediary platforms. A definition has been developed on this basis around four technologically-neutral elements that are shared among the relevant types of online intermediaries:

- the fact that their service constitutes an information society service, as defined in Directive (EU) No 2015/1535;

- allowing business users to offer their products and services to consumers;

- with the aim to facilitate direct transactions between business users and consumers, irrespective of where these transactions are ultimately concluded; and

- provided on the basis of contractual relationships between, on the one hand, the online intermediary and, on the other hand, each of those business users and consumers.

Moreover, one policy option identified in this Impact Assessment report is to strengthen the effectiveness of the proposed ranking transparency obligation by extending it to online general search engines. Under this option, the existing legal definition of *online search engines*[10] would be incorporated into the legal instrument to allow for this targeted extension. The use of this separate legal definition for a type of online service provider that is different

[10] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union; online search engines are defined as "a digital service that allows users to perform searches of, in principle, all websites or websites in a particular language on the basis of a query on any subject in the form of a keyword, phrase or other input, and returns links in which information related to the requested content can be found".

from the online platforms targeted will only help confirm the precise scope of the concept "online intermediation services".

The proposed definitions and scope are furthermore coherent with proposals addressing digital services in other areas, in particular in the field of taxation. There, a preferred option targets *revenues of a business resulting from the exploitation of digital activities characterised by user value creation, namely advertising revenue and revenue from services provided by online marketplaces/intermediaries*. Given the different objectives of the interventions are different, the conceptual scope of the two initiatives complement each other, and present no contradiction.

1.7. Evidence-base & types of issues covered

Importantly, these results are based on surveys among randomly selected business users of online platforms, as well as on an existing independent panel of around 2 500 businesses where all participants were required to respond (i.e. regardless of whether they had experienced problems). The random selection of businesses should guard against important aberrations in the results due to self-selection bias. Moreover, it should be noted that the number of reported issues is largely consistent between the overall results and the independent business panel (37% of the panel members experienced issues, which figure amounted to 68% for heavy users, against 46% of all business users surveyed). Finally, these results were tested with stakeholders from different groups, including by means of a large number of bilateral meetings, (separate and combined) workshops with platforms and business users, a Member State survey, a public consultation, comments received to the Inception Impact Assessment for this initiative, several meetings of the e-commerce expert group, focus groups hosted by the Joint Research Centre's policy design lab and by means of further independent studies on platforms' data and terms and conditions.

1.8. Overview of problem drivers

Platforms are increasingly an important vehicle for market access

- Digital trade is growing and increasingly intermediated by online platforms
- Platforms are important gateways to new (cross-border) market and business opportunities

Platforms can benefit from virtuous growth cycle due to strong data-driven network effects of unprecedented magnitude, speed and scale proper to the online world

- Indirect network effects are at the heart of the business model of online platforms: the increase in the number of users on one side of the platform (e.g. sellers, content creators, service providers) makes it more attractive to users on the other side (e.g. consumers, viewers) and the other way around.
- The network value increases very rapidly with the number of additional users on either side, while the cost increase to provide services to additional users on either side grows increasingly slowly. Platforms thus create their economic value by attracting/retaining users on both sides of the market, while the cost for supporting additional users is marginal: when a platform scales to millions of consumers, functions such as support are frequently automated in order to maintain low scaling costs.
- These 'winner-takes-most' dynamics are reinforced by platforms' a data-driven competitive advantage. Platforms have access to high quality, variety and volumes of data. This gives them insight into users' profiles/preferences, allowing them to deliver the best user experience. This leads to increased returns to scale, scope and network effects.

Imbalanced bargaining power and business users' dependency

- Above specifics lead to tendency towards market concentration: the bigger a platform is the stronger the network effects, which leads to increased bargaining power
- Platforms' business strategies are mainly focused on attracting end-users – platforms compete aggressively for the buyers, subsidising that side of the market through higher price and/or lower quality of service offered on the seller (business users) side
- Most businesses thus need to be present on more than one platform within each segment to reach consumers

Fear of retaliation

The above described dependency (due to platforms' "gateway" function and resulting greater bargaining power) leads to fear of retaliation. The latter renders the quantification of P2B issues difficult, thus preventing their timely identification and resolution.

1.9. Conclusion of Problem Definition

EU businesses cannot exploit the full potential of the platform economy because of issues in the platform-to-business relations and emerging re-fragmentation of the single market.

Business users active on platforms face a number of potentially harmful trading practices for which there is a lack of effective redress. According to a study carried out for the European Commission, these trading practices would concern a large number of business users. The results of the study show that 46% of business users encounter problems in their relation with platforms while this percentage is higher (75%) for business users realising more than half of their turnover on platforms. Almost one third of issues remain unresolved while 29% are solved only with difficulties. The unfair trading practices listed in this section are gradually undermining business trust in the platform economy. Trust is primordial to the platform economy since it allows increasing the number of users on both sides thus optimising data-driven network effects which fuel online platforms' growth. Potentially unfair and non-transparent P2B practices are therefore not only detrimental for business users (since they lead to direct loss in sales) but could also negatively impact the growth of the online intermediation sector and reduce platform operators' revenues (through unrealised commissions). The long-term sustainability of the platform economy is therefore closely linked to issues encountered by business users in their relations with platforms.

Platform operators are increasingly faced with emerging national legislations which start fragmenting the naturally cross-border market for online intermediation in the EU. The uncoordinated adoption of national legislations - whether platform-specific or covering B2B issues in general but applicable to platform businesses – may result in divergent regulatory measures across the EU and carry the risk of hampering online platforms' ability to scale up. The EU platform economy is of intrinsic global nature and is by definition cross-border. Scaling-up is core to platforms' business strategies as it allows for stronger network effects.

1.10. Legal basis

The combined effect of potentially unfair trading practices, lack of effective redress, and emerging regulatory re-fragmentation

Today, online platforms are the most effective way to provide goods and services across borders (cf. section 2.3.3). This inherent cross-border nature of online platforms distinguishes the present initiative from the "traditional Single Market" approach, where existing national fragmentation inhibits the scaling up of predominantly national actors (e.g. national telecom operators, or incumbent energy suppliers).

The present initiative indeed rather involves a longer-term risk of what would essentially be a significant "re-fragmentation" of the Single Market, evidenced in the general pressure on national legislators and authorities to regulate the novel online platform-business models, including, in light of dependent businesses being subject to a range of harmful trading practices in regard of which existing national legislation does not provide effective redress.

This real risk of fragmentation is one part of a three-pronged **interlinked** problem, which otherwise includes unilateral P2B trading practices that are capable of causing direct harm to businesses and the ineffectiveness of redress in addressing such unilateral trading practices.

The present initiative therefore aims to prevent direct harm to businesses in the immediate term, and to safeguard the Single Market-potential of online platforms in the medium to long term, by improving business user trust and by enabling well-informed policy responses at the appropriate level. It therefore serves to protect the interests of all participants in the online platform ecosystems, and Article 114 TFEU constitutes the relevant legal basis.

1.11. Subsidiarity: EU action required to provide harmonised framework for cross-border, online platform-specific issues

EU action is the only way to prevent direct harm to businesses in the immediate term, and to safeguard the Single Market-potential of online platforms in the medium to long term. One part of the interlinked problem set is that existing redress possibilities including national rules are ineffective in tackling the online platform-specific cross-border trading practices. The ineffectiveness of existing redress combined with the occurrence of such trading practices is in fact not only causing direct harm to EU businesses, but also fuelling the long(er)-term risk of fragmentation, which would negatively affect the Single Market potential of online platforms.

EU action targeting online platforms will not result in any fragmentation in the legal framework within which EU businesses operate, as businesses use online platforms for a dedicated purpose (most efficient way to make direct cross-border sales to consumers) while facing specific problems (access to justice is particularly ineffective, and delisting, data & self-learning algorithms are not seen offline). Indeed, the set-up of online intermediation does not have an offline equivalent. Online platforms enable direct transactions between business users and consumers while maintaining a degree of control over them. Supermarkets do not enable such direct transactions, whereas shopping malls do but without maintaining control (in relation to shopping malls, it is noted that leases for retail space sometimes include turnover-based rent calculations which actually serve to protect the business user in case of disappointing "foot fall" – reflecting a bargaining position that is at least equal). Second, the combination of drivers underlying the problem in the present initiative is specific to online platforms, with in particular the size and nature of the data-driven indirect and direct network effects leading to a particularly important dependency of business users on platforms as the most effective gateway to very large cross-border consumer markets. Finally, the individual problems are equally specific to online platforms; in the offline world, the effects of paid-for placement are for example not opaque (all suppliers can visit the supermarket and verify). Also, the negative effects of unilateral P2B trading practices partly result from the lack of effective bilateral complaint-handling which, in turn, is due to the unparalleled size of businesses and products offered (even a specialised platform like Etsy.com has 2 million sellers).

1.12. A light-touch and staged co-regulatory option geared to online intermediation

The principal aim of the Initiative is to improve transparency and bilateral conflict resolution in a first step, focusing on internal complaint-handling and mediation, subject to transparency-enabled monitoring. This links to the particularity of online intermediation, where speed is crucial and issues can only be solved quickly by the platform itself. Indeed, 71% of business users that took action to resolve issues turned to the platform itself, but in the majority of cases (68%) the issue could not be resolved. And although currently used only to a limited extent, online mediation did allow problems to be resolved in a majority of cases (64% for heavy users).[11]

The proposed regulatory framework therefore requires (and enables) *monitoring* rather than *public enforcement*. The proposed legal obligations in the Preferred Option nonetheless play on important reputational levers (that can influence both businesses and consumers) and will already help to prevent harm from P2B trading practices. Indeed, enhanced transparency on the "business-friendliness" of incumbent online platforms, combined with a dedicated monitoring function, should provide real additional competitive parameters for the thousands of online platform start-ups that exist in the EU as well as at global level.

The legal transparency and redress obligations at the same time mostly require a one-off implementation by the platform, and are relatively easy to monitor. The provision providing representative organisations with legal standing to bring actions on behalf of business users is therefore foreseen to ensure enforcement *exclusively* of these high-level legal transparency and redress obligations, in light of the main barriers to justice identified in online intermediation, i.e. the fear of retaliation and the use of exclusive choice of forum-clauses. To reflect this purpose, it will also be limited to injunctive (and not compensatory) relief and therefore not imply additional costs over and above those identified in section 6. It will at the same time be fully aligned with the quality criteria for representative bodies set out in the 2013 Commission Recommendation on Collective Redress. By limiting standing for representative organisations to applications for injunctive relief only, it is more effective and can avoid the problems encountered at Member State-level in relation to *compensatory* collective redress.[12] Indeed, legal standing to bring injunctive actions for organisations representing SMEs is an established phenomenon in the area of unfair trading practices in all EU Member States.[13]

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[11] Table 4.7 of the ECORYS 2017 (see footnote 3, page 64).

[12] Report from the Commission on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) (forthcoming)

[13] Annex 7 of the Commission Staff Working Document – Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (recast) Impact Assessment (COM(2009) 126 final, SEC (2009 316) shows that organisations representing SMEs have legal standing to bring injunctive actions to tackle unfair trading practices in general, or for late payments in particular, under all Member States' national laws; save that in France it is done so in a different manner to the other Member States by reference to direct or indirect detriment to fair competition and in Poland, the system is less developed. The situation in the Member States is set out in more detail in Annex 8.

1.13. High-level but effective transparency obligations with a scope for self-regulation

The proposed legal obligations will balance the need to be concrete in order to provide the required legal certainty for both online platforms as well as their business with the need to prevent any significant compliance burden.

This will be achieved by providing clear yet technologically-neutral principles and concrete interpretative examples in a directly applicable EU Regulation. The transparency obligations will also translate only to targeted descriptions to be included in platforms' *general* terms and conditions rather than at the level of individual businesses, services or products, which approach reflects the dependency-situation that falls within the scope of the Initiative.

By way of example, on ranking it will be explained in the proposed legal instrument that the description of the *main ranking parameters* shall be general in nature and refer to the average situation applying for the relevant online intermediation services, which, however, will need to be based on real historic results. In this regard, it will be explained that by complying with this provision platforms must enable business users to obtain a reasonable understanding of the functioning thereof, to the extent these parameters do not individually or jointly constitute trade secrets as defined in Article 2(1) of the Trade Secrets Directive. Similarly, on the use of MFN clauses, online platforms will be required to provide only a targeted description of the main justifications for their use, while referring to concrete data and facts.

Such an approach is also based on selected real-life industry examples of meaningful transparency provided by certain – but not all – platform operators. For example, one particular collaborative economy platform that also hosts professional users provides a general page setting out the six main factors determining listing results, providing for each factor a concrete example of what is meant. In addition, this collaborative economy platform explicitly mentions that it may boost results of business users that are new to the platform.

Another vertically integrated e-commerce platform explicitly commits in its general terms and conditions to log and give access to all activities of business users on the platform in the form of statistics and reports.

Therefore, the legal obligations constitute self-standing rules. They however impose only minimum levels of required transparency and the Regulation will be drafted in a results-oriented manner, providing only interpretative examples of how the desired result may be achieved. Hence, the Initiative deliberately leaves room to industry to develop different methods to comply with the legal principles. In this regard, the foreseen dedicated monitoring exercises to specifically inform a possible review of the legal instrument will aim at triggering an important self-regulatory effort in a first step - with the potential for this to be incorporated in any future rules that may be required in a second step. The Initiative will include an encouragement to industry to draw up legitimate codes of conduct for the implementation of the legal principles in the most useful and efficient manner in light of evolving technologies. Moreover, the legal instrument will comprise a review clause that includes an explicit reference that any such legitimate codes of conduct may be taken into account in the evaluation by the Commission.

1.14. Effectiveness of a legal definition of online intermediation services

The legal definitional elements of "online intermediation services" allow a precise scoping of online platforms that can exhibit the dependency-related problems that the present Initiative aims to address.

First, all targeted platform services are provided as part of an "information society service", in line with the existing services-based definition in Regulation 2015/1535/EU. This limits the scope of the intervention to *online* services.

Second, online platforms can only act as a "gateway" to consumers in case their online intermediation services enable in some way commercial relations occurring between two different groups of *direct* users (business users and consumers) of the same online intermediation services. The definition will to this end refer to the existence of a direct contractual relationship between, on the one hand, the relevant information society service providing the online intermediation services and, on the other hand, each of its business users and private users (consumers), as the targeted multi-sided markets are without exception characterised by such triangular business-platform-consumer contractual relationships. A wide array of online tools that have some (one-sided or auxiliary) involvement in the commercial relations between business users and consumers but that do not constitute a "gateway intermediary" are thus excluded (e.g. ad serving platforms or search engine optimisation software). The notion of "consumer" in addition refers exclusively to private individuals under EU law, further limiting the scope of the initiative to online platforms that intermediate *B2C* commercial relations, where network effects and related imbalances in bargaining power are largest, and where evidence of harmful trading practices is available.

Third, the proposed legal transparency obligations will apply only to the extent online platforms unilaterally impose "pre-defined, standard terms and conditions", to reflect the superior bargaining power of the "gateway intermediaries" that the initiative targets.

Fourth, the "online intermediation services" will be defined as consisting in (i) "allowing business users to offer their goods and services to consumers", (ii) "with the aim to facilitate the initiating of direct transactions between business users and consumers, irrespective of where these transactions are ultimately concluded". Crucial gateway intermediaries including "local search" services where the transactional decision is taken online regardless of where the deal is ultimately concluded (e.g. offline for restaurants) will thereby be covered, whereas mere auxiliary activities such as online payment services will be excluded. The latter activity is namely inherently auxiliary to the supply of goods and services and can never be used on a standalone basis to *initiate* commercial relations.

The existing legal definition of *online search engines*[14] would be incorporated into the legal instrument for a targeted extension of the legal transparency provision on ranking. The use of this separate legal definition for a type of online service provider that is different from the online platforms, which will be targeted horizontally, would only help confirm the narrow scope of the concept "online intermediation services".

[14] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union; online search engines are defined as "a digital service that allows users to perform searches of, in principle, all websites or websites in a particular language on the basis of a query on any subject in the form of a keyword, phrase or other input, and returns links in which information related to the requested content can be found".

The additional inclusion of online search engines in the scope of the provision would, however, be limited to the provisions on ranking and legal representative standing, in order to maintain the balance of effectiveness, efficiency, and proportionality.

Alignment with future legal definitions, e.g. **in the field of taxation** is currently in progress, with due regard to the different objectives and the requirements to limit the unnecessary proliferation of legal definitions of platforms.

2. PROCEDURAL INFORMATION

2.1. Identification

This Staff Working Paper was prepared by Directorate F of Directorate General 'Communications Networks, Content and Technology' and Directorate E of DG GROW. The *Decide* reference of this initiative is PLAN/2017/1375.

2.2. Organisation and chronology

Several other services of the Commission with a policy interest in the initiative have been associated in the development of this analysis. An Inter-Service Steering Group (ISG) has been created to this effect. The ISG includes representatives of DG COMP, DG GROW, DG ECFIN, DG EMPL, DG JUST, DG TRADE, DG ENV, DG ENER, LS, EPSC, JRC, RTD, EAC.

The last meeting of the ISG, chaired by the Secretariat General of the European Commission was held on 30 October 2017. Minutes Ares(2017)5417127 of the meeting are enclosed.

2.3. Regulatory Scrutiny Board

This staff working document was discussed at the regulatory scrutiny board meeting of 29 November 2017. The Board issued a negative opinion.

2.4. Evidence

The options considered in this impact assessment were designed by taking into account the following main inputs, in addition to less central references quoted in the body of the Impact Assessment:

1. Studies commissioned by the European Commission

On business to business issues

- ECORYS, *Business-to-Business relations in the online platform environment FWC ENTR/300/PP/2013/FC-WIFO*, 2017 (commissioned by DG GROW & DG CNECT)
- ERNST&YOUNG, *Contractual Relationships between Online Platforms and Their Professional Users*, SMART 2017/0041 (commissioned by DG CNECT)
- VVA, *Data in platform-to-business relations, Contract nr FWC ENTR/172/PP/2012/FC-lot2 Service contract Nr 645/PP/GRO/IM A/17/1131/10398*, forthcoming (commissioned by DG GROW)
- GRAEF I. et al., *Contractual terms and conditions of large e-commerce platforms*, 2016 (commissioned by DG GROW)

- Flash Eurobarometer 439 "The use of online marketplaces and search engines by SMEs" of June 2016 (4 904 respondents)

On consumer issues

- LSE et al., *Behavioural Study on the Transparency of Online Platforms*, Request for Specific Services 2016 85 04 for the implementation of the Framework Contract no Chafea/2015/CP/01, forthcoming (commissioned by DG JUST)
- Ipsos Public Affairs *Consumer market study on online market segmentation through personalised pricing/offers in the European Union*, forthcoming (commissioned by DG JUST)
- GfK et al., *Behavioural study on advertising and marketing practices in online social media*, forthcoming (commissioned by DG JUST)
- VVA, *Exploratory study of consumer issues in online peer-to-peer platform markets*, May 2017 (commissioned by DG JUST)
- Special Eurobarometer 447 "Online platforms" of June 2016 (27 969 respondents)
- Standard Eurobarometer 86 "Public opinion in the European Union" of Autumn 2016 survey (27 818 respondents)

Research conducted by the Joint Research Centre

- JRC research online platforms
- JRC, *Quality discrimination in multi-sided markets*[15]
- JRC, *Platform to business relations in online ecosystem*[16]

Other data sources

- Dealroom economic report and data set on online platforms in Europe
- Eurostat 2017: use of social networks by businesses
- Eurostat 2017: use of online advertising by businesses
- Report on the Monitoring Exercise Carried out in the Online Hotel Booking Sector by EU Competition Authorities in 2016

2. Industry surveys and studies consulted

- The Booksellers Association of the UK & Ireland, survey into business-to-business relations on online platforms of September 2017 (83 respondents)
- Amazon Webretailer survey (1 500 respondents)
- App Alliance survey (673 respondents)
- IAB programmatic advertising survey (1 232 respondents)
- Future of Business survey, report on international trade (49 081 respondents), by the World Bank, OECD, Facebook
- iOS developer survey https://tapdaq.com/blog/apple-developers-think-you-are-just-one-inconsistent-loop Survey among crowdworkers: "*Unfair treatment by requesters and disinterest from platform.* http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---

[15] Forthcoming. Summary available in Annex 6
[16] Forthcoming. Summary available in Annex 6

travail/documents/publication/wcms_479693.pdfCopenhagen Economics study (for EDiMA) - online platforms the engines of the EU economy
- Copenhagen Economics study (for Ebay) - economics effects of marketplace bans
- Roland Berger report "Fair play in the digital arena" (for 1&1 in Germany)
- Oxera study (Google sponsored) on benefits of online platforms. Technical appendix

3. Other sources

- Labour platforms EP report: http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf
- TNO NL report - Digital platforms: an analytical framework for identifying and evaluating policy options
- UK House of Lords report on Online platforms

- CNNum Report
- Monopolkommission Special Report No 68 "Competition policy: The challenge of digital markets" of 2015
- UK CMA report price comparison tools
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2.5. External expertise

The European Commission sought external expertise, as follows, before drafting this Impact Assessment. Views of the experts have contributed to the problem framing and evidence collection strategy. Consultation of experts listed here below does not imply automatic endorsement on their side of the Impact Assessment report.

- Andrei Hagiu, Harvard Business School in November 2015
- Annabelle Gawer, Imperial College of London in November 2015, February 2016
- Bernard Rieder, University of Amsterdam in November 2015
- Bruno Jullien, Toulouse School of Economics in November 2015
- David Evans, University of Chicago in October 2015
- Geoffrey Parker, Tulane University in February 2016
- Giorgos Zervas, Boston University in November 2015
- Inge Graef, Catholic University of Leuven in November 2015
- Jonathan Cave, University of Warwick in December 2015
- Jose Luis Moraga Gonzalez, Free University of Amsterdam in November 2015
- Lapo Filistrucchi, University of Florence in November 2015
- Marc Bourreau, Telecom – Paris Tech in November 2015
- Nicolai van Gorp, E-conomics in January 2016
- Peter Evans, Center for Global Enterprise in February 2016
- Pieter Nooren, Christine Balch, TNO in October 2016
- Viktor Mayer-Schönberger, Oxford Internet Institute, in December 2015

3. STAKEHOLDER CONSULTATION

3.1. The stakeholders engagement strategy

The Commission has consulted broadly on the business-to-business related issues emerging in the online platforms' ecosystem. First, preceding the Communication on online platforms, a

wide consultation led to a clearer definition of the **problem space** and the start of an in-depth fact-finding exercise. Second, a series of workshops and broad consultation through several surveys informed the **problem definition** and led to preliminary policy options. Finally, in-depth focus groups, workshops, a questionnaire and open presentation to the Member States contributed to the **design and testing of policy options**.

In addition to the consultation tools used, the Commission's services have met or interviewed through bilateral meetings a series of stakeholders, as listed here-below.

In developing the stakeholder engagement strategy, the **stakeholder mapping** included: (i) a spectrum of business users of online platforms (to the extent possible per type of platform, size of companies, geographical spread in Europe), (ii) a long-list of online platforms (in different sectors, different company sizes, established in Europe or international), (iii) citizens (through consumer organizations and digital rights civil society representatives), (iv) third party services (e.g. payment or data intermediaries), and (v) academia.

The different consultation tools as well as brief summaries of their results are described here-below.

3.2. Bilateral meetings

In the course of the preparation of this fact-finding exercise, the Commission has engaged with the following stakeholders through bilateral meetings:

- ACCOR Hotels
- AGCOM
- Airbnb
- Akamai Technologies
- Allegro
- Alibaba
- Amazon
- App Developers Alliance
- Apple
- Bundesverband E-Commerce und Versandhandel Deutschland e.V. (bevh)
- Booking.com
- Cicero group
- Der Mittelstandsverbund – ZGV e.V.
- Deutsche Telekom
- Ebay
- Edima
- EFSI - European Federation for Services to Individuals (personal and household services)
- Enterprise Holdings
- ETSY
- ETTSA
- European Association of Communications Agencies
- European Booksellers' Association
- European eCommerce and Omni-Channel Trade Association (EMOTA)
- European Hotel Forum
- European Games Developer Federation
- Expedia

- Facebook
- Federation of European Publishers
- Gobee.bike
- Google
- Hilton worldwide
- HOTREC
- Independent Retail Europe
- idealo
- King Digital
- Mon Orxata
- Mozilla
- Mindbase
- Open Forum Europe
- Independent Retail Europe
- Rakuten
- Salesforce
- Sentiance
- Seznam - web portal and search engine
- Spotify
- SRIW/Bitkom
- Sugartrends
- TechUK
- The Booksellers Association of the UK & Ireland Ltd
- TripAdvisor
- Union des Métiers et des Industries de l'Hôtellerie
- United Internet Media and CEO of 1&1 Mail & Media Applications
- World Economic Forum
- Yelp, Inc.
- Zalando

3.3. The Outcome of the Public Consultations

3.3.1. Public consultation on online platforms, 24 September 2015 until 6 January 2016[17]

The public consultation's objective was to gather evidence and views on the regulatory environment for platforms, liability of intermediaries, data and cloud and collaborative economy. It was launched on 24 September 2015 and closed on 6 January 2016.

More than 1036 replies were received via the procedures foreseen in the consultation. An additional 10 599 individual contributions were received via one single advocacy association, mostly addressing only some of the questions posed in the consultation.

Not all respondents answered every question or section. More than 80 percent of the respondents replied to the sections on 'platforms' and 'online intermediaries & tackling illegal content', around 60 percent of the respondents replied to the section on 'data and cloud computing' and around one third replied to the section on 'collaborative economy'.

[17] **https://ec.europa.eu/digital-single-market/en/news/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and**

As to the geographical distribution of responses:

- Replies came from 27 EU Member States.
- About 10 percent of the replies came from outside of the EU, more than half of them from the United States.
- The largest number of responses came from Germany (17 %), Belgium (13 %) and United Kingdom (11 %).

By category, the respondents were:

- 462 individual citizens
- 243 associations or trade organizations representing businesses
- 2 "other"
- 157 businesses, including suppliers using an online platform to provide services
- 46 associations or trade organizations representing civil society
- 46 online platforms
- 34 research institutions or Think Tanks
- 28 public authorities
- 15 associations or trade organizations representing consumers

As pointed out in the qualitative analysis of the public consultation[18], businesses and associations of businesses were primarily concerned with platforms dominance leading to competition and fair-trading issues, copyright/IP rights protection, and to some extent the fairness of rankings and neutrality of online search results. Businesses and associations of businesses suggested that online platforms should display clearly their compliance with IP rights, clarity over usage of data, transparency / traceability of online service operators.

Most business and citizen respondents stated that platforms should be more transparent notably about search results, clarity about the actual supplier and reviews mechanisms. They also consider that online platforms do not provide sufficient information on personal and non-personal data collected and on their terms and conditions. Responses from businesses on how these problems could be best addressed were evenly divided between purely regulatory measures and a combination of market dynamics, self-regulatory and regulatory measures.

According to the public consultation on online platforms most online platforms think they provide sufficient information regarding search rankings, clarity about the actual supplier, reviews mechanisms, terms & conditions and data-collection.

As pointed out in the qualitative analysis of the public consultation[19], online platforms consider they treat suppliers fairly, and identify various means by which they do. They point to the natural alignment of business incentives and the regularly efficient business terms and practices, including open communication, transparency, compliance with rules, help desks, and efficient APIs allowing customisation. Online platforms identify common constraints to their expansion to new markets in the EU, around non-harmonized sets of complex regulation across EU countries, and application of current EU directives which are not consistent enough within the EU. There is broad support for the Digital Single Market initiative.

[18] https://ec.europa.eu/digital-single-market/en/news/study-online-platforms-contrasting-perceptions-european-stakeholders-qualitative-analysis

[19] See footnote 1

3.3.2. Public consultation: Building a European Data Economy, 10 January to 26 April 2017

In the Public Consultation, the section on portability of non-personal data was responded to by a total of 296 respondents, out of whom 261 represented businesses (including self-employed individuals) and 35 were individuals responding in their personal capacity.

Out of the respondents to the portability section of the consultation, 54.3 % said they are using or that they had used services allowing the portability of non-personal data that they had previously provided to the service. Different types of cloud services were most frequently mentioned as the context for porting data, along with different kinds of online platforms. The majority of the respondents (73.1 %) were either neutral (43.1 %) or satisfied (30 %) with the current conditions they were met with. Among those less satisfied (26.9 %), the lack of, or insufficiency of standards on how to port data, as well as the lack of interoperability of formats and semantics, seem to be the two main reasons for dissatisfaction with the conditions for data portability. Other reasons mentioned were also technical in nature, such as the lack of possibilities to upload the data to another service once extracted and difficult demand for anonymisation or pseudonymisation of data. Contractual issues, such as unclear or changing contractual conditions were also mentioned by some respondents.

Both businesses and individuals perceive the most important advantages of data portability to be the ability to build value deriving from the data (53.2 %), to switch providers (52.86 %), and to give access to third parties to the data (42.09 %). There were multiple answers possible, and many respondents opted for several answers. When asked to specify additional advantages to portability of non-personal data, 17 respondents mentioned the ability to introduce new business models, services or products and 17 respondents mentioned the positive effect such portability would have on the competition in the market.

Out of the respondents representing businesses, 40.9% said their business offers portability of non-personal data to their clients. However, few respondents gave concrete examples when asked about the conditions under which they grant such portability. Out of those who did respond, 6 claimed to offer free portability of either all their data or all non-personal data. These were mostly organisations and research bodies. Another 5 reported to offer portability as a paid service. When asked to give good examples of services offering data portability, many respondents gave examples, but few were repeated by several respondents.

3.3.3. Flash Eurobarometer 439: The use of online marketplaces and search engines by SMEs, 6 July 2016

The Eurobarometer[20] survey focused on selling goods and services online and, in particular, on retail and services SMEs in 10 Member States, and their use of search engines and online marketplaces to sell their goods and services.

Among other, findings of the study included that:

- At least half of the companies using online marketplaces get the data they need about their customers (53%), while more than four in ten companies disagree (42%).

[20] https://data.europa.eu/euodp/fi/data/dataset/S2125_439_ENG

- At least half of these companies know what data are collected by the online marketplace about their company's activity, and how the data is used (55%), while 37% disagrees.
- Just over four in ten companies using online marketplaces say they can easily transfer key commercial data from one online marketplace to another (41%). However, companies are most likely to disagree that this transfer can be easily made (47%). Just over one quarter tend to disagree (28%), while 19% totally disagree.
- More than half of all companies selling online agree that they can report false reviews about their company and have them removed (53%). Just over one quarter disagree (28%). However, more than half agree that, in general, user reviews are genuine (53%).
- More than half say their company's reviews on online platforms have a significant impact on their sales (52%).
- Just over one in five companies using online marketplaces totally agree that the terms and conditions for online marketplaces are clear in general (21%), while 42% tend to agree. Overall, a majority agree to some extent that these terms and conditions are clear (63%), while 32% disagree.
- Just over a third of companies agree that they can influence or amend the terms and conditions (36%). However, the majority (58%) disagree they can influence or amend these terms and
- conditions, with 34% that totally disagree.
- The majority of these companies agree that they can easily switch to a different online marketplace if the existing terms and conditions are changed to the detriment of their company (54%). Overall, just over a third of companies disagree with this statement (35%).

Half of the companies that use an online marketplace agree that there is a reliable dispute resolution system if they have a dispute with the online marketplace they use (50%). Almost three in ten companies disagree (29%).

3.3.4. Survey of business users, 5 December 2016 – 2 February 2017

An external contractor (ECORYS; FWC ENTR/300/PP/2013/FC-WIFO) carried out a study to provide additional evidence to help the Commission determine the scope, actual scale and impact of potentially unfair B2B trading practices applied by online platforms.

In total three surveys for business users were conducted for the study. They consisted of one survey on invitation-only basis ('closed survey'), one survey with an open invitation (made available via the website of the European Commission; 'open survey') and one survey making use of a business panel ('business panel survey'). The results presented below are an aggregate of these three surveys.

In the study 46% of business user responders had experienced problems and disagreements with the platforms in their business relationship. Among the business users with more than half of turnover generated via online platforms (heavy users), the share of those that experienced problems was significantly higher (75%). Technical problems and lack of customer support are the most prevalent causes of problems for both heavy and non-heavy users. Lack of transparency of platform policies and practices on data/content are experienced by larger share of heavy users compared to non-heavy users. Among other reported problems were e.g. unfair terms and conditions, sudden changes in contractual terms or pricing, discontinuation/ suspension of user account, limitations on payment possibilities and bias of search related practices.

3.3.5. Problem definition: targeted workshops

Business-to-business relationships in the online platforms environment - data access, (re-)use and portability – engagement workshop, 19 October 2016[21]

The workshop aimed at providing a better insight into the data related practices in the relationship between online platforms and their business users. The workshop brought together individual business users of different online platforms, associations representing such business users, academics, think tanks and government officials.

Several participants highlighted that some online platforms for example impose specific (proprietary) payment systems but do not share the payment information of a customer with the third-party business providing a service, including subscription-based services. Businesses highlighted that lack of direct financial contact with a customer limits customer strategy. According to the participants communication with customers, which is essential for certain personalised services, is often being run via platform. Businesses also reported that they experience lock-in effects with regard to the key data controlled by specific, individual online platforms. Businesses also seemed to have difficulties in accessing ad performance data and data on their sales statistics. There is generally a lack of transparency on the performance measurement (including on the functioning of algorithmic decision-making), and a procedural difficulty around the absence of independent third-party auditing of the services provided

Solutions explored by the participants for enabling data sharing and trust range from sector-specific discussions, to dialogue and cooperation in data sharing, to standard contractual clauses, technical and legal data standards, enforcement of the existing data sharing framework for e.g. public sector information, and, finally, mediation mechanisms. Specifics of online industries and business models need to be taken into account when extension of application of similar rules (e.g. consumer protection) is being contemplated. Some businesses also explain that although market-driven solutions for offering enhanced transparency and access to data to business users could materialise, online platforms currently impair their development by technical means – including by the abovementioned data-related practices.

Business-to-business relationships in the online platforms environment – issues related to Terms and Conditions, workshop hosted by the European Commission, 14 November 2016[22]

The workshop aimed to better understand the contractual conditions governing B2B relationships between online platforms and their business users, while specifically focusing on standard terms and conditions (T&Cs) of online platforms applicable to business users. Accordingly, the core concerns of the discussion relate to (i.) (im)balances in T&Cs; (ii.) clarity and transparency of T&Cs; and (iii.) redress possibilities and possible solutions to conflicts.

Regarding the first concern, online platforms usually reserve themselves the right to unilaterally alter their T&Cs, without necessarily providing clear reasoning, prior notification to business users or transitional period for compliance. The overall conclusion is therefore that T&Cs are not negotiable, which also raises questions concerning the transparency of T&Cs. These T&Cs frequently contain 'bundling clauses' that already prescribe the use of certain auxiliary services, or even refer to price-related/non-price-related parity clauses, which precludes businesses from offering benefits – such as membership schemes - to react to demand or competition. Another common practice that is identified in T&Cs relates to not providing for the sharing of data controlled by the platform (including with their business users) and at the same time allowing platforms to have access to business and user data;

[21] Full report available at https://ec.europa.eu/digital-single-market/en/news/data-related-aspects-business-platform-trading-practices-workshop-report

[22] Full report available at https://ec.europa.eu/newsroom/document.cfm?doc_id=43829

since sharing data with the business users still remains at the discretion of the platforms. Lastly, termination or suspension of business users' accounts does not always seem to be based on clear and justified criteria.

Moving forward to the second concern of readability, transparency and clarity of T&Cs, participants reported that T&Cs are frequently drafted in a rather vague manner, which creates space for difficulties regarding execution of the contractual T&Cs, dispute resolution and enforcement. This can trigger operational difficulties for business users who are faced with a lack of clarity on the conditions and the procedures related to terminating or suspending a user account, or delisting a product or service. On top of that, an escalation timeframe and clear description of what a business user can do to rectify a breach of T&Cs or react to a notification by a platform or to a complaint by a different user or consumer are often missing. Furthermore, T&Cs do not explicitly stipulate the general factors that influence the fee paid to the platform and the ranking on the platform (or least how the algorithm responsible for allocating the ranking is weighted).

In relation to the last issue of redress, it was highlighted that two main hurdles have to be overcome in order to secure effective redress and solutions to conflicts: (i.)the lack of speed associated with traditional redress mechanisms and (ii.)the fear of retaliation that would prevent platforms' business users from complaining or initiating procedures. The responsibilities of the platform in the procedure also seem unclear, and without guarantee of unbiased decision-making. Redress possibilities appear superficial and burdened by imprecise procedural rules and lengthy procedures. References to external dispute resolution mechanisms are often missing in standard T&Cs in a B2B context. In addition, a business that wishes to pursue the matter via litigation has to identify the proper respondent, which can be difficult given the complex company structure and choice of jurisdiction by platforms. Combined with the obstacles outlined above, there appears to be very little room for business users to successfully challenge platforms' decisions.

Business-to-business relationships in the online platforms environment - algorithms, ranking and transparency workshop hosted by the European Commission, 16 March 2017[23]

The workshop aimed at gaining a better understanding of the challenges that algorithmic practices of online platforms may pose for their business users, as well as at putting the algorithmic selection in the context of various business models and industry sectors. Finally, it aimed at collecting views of business users about what would constitute desirable outcomes for them.

Business users of online platforms reported lack of transparency of search algorithms and about experienced discrimination facilitated by this lack of transparency e.g. in the form of biased search result ranking that can be affected for example by paying additional fees to the platform. Due to lack of transparency advertisers cannot make sure that they get what they pay for. Publishers relying on platforms for the findability of their content have concerns that algorithms may be biased in favour of the content of the platform operator, without the users being aware. Business users across all sectors wish for more transparency with regard to search and ranking related practices of online platforms, i.e. the use of algorithms by platforms. All business users wish for a more effective enforcement of the current legislative and regulatory framework, both at the EU and national level. They argue that such more effective enforcement would be capable of resolving some of the issues they identify with algorithms used in search and ranking. Business users active in trade in services and goods would welcome an independent, external redress mechanism for resolution of problems and conflicts between platforms and their business users. As the service industry is more location-dependent, the businesses active on OTAs argued for the algorithm to take into account local regulation (for instance, on pricing). They claim that to be fair and more viable, the algorithm also needs to use more objective parameters (for instance geographic location instead of popularity, on OTAs).

[23] Full report available at https://ec.europa.eu/newsroom/document.cfm?doc_id=40698

Besides the fuller and more effective application of the existing legislation including consumer protection regulation, business users consider self-regulation, codes of conduct and other soft law as potentially useful instruments in tackling these problems.

Business-to-business relationships in the online platforms environment – discussion with online platforms, workshop hosted by the European Commission, 24 March 2017[24]

The workshop focused on gathering the platforms' views on the subject of relationships between online platforms and their business users. According to representatives of online platforms unilateral changes to T&C of use and the lack of the possibility to negotiate them is due to large amount of users. Most of the platforms reported that they inform their business users about changes of T&C by email and specify what exactly has been amended as well as when changes are to enter in force. Platforms claim such amendments are not very frequent and they may stem from the quickly changing business environment and the need to adapt to other platforms' practices. With regard to search and ranking practices, platforms denied a lack of transparency. Consumer legislation also imposes a degree of transparency, for instance by clearly indicating advertising as such.

According the platforms, the number of suspensions is marginal compared to the number of businesses active on platforms. Blocking of accounts occur only for the most serious violations, most usually after a series of warnings. Suspensions are linked mostly to fraudulent actions or illegal content/ items. Business users are usually informed about delisting or suspension concerning their products / accounts by automated email, or information displayed in their personal area of the website. Platforms may also make available information about how to challenge suspension/delisting decision to businesses by setting up dedicated online forums, FAQs, etc., and some of them have set up call centres where eventually a human interlocutor can be reached.

Platforms also identified the notice-and-take-down requirements as a significant challenge due to the strict deadlines and harsh consequences imposed for non-compliance. The risk of liability platforms are facing is such that they prefer to take action first and deal with possible wrongful suspension later, which leads to some cases of businesses using false complaints against each-other as commercial tactics.

Platforms do not share business users' concerns with regard to favouring certain products/services on online platforms. Platforms state that when they act as retailers and compete with their own business users, they do so within the limits and requirements of competition law. Platforms consider this competition as logical business practice which would not need redress. Platforms also disagree with the statement that they prefer certain auxiliary services (for example, payment or delivery systems) to other and limit the choice of business users in this regard.

Platforms explained that various data are available to business users to access and in certain cases to retrieve. Business data may in certain cases be personal data in the sense of the General Data Protection Regulation (GDPR). Sharing personal data is restricted due to legal constraints. Platforms explained that they share little personal data because of these constraints, but also to avoid free-riding due to their business model, which is based on creating relationships between business users and consumers. Certain types of business data are shared with business users, as it is valuable to them to help to develop their business.

Regarding redress, the platforms' argument is twofold. On the one hand they put forward the strength and claimed effectiveness of their internal redress mechanisms, which they are constantly improving and adapting to the market's demands, as well as the symbiotic nature of their relation with the businesses. On the other hand, they are sceptical about the creation of an external redress mechanism

[24] Full report available at https://ec.europa.eu/newsroom/document.cfm?doc_id=43936

to deal with platform-to-business issues, and do not see how such a system could fit the requirements, i.e. be effective, cheap and fast, at least in comparison with the existing solutions. They point out the significant differences in business models of different platforms and in different sectors, which they consider would make a "one size fits all" solution unfeasible.

3.3.6. Options design and evaluation

Focus Groups with Business Users – 7 September 2017

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.

The full report prepared by the EU Policy Lab (JRC) will be published.

Focus groups with Platforms – 20 October 2017

The focus group explored possible solutions to issues identified during the fact-finding exercise. The workshop was focused on gathering information on how platforms deal with practices concerning the process of delisting the content/offers submitted by business users, the processes for handling complaints by from their business users, information provided to business users on the rules governing paid ranking or payment for increased visibility (if applicable), information provided to business users on more favorable treatment of a platform's own products or services, information provided to business users on what data about their activity is collected and used by the platform operation and what data the business user has access to and the use of external mediation to solve disputes with business users.

The workshop gathered representatives of platforms active in different sectors of the economy (e.g. e-commerce, app stores, review websites, online travel agencies – OTAs, social networks and advertising) as well as representatives of industry organizations. The workshop was organized under Chatham House rules and this report gives a high-level overview of the issues raised during the discussion.

At the beginning, the European Commission presented the objective of the workshop, which was an opportunity to explore possible solutions to the issues identified during the fact-finding exercise on B2B relationships on online platforms. Participants then discussed the solutions in group settings.

The discussion was focused on mapping how the practices identified above occurred in practice before discussing possible solutions focused on transparency, dispute resolution and the role a possible expert body could play.

With regard to practices concerning the process of delisting the content/offers submitted by business users, it was discussed that the starting point should relate to a breach of the Terms and Conditions. A good rule for changes in the Terms and Conditions that may trigger delisting of content/offers, whether for changes in the law, clarification whether certain types of behaviour are acceptable or not (which may originate from business users or their associations, evolve from fraudulent activity or a desire for better protection etc.) is to communicate such changes to businesses. It was recognised that communication was key and if compliance caused practical difficulties when implemented, this should be considered before it triggered delisting. Good practices for communicating changes may depend on the nature of the change, but conveying the context was considered beneficial to businesses. Where a minor change is proposed, this could be notified through an email campaign. Where a more major change is anticipated, this could be potentially discussed in forums or tested with business associations. It was considered fair that changes in Terms and Conditions should not be applied retrospectively for example, to products or services already listed on a platform, but should apply for any future use of a platform.

With regard to the processes for handling complaints from their business users, platforms recognised that having the problem brought to the platform's attention and a dialogue pursued, was a good way to try and correct problems quickly. This could be achieved through providing a point of contact. The value of having a mechanism that gave opportunities for businesses to correct their behaviour was in line with the platforms' desire to continue the business relationship, save where they may be good reason to suspend the activities (for example, due to illegal activity or where more time is needed for a business to adapt their behaviour to meet the standards set out in the Terms and Conditions). The same objective was considered important whether such opportunity to correct behaviour occurred within the internal redress mechanisms or through an external mediation body, provided that this did not introduce additional administrative burdens.

With regard to the information provided to business users on the rules governing paid ranking or payment for increased visibility (where applicable), there was a recognition that businesses should be made aware that their ranking still depended on them offering a quality product or service and that it was in both the interests of the platform and the businesses, for the paid ranking or any increased visibility to offer a return on the investment. This could be assisted by dialogue with businesses, communication of the information/guidelines on the factors taken into account for ranking (without disclosing algorithms) and the offer of analytical assistance.

With regard to the information provided to business users on more favorable treatment of a platform's own products or services, the placing of own products on the market was recognized as a practice to match customer demand so a full range of products or services were available on the platform. There was a recognition that consumers needed to be advised that where a product or service was the platform's own (providing the same transparency to businesses, as is required to consumers) and that such products or services would only compete if they were of quality. The value of ensuring Chinese walls were put in place to separate the departments that worked on the development of own products and search and ranking was recognised. This would lead to a desirable environment of fair competition.

With regard to the information provided to business users on what data about their activity is collected and used by the platform and what data the business user has access to, it was recognised that data analysis was part of the service offered by platforms and access should be restricted to avoid circumvention and free-riding. The value in sharing data was recognised as it can ultimately lead to optimisation of sales, beneficial for both the businesses and the platforms. However, some reservations on sharing data were expressed such as the difficultly with the usefulness of raw data, the incompatibility of transferring data from one platform to another and vulnerability to abuse, where for example, the standards to verify reviews may be lower platform to platform. The benefit of businesses better understanding how they could use data was recognised.

With regard to an expert body, it was recognised that this could add value particularly if it could be used to raise awareness of the actions platforms were taking to be more transparent to their business users and could be used to publicise a platform's performance in that regard, possibly via an internet portal. If the expert body was trusted by the businesses, it could be a useful avenue through which platforms could be informed of problems and complaints, where businesses do not go directly to them, to give an opportunity for them to be resolved. It may be a less damaging method for platforms, who could deal with problems without having to do so in reaction to a damaging, very public social media campaign. Such a body could collect good and bad practices and develop Codes of Practice however, it was recognised that such an expert body would need to respect platform's business secrets so that it did not force them to disclose matters that may negatively affect their competitive advantage.

3.3.7. Questionnaire "Online platforms and platforms-to-business relations for Member States

A. Online Platforms – main findings

A.1. Online platforms greatly benefit consumers as well as businesses, and it is an imperative for the EU to support their further development

All Member States which commented on this point emphasised the significant benefits of platforms, their potential for growth and innovation, the opportunities both for consumers and businesses; most of them also stressed the need to support the platform environment, in particular the European marketplaces. Regarding the means of support, the views of Member States very much diverge: one Member State stressed that the statement was too general to be endorsed as such. Another stressed that only a clearly identified public interest would justify intervention into commercial freedom; other indicated that they took dissuasive enforcement measures (sanctions) in order to effectively support European businesses against repressive behaviour of platforms. Some responding Member States indicated that they would support self-regulatory measures only to enable platforms to develop. Some would abstain from regulation because they believe that the market is developing too fast to allow for timely regulation. Other favour a "neutrality" principle for platforms which would allow for balancing interests.

A.2. Online platforms benefit from indirect and data network effects of an unprecedented magnitude

Most responding Member States largely agreed on network effects, however some stressed that there is a high additional competitive pressure put on platforms; that there are competitive effects resulting from multi-homing and cross-market competition; that most platforms are small and local. Some stressed that network effect have both positive and negative aspects; that benefits from network effects may be justified in principle and only be addressed by regulatory means with respect to specific problems.

A.3. Digital trade is growing fast and will increasingly be intermediated by online platforms

Responding Member States confirm that according to statistics available there is exponential growth in digital trade, which is expected to continue to grow. One Member State points to the importance of free flow of data to enable European and indigenous platforms to capture this growth. Another Member State only agrees partially indicating that predictions of future growth of digital trade must be seen as part of an overall picture including also predictions on external costs (jobs, environment). Where Member States commented on the increase of intermediation by online platforms, they also agreed with the above statement. While endorsing the statement, some Member States stressed that the evolution cannot be predicted in its precise form and that therefore any regulation should stay technologically-neutral and principles-based.

A.4. Businesses increasingly depend on platforms for accessing customers, while online platforms lack an incentive to protect the business-side of their multi-sided markets.

A large number of responding Member States in principle endorse the statement on dependency and the failure of competitive pressure of the market mechanism to allow businesses to protect their interests. One Member State sees a stronger position on the side of the platforms and would seek for some outbalancing of the relationship. Another one agrees that there is often an unequal bargaining situation and a high risk of unfair terms. Some Member States see a direct need for appropriate regulation of online platforms. While endorsing the statement on dependency in principle, one Member State also pointed to a "three pillar" symbiosis: The P2C-B2C-P2B relationships are interdependent and platforms would have an incentive to protect businesses insofar as the loss of businesses on their platform would also lead to loss of consumers on the platforms.

Some responding Member States take a more cautious approach. One Member State stressed the importance of not stifling competition between the platforms/businesses. Another one would not subscribe as such to a statement that online platforms would lack an incentive to protect businesses and is looking for final findings of the Commission in this respect. One Member State does not share a finding of dependency of SMEs on platforms (relying on Eurobarometer 447). Another believes that there is a diverse picture and that any problems would sufficiently be addressed by competition law. It was stressed that due to the evolving phenomenon of the platform economy, regulation may not be fit for purpose within a near future, as well as that regarding certain practices of platforms - such as typically manipulation of search results – these are subject to competitive constraints and therefore there would be an incentive for platforms to protect businesses interests.

A.5. Friction exists in platform-to-business relations, but business users' important fear of commercial retaliation in the case of complaints means precise scale is unknown

Some responding Member States agreed with the statement; some pointed to the fact that businesses might also be prone to sacrifice more and make compromises to the platforms' benefits. Some Member States would welcome an appeals mechanism for businesses to handle delisting which should be outbalanced with the burden put on platforms. Another Member State pointed out that their national competition authority allows for confidentiality and provides for interim measures to prevent retaliation. Some Member States ask for inquiring this issue with businesses.

One Member State asks for further examination as to how to address frictions if they exist. Some stressed that the higher risk of retaliation of business, if compared to consumers, should be seen against the fact that businesses also have more scope to preserve their rights (legal advice, ability to complain due to turnover). The fact finding exercise was welcomed by Member States who also inquired for more data to enable the authorities to address the problem effectively and in a proportionate way, pointing to the fact that imbalances in bargaining power are not particular to P2B relationships.

One Member State indicated that it had not found evidence of friction and fear of retaliation and believes that the current legal framework is sufficient to ensure the functioning of the sector.

B. Objectives of possible EU action on P2B relations

B.1. To ensure a predictable business environment for firms trading online, thus supporting the development of trade on online platforms and related innovation as well as greater choice and value for consumers

Various responding Member States emphasised the need to ensure a predictable business environment for firms trading online. Some stressed the need for legal certainty as well as creating fair competitive conditions for companies, free from discrimination. On the other hand, other consider that the first priority should be to ensure an environment where platforms are not only able to innovate, but also

one in which the barriers to entry for emerging platforms and new business models are low. Thus, overly burdensome regulation on platform providers and businesses should be avoided, while standardised appeal mechanisms are welcomed. Some believe that any possible EU action on P2B relations would require an evidence-based assessment as to whether the current regulation (including antitrust) is sufficient to address potential issues related to online platforms. According to some Member States, the dynamic market developments of platforms poses a risk that legislation will not be able to follow and becomes a barrier to development of new business models. The need for technological neutrality was also stressed.

B.2. To facilitate the emergence of new online platform firms, including by reducing barriers to entry and by ensuring a level playing field

Responding Member States stressed the fact that overregulation can have a negative impact on the level playing field, competition, innovation and starting a digital business in the EU, as well as it can increase barriers to entry and make it less likely that future European platforms grow into global businesses. Some Member States emphasised the need to ensure fait relations between platforms and businesses based on transparency, non-discrimination and equality. Other believe that the emergence of new platforms can be facilitated by addressing outstanding barriers and updating existing regulation to make it fit for a digital age, as well as lightening the burden of regulation for small businesses and encouraging access to finance. On the other hand one Member State believes that most problems could be solved by ensuring efficient enforcement of existing regulations. Responding Member States also underlined the need for a high quality impact assessment, as well as for alternative tools to regulation to be considered.

B.3. To prevent further fragmentation of the EU's Digital Single Market following diverging national platform-initiatives

A large number of responding Member States believe that, given the borderless nature of the internet and platforms, it is necessary to avoid fragmentation of the EU Digital Single Market, and thus they consider that the European level is appropriate for initiatives, including, where necessary, adapting the institutional set-up for the challenges of digitalisation on the appropriate levels. This would allow not only for a coherent solution, preventing the fragmentation of the Digital Single market, but also would constitute a critical mass for changes. In addition, some Member States believe that one-size-fits-all solutions might not be possible, therefore it would also be necessary, in particular when it falls under the competence of the Member States, to ensure flexibility in terms of solutions that would need to be adopted by Member States themselves. One Member State believes the focus should be on ex-post regulation, which would be easier and faster to adapt to changes. One Member State emphasised the essential nature of free flow of data for the development of the DSM, while another one does not see a tendency for any fragmentation.

C. Suggested follow-up

C.1. Transparency

Responding Member States emphasised the need to further ensure transparency, although this was expressed often in more general terms.

Overall support is expressed as regards the need that changes to terms and conditions should be made clear and be announced reasonably in advance.

C.2. Redress

With respect to redress mechanisms, a large number of responding Member States agrees on the importance of resolving disputes, some stressing that this should be the "normal " situation; some emphasise that both is needed, dispute settlement and access to courts; some believe that such

mechanisms are already in place but remain open to possible EU action in this field. The interlinkage between effective redress and the creation of a clear unfairness standard was in addition highlighted by some Member States, i.e. the latter being a precondition for ensuring effective redress.

C.3. Fairness

More nuanced views are expressed in relation to the possible introduction of a fairness standard. Some responding Member States strongly favour the introduction of such a standard. They however stress the need to have any fairness standard serve as a minimum harmonisation tool, thereby enabling the Member States to continue enforcing their existing legislation on B2B unfair commercial practices, such as national legislation addressing imbalances in bargaining power and situations of economic dependency.

C.4. Other

Certain responding Member States believe that the current legal framework that is used to tackle unfair practices (in particular competition rules) should be revised and updated to be rendered fit for purpose, and that the time needed to complete the procedures should be reduced. One Member State's main concern is the development of tools that would allow the regulator to effectively supervise the application of competition rules.

D. Indicators

Possible indicators, as set out by Member States in the replies, should measure the competitiveness of the market, the level of effective and disruptive entry into the market, the level of innovation, but also the level of European capital invested in online platforms, the number of business users and consumers, and turnover with sufficient granularity.

E. Platform-specific legislation in Member States

In Germany, the 9th Amendment of the German Act against Restraints and Competition enables the German FCO to explicitly take into account the characteristics of the digital economy when examining market power in merger reviews and antitrust investigations, taking into account the characteristics of multi-sided markets and networks. In France, le Code du Commerce (Titre IV du Livre IV, l'Article 442-6) allows for sanctioning of restrictive practices in business relations, and enables the government to act where a potential abusive practices occur. Moreover, la Commission d'examen des pratiques commerciales (CEPC) can issue opinions and recommendations on unfair practices. Some responding Member States believe that existing regulation, including competition rules, are sufficient to address any issues related to online platforms. In Austria, unfair trading practices are dealt with within the framework of the Unfair Competition Act. Austria also introduced a legal framework banning parity clauses between platforms and hotels. Estonia considers that general legal acts (such as Law of Obligations Act, Trading Act, Consumer Protection Act, Information Society Act) also apply to online platforms.

F. Evidence of unfair P2B commercial practices

In general, price parity clauses, restrictive terms and conditions, delisting, de-ranking and misleading information provided by OTAs to consumers are the most often mentioned unfair P2B practices in many Member States. Some Member States in addition, mention privacy breaches, preferential treatment of platforms' own products, misleading ("last available room") or non-existing information or discounts supposedly offered by OTAs. Other also mentioned clauses forbidding direct B2C marketing. Some Member States, in turn, identified the following unfair practices: obligation to use payment processing provided by an app store that includes 30% commission; confusion around agreements between businesses and platforms; issues with ranking transparency and paid-for ranking. Competition authority in one Member State as part of its analysis concerning the digital markets, also

identified wide parity clauses employed by OTAs as infringing competition law. However due to the fact that narrow parity clauses were subsequently implemented, further investigations were stopped. One Member State believes that traditional competition concerns regarding potentially unfair conduct can still be relevant, however evidence shows that their effects can vary based on market characteristics due to the complexity of multi-sided markets.

3.3.8. Meeting of the eCommerce expert group of 24 October 2017

The Commission presented to Member States a state of play of its platform-to-business initiative on 24 October in a meeting of the regular eCommerce expert group. Initially, the experts representing Member States displayed an apprehension about parts of the exercise. They questioned what they perceived as an online/offline regulatory divide that would come from the proposal. They also showed some concerns about the necessity of regulation (instead of application of existing rules, mainly competition law), and stressed their wish not to create new bodies / agencies.

In turn, the Commission re-stated its positive approach to both businesses and platforms. Experts were constructive during the discussions organised in four round tables. After the brainstorming on the different options, the reactions were more positive and indicated that experts' concerns were partly assuaged by learning more about the initiative.

Changes to terms and conditions, ranking and delisting

Ranking: Participants discussed (i) the appropriateness of imposing a transparency obligation requiring platforms to explain the criteria used for ranking, and (ii) whether the initiative should concern ranking practices in general or focus on paid-for ranking. Regarding (i), a transparency requirement as such was considered proportionate and legitimate. Two participants stressed however that ranking should not be covered by the initiative of the Commission since this is intervention in B2B space and should be left to commercial and COMP law. As to (ii), most participants felt unprepared to address this question but among those who were informed, there was a preference to opt for a transparency obligation covering ranking practices in general. Some participants stressed that they do not understand the issue around paid-for-ranking as such unfair practice would not be viable in the longer term, i.e. this would have a negative impact on the reputation of the platform concerned. One participant with more insight into ranking issues gave the example of an enterprise having lost 30% of turnover due to a change in the ranking policy of a platform. Another participant stressed the need for solving problems encountered in a timely manner. Yet another participant proposed to work towards identifying best practices in ranking.

Changes to T&C: This issue was judged core to the entire P2B issue. Clear T&C and transparent changes to them could help address also the lack of redress issue. Some participants expressed the view that the proportionality of a transparency obligation would depend on the precise wording and on the size of the platform. While some participants considered that no regulation was needed since there was competition in the market space, other expressed the view that changes to terms and conditions should not only be announced with a prior notice but also that it was to the initiative to define the length of such a prior notice period (depending on the nature of the change to T&C) and that it was important to ensure the effectiveness of the means of announcing the change (in a way that it reaches the business user). Another participant stressed that T&C should be simplified in order to make them transparent and user-friendly for businesses. Most participants of the sub-group discussing the issue agreed with him that this would not be more burdensome for smaller platforms. Representative of Member States where businesses would not use platforms acknowledged that greater transparency and predictability may help promotion of digital literacy. It was also suggested to extend B2C legislation to B2B.

Delisting: Some participants found legitimate the requirement on platforms to provide a statement of reasons for delisting. It was even suggested that such statement comprise an explanation on the procedure how to re-establish the user on the platform. According to other participants, evidence around the occurrence of the issue and the definition of the scope of the initiative were needed to

decide whether the proposed transparency requirement was proportionate or not. Delisting-related requirements should be aligned with illegal content/N&A procedure. A participant stressed that the criteria for delisting should be specified in the T&C, which could also allow for automated responses thus limiting the burden of the transparency requirements.

Redress: There was an overall agreement among experts on the importance of redress. Some concerns were explained that internal complaints mechanisms could be burdensome for SMEs. The need was stressed to promote existing best practices (combining effectiveness with operational efficiency, possibly as part of a self-regulatory measure. Experts stressed that there was a clear link between transparency on T&C and delisting on the one hand, and internal complaints systems on the other: greater clarity on the former would lead to less complaints. The following incentives for non-mandatory mediation were discussed:

- Through naming and shaming (if platforms don't engage seriously in mediation).
- Through the threat of easier access to EU courts. If platforms realise that they are getting an increasing number of complaints or requests for mediation in a given area, they might fear that some collective interest redress action might be building up. Hence, they may be well advised to pre-empt this through good faith mediation and/or adaptions of their contested behaviour.
- Mediation will also grow in importance if it is offered in an accessible way, is fast and cheap. For instance, easy-to-use "online" mediation would clearly be important for SMEs (especially if they operate from the periphery). Domain name arbitration was quoted as a good example.
- The number of competent and credible mediators on "platform issues" may also increase as a result of our intervention. If the Commission promotes and encourages the concept, we might act as "market makers" by attracting new mediators into this growing field.

Collective interest redress was generally perceived positively, also in terms of overcoming the fear factor. While improved "access to EU Courts" was generally considered positively, there were some doubts as to how many SMEs would find this a feasible option (in terms of costs, fear factor, etc). However, it was stressed that the "threat of easier access to EU Courts" might be as important as the access itself, as it would platforms to take mediation more seriously.

Data, non-discrimination and MFNs (emerging issues): there was no strong disagreement that further reflection was needed before any action is taken on these issues. It was stressed that there was a risk that a monitoring body on P2B would issue recommendations conflicting with other bodies. Hence, it was important to ensure coherence. Some experts argued that issues like discrimination, data, bundling, price parity clauses were not platform specific. Data portability was raised as a possible issue for further analysis. It was argued that there was no evidence of problematic practices that could not be tackled by competition law. Some additional issues were flagged by some experts: EU-level negotiation with platforms to ensure access for businesses from smaller countries where platforms often don't offer services, promoting interoperability by working on common standards for data exchange, working with platforms to encourage voluntary sharing of aggregate data to inform policy – e.g. urban planning, transport networks, etc.

Monitoring

The Member States welcomed the discussion of 24 October as it provided them with info on the progress of the Commission's work. They were eager to see the proposal and asked for as much information on it to be shared as early as possible. Given the small amount of knowledge they had about the monitoring part of the proposal, they mostly put forward general ideas during the discussion.

They overall agreed with monitoring being part of the proposal. In the same time, they were generally against a new body being created for this task, and even more strongly against a new European Agency created to this purpose.

As regards the competencies of the monitoring organism, many Member States wanted its activity to be linked to the proposal itself, that is to monitor the progress of the areas concerned by the text and the effect on the market players. They wanted to see data gathering, but also analysis, and some (few) mentioned the possibility of the body to propose policy recommendations based on its findings. A majority also stressed the need for the body to liaise with national level bodies that might have pertinent information, so that they benefit as much as possible from existing data. In the same vein, they also mentioned the body to collect national-level data. Monitoring of data relating to redress mechanisms was also mentioned (number of cases filed, solved, satisfaction levels, etc.).

3.3.9. Stakeholder workshop effective dispute resolution and the fundamental right to conduct a business, 6 July 201725

The workshop 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 consisted of dispute resolution, e-commerce and platform experts from EU Member States as well as academics.

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.

Key characteristics identified 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 interest 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

[25] Full report available at https://ec.europa.eu/newsroom/document.cfm?doc_id=45987

- 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).

3.4. Feedback to the Inception Impact Assessment

The Inception Impact Assessment (IIA) was published on 25 October 2017, giving stakeholders the opportunity to comment on. Until the closing date of the consultation, on 22 November 2017, 66 responses were received in total

i. Geographical distribution of the responses:

We received stakeholders' responses from 16 Member States and a non-Member State country.

ii. By category, the respondents were:

- Online Platform Operators (4);
- Business-Users (classified as Business Organisations/ Companies) (16);
- Business Associations (30);
- NGOs (6);
- Academic/ Research Institutes (3);
- Trade Unions (3).

As a caveat, it shall be mentioned that there are 3 duplicated responses received and there is also a response received by an individual that was removed from the feedback database. Thus, the total number of responses is considered to be 62.

The IIA in context

Online platforms offer major new opportunities to businesses in accessing global consumer markets and constitute a significant driver for innovation and growth in the digital economy. The European Commission has carried out a fact-finding exercise regarding platform-to-business practices in the online platform environment. The results of the fact-finding point to the existence of potentially unfair trading practices that could hinder both platforms and businesses in achieving their maximum potential in the digital economy.

Based on this fact-finding, the Commission announced, in its Mid-Term Review of the Digital Single Market Strategy, its commitment to 'prepare actions to address the issues of unfair contractual clauses and trading practices identified in platform-to-business relationships, including by exploring dispute resolution, fair practices criteria and transparency. These actions could, on the basis of an Impact Assessment and informed by structured dialogues with Member States and stakeholders, take the form of a legislative instrument.'

The present IIA is the preliminary step of the Impact Assessment process.

Results

i. Platforms:

Among the stakeholder responses, 4 platforms were identified that fall under the scope of the exercise. Their positions are, in summary: 3 opted for self-regulation and 1 supported targeted (co-)regulatory approach, because of the fact that their model makes use of third-party app stores. In detail:

a. Booking.com: Opted for self-regulation, as they deem the existing rules sufficient for the attainment of the objectives laid down in this IIA. They believe that regulatory intervention would be a punishment for all fair platforms, thus this would be an option to be avoided.

b. Group Allegro: They expressed a clear preference for a light-touch self-regulation approach.

c. Google: They suggest caution against a presumption that targeted and prescriptive legislative intervention is necessary or inevitable.

d. Microsoft (partial platform as they also act as seller of third party apps/goods on online platforms): For them, isolated problems can almost always be solved with limited action, tailored to the failure that allowed the problem to persist. In Microsoft's view this is the best way to ensure that online platforms continue to be a powerful catalyst for innovation, growth, and consumer welfare in the EU.

ii. Business-users:

16 companies/ business-users came forward with feedback on the IIA. Generally, their position was leaning on Self-/Co-Regulation (or a hybrid of those two – 10 out of 16), while 2 business-users stated that they would be particularly supportive to option 1, corresponding to soft law.

Seznam, Spotify and Skyscanner (search engine, app provider and meta-search engine, respectively) were also in a favour of an industry-led solution that would correspond to self-regulation.

iii. Business Associations:

There were 30 responses by business associations, 12 of them (almost 40%) were advocating in favour of soft law (Option 1). Accordingly, Self-/Co-Regulation were considered as prominent choice amongst them as well with 6 supportive responses (plus another 4 endorsing them). Regulation was backed by only 5 respondents, while 3 of the business associations claimed that there is no need for change.

As a caveat, concerning the categorization of business associations, it should be highlighted that there are cases of respondents that throughout the fact-finding exercise have been leaning towards representing the interests of platforms (i.e. EDiMA).

iv. Others:

Lastly, according to the stakeholders' consultation all 3 Trade Unions that responded are in favour of Regulation. While the 6 NGOs called for a non-legislative approach. Notably enough, 4 of them advocated in favour of Self-/Co-Regulation and only 1 supported a soft-law approach for the matter at stake.

4. WHO IS AFFECTED BY THE INITIATIVE AND HOW?

4.1. Who is Affected ?

4.1.1. Business users

Business users of platforms depend on online platforms to enhance the visibility of their products/services. More than a million EU enterprises trade through online platforms in order to reach their customers, and almost half (42%) of SME respondents to a recent Eurobarometer survey on online platforms use online marketplaces to sell their products and services. A conservative analysis of the main sectors of the business users concerned by this impact assessment (including app developers, retail and accommodation) shows that around 4.7 million jobs depend on business users of online platforms.

Impact of measures aiming to address potential unfair trading practices

In terms of transparency, business users' operations will be significantly and positively affected, since the proposed measures entail legal obligations to provide business users with specific information regarding contractual terms and conditions and other aspects of platform's operations, and allowing for a transitional period for businesses to implement changes to T&Cs. This positive impact will allow business users to arrange their operations to platforms' requirements. Transparency also allows business users to understand the rationale for delisting of their accounts and their separate products/services, and grants them the opportunity to challenge the delisting decision based on the actionable statement given.

Business users will better understand the conditions of online platforms, including possible differential treatment of the platform's products or services. Bundling practices by platforms therefore have to be fully transparent, allowing business users to choose the platforms on which they operate and adapt their business models if needed.

In the same vein, online platforms will have to include in contractual T&Cs and/or other accessible information sources their ranking mechanism criteria. Business users will therefore better understand the conditions for the use of any mechanism that allows them to influence their ranking against remuneration, avoiding costs for business users that might not opt for such options based on the additional information provided.

The requirement for platforms to explicitly state whether they impose MFN clauses on business users will also provide business users with greater legal certainty. They will also introduce more trust into the platform environment which will further increase business user participation, which in line with network effects will help platforms to engage with more.

Impact of measures on effective redress

The measures on redress in the preferred option will also have a positive impact on business users. Business users' access to redress will be facilitated, as they will be provided by additional evidence in case of problems thanks to the transparency on the content of T&Cs, to reasons for delisting, differential treatment, data, MFNs and ranking. Business users' access to

redress mechanisms will also be improved by the proposal for platforms to voluntarily set-up platform specific ADR mechanisms and the requirement to provide effective and accessible internal complaint handling mechanisms. In addition, business users will more easily be able to identify mediation possibilities thanks to the obligation for platforms to list to EU mediation bodies in their contractual T&Cs.

Overall, these measures will have a positive impact on business users since they will avoid significant costs of litigation and resolve issues more quickly and efficiently. A study commissioned by the European Parliament stresses that mediation costs amount to approximately a quarter of litigation costs (roughly estimated costs of litigation amount to 10.000 EUR, while mediation costs amount to 2.500 EUR [26]).

Benefits for business users

Businesses of all sizes using online platforms to trade will be the main beneficiary of the preferred option. The particular relative benefits will be strongest for weaker parties such as microenterprises, whose bargaining power in the online platform economy is particularly limited.

The measures supporting greater transparency on delisting and/or T&Cs could lead to fewer complaints for businesses and thus to reduced administrative and legal costs for platforms. Business users will experience an increase in turnover, will be able to, inter alia, maintain employment and pursue sustainable growth, competition and competitiveness.

The measures improving access to redress will avoid high costs by avoiding litigation, and by more quickly and effectively resolving disputes through better access to existing and new redress mechanisms.

Business users would not incur any additional costs.

4.1.2. Online platforms

Section 1.3 of the main report includes illustrative explanations of the type of business models which are considered in scope of the initiative. This section contains further details on how platforms are affected.

How are platforms affected?

While online platforms will bear costs linked to the implementation of the measures in the preferred option package, they will also benefit from the effect of these measures, as an increase in the use of online platforms by business users will lead to increases in activity of online platforms as well. This is true for the approximately 6359 active online platform operators in the EU. The costs for these platforms will differ depending on their size (40% have >10 employees, 77% have >50 employees), as thresholds are proposed for the obligations related to internal redress mechanisms[27].

[26] Note of the European Parliament, Quantifying the cost of not using mediation – a data analysis.
[27] Dealroom report.

Online platforms will incur different costs linked to the implementation of the measures on transparency and redress.

First, platforms need to comply with the different transparency requirements with regard to changes in their terms and conditions, delisting, discrimination, paid ranking, general data policy and MFNs. The costs would very much depend on the way chosen by platforms to comply with the proposed provisions. Quantifying the impacts of the transparency obligations would thus imply several assumptions and not be reliable. Therefore, the qualitative assessment of their impact is set out below:

- The obligation to **announce changes to terms and conditions and provide business users with a reasonable notice period** to prepare to the changes announced is expected to lead to minimal operational and financial costs. Implementation costs would be limited to one-off effort for platforms to adapt the implementation and communication of their terms and conditions policy. This does not require however a more individualized approach which would be more heavy and expensive.

- The obligation to provide business users with **clear statement of the reasons for delisting or suspension** would imply adjustment in the platforms' information system. Platforms could also face additional costs in safeguarding their customers and businesses against fraudulent businesses users who might use the additional information provided to circumvent or game existing safeguarding measures. On the other hand, more clarity on terms and conditions changes associated with a reasonable notice period and a statement of reasons for delisting could also result in a reduced number of P2B disputes thus also reducing platforms' litigation costs.

- The obligation to **make transparent the use of MFN clauses and their justification** implies only a simple update of the terms and conditions.

- The **data-related transparency obligation** would imply a one-off initial cost limited to legal expertise and revision of the terms and conditions, where unclear language is used currently. The legal costs may be higher for platforms who have not defined their data policy.

- The **transparency obligation with regard to the criteria for ranking** would be applicable to a variety of technical models used by platforms to that effect. This provision would have no technical costs on the platform; the implementation costs would be limited to the publication of the measures. The costs are not excessive given that online platforms already need to comply with consumer protection law and need to disclose to consumers whether a presentation of offers on a website is influenced by the commercial interests of the platform operator.

The **transparency obligation with regard to platforms' preferential treatment of its own services** could possibly lead to higher costs for larger, vertically integrated platform operators with many different products or services. In instances where differentiated treatment is possible on the basis of different criteria (e.g. delivery time, payment services, technical specifications, etc.), a platform with a big customer base or many services may incur higher one-off implementation costs to specify and explain the differentiated treatment it applies. Complying with transparency requirement with regard to auxiliary services this requirement is

expected to entail limited one-off cost for adapting advertising and billing. As to the size of the platform, the same logic would apply: the greater the number of auxiliary services, the more burdensome the compliance with the obligation.

The costs linked to creation or upgrading of an internal dispute settlement system will primarily affect medium and large platforms, as small ones will be exempted under the proposal. According to the interviews carried out by the Commission, most platforms already have some form of complaints handling system in place. A safe assumption is that online platforms would choose to build on existing structures so as to minimise costs. Nonetheless, these systems may need to be upgraded to comply with the quality standards set out in the legal act, notably speed and effectiveness. The changes to be made could include identifying a clear contact point for submitting complaints, offering an automatic filtering of complaints as well as human interfaces for more complex cases, as well as support in different languages.

Assuming that platforms would need to create a dispute settlement system from scratch, the costs would be divided between set-up and running costs. While it cannot be guaranteed that the administrative burden resulting from this particular measure is always limited, platforms may in many cases be able to develop intelligent solutions to lower costs, and they are likely to have a commercial incentive to follow the example of larger players[28]. In light of the foregoing, the cost for setting up an effective internal complaint-handling mechanism is limited, as many of the small but growing companies to which the obligation applies will be able to leverage existing internal structures as well as external technologies to minimize costs. In addition, putting in place an effective internal complaint-handling system constitutes an investment the costs of which may be somewhat offset over time as a result of increased or more efficient platform-use. The precise cost therefore strongly depends on a case-by-case assessment, but direct impacts can be estimated to lie in the range of a 0.4 to 1% increase in the cost base for smaller platform companies[29], and a one-off cost of 0.03% of total turnover for larger ones[30]. The cost is therefore expected to be limited in all cases but can be expected to be exponentially bigger for the smallest companies, which supports exempting companies with less than 50 employees and a turnover or balance sheet total of less than €10 million from this particular obligation.

Small platforms which are micro-enterprises are excluded from the scope of the intervention according to the Think Small First principle, unless their inclusion can be justified. In addition, small businesses will also be exempted of the measures linked to the internal redress mechanism obligation, to ensure that only companies that generate sufficient revenue to absorb the possible administrative burden are covered. Neither micro- nor small enterprises will therefore have to bear the associated costs.

The costs for setting up an industry-led **external mediation mechanism** would be determined by the set-up chosen by industry, which is difficult to predict. However, this constitutes a voluntary call on platforms, and the cost can therefore be fully avoided. In addition, mediation constitutes a proven and much used alternative to court litigation[31] and private parties active

[28] See Section IA dealing with proportionality for more detail.

[29] Assuming a cost of one additional FTE for small companies having between 50 and 250 employees.

[30] Based on the actual example of a EUR 1.75 million one-off cost for a platform company achieving a EUR 6 billion annual turnover.

[31] In the Netherlands alone, over 2 900 certified mediators are currently active, see: Mediators federatie Nederland, MfN-vragenlijst of 2016.

in the legal services area are therefore likely to have an incentive to invest in this area. Indeed, it cannot be excluded that a market for specialised P2B mediation services can develop which would largely prevent the need for platforms to bear any costs. Finally, there are more than 7,000 platforms in the EU alone, and almost 20,000 globally.[32] Whilst it is difficult to predict with certainty how many exactly of all platforms worldwide will fall within the geographic scope of this initiative as described in Section 8.2 above, it is safe to assume that the yearly cost per platform will be minimal. In the event that the platform would choose to transfer these costs to the businesses operating on the platform, the cost increase for the average business would be even more diluted.

4.1.3. Online General Search Engines

In addition to online platforms as defined in 4.1.2, the initiative would cover online general search engines. Online general search engines are defined in Directive (EU) No 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, as "a digital service that allows users to perform searches of, in principle, all websites or websites in a particular language on the basis of a query on any subject in the form of a keyword, phrase or other input, and returns links in which information related to the requested content can be found".

Under policy option 2c, the providers of such digital services would face a single legal transparency obligation requiring them to inform the general public about their main ranking parameters. This would apply regardless of the fact that these digital services do not constitute online platforms or online intermediation services as defined in the previous section 4.1.2, but reflect their general importance as a source of referred Internet traffic – where ranking has a marked impact on revenues.

The services covered by this option include only services such as Google Search, Yahoo and Bing[33], which all aim to index and render accessible the entire web, or regional examples of such services that index all websites in a particular language.

4.1.4. Consumers

Approximately 60% of private consumption and 30% of public consumption of goods and services related to the total 'Internet Economy' is channelled via online platforms. Therefore, any change that may happen to the regime governing the operations of online platforms will certainly impact consumers as well, since due to the relatively limited participation of business users in the platform economy, consumers may for instance not have access to the full range of products/services available.

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[32] According to the Dealroom database there are 7,012 EU platform businesses and 19,526 global platform businesses.

[33] The definition of search engine does not cover search functions that are limited to the content of a specific website, irrespective of whether the search function is provided by an external search engine. Neither does it cover online services that compare the price of particular products or services from different traders, and then redirect the user to the preferred trader to purchase the product. See Directive (EU) No 2016/1148/EU of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security network and information systems across the Union (OJ L 194, 19.7.2016, p1).

The proposed option is expected to lead to the growth of the platform economy. There will therefore be an increase of options available to the consumers. Investing on business-oriented fair practices and platform transparency could indirectly also foster consumer's trust in platform economy and further support the growth of cross-border sales, as well as complement consumer protection rules on unfair commercial practices. Turnover on online platforms is therefore expected to increase. Indicatively, the value of good/services purchased by private households and the public sector via online intermediaries was estimated at EUR 270 billion (2014 figures), corresponding, namely, to 2,5% of the total final consumption in the EU-28, and can be expected to grow under the preferred package.

Consumer trust in e-commerce is also growing. More than one in two Europeans now buy online (55% of consumers in 2016[34]). Since 2014, consumers' levels of trust have increased by 12 percentage points for purchases from retailers located in the same country (72.4% of consumers are confident buying online in their own country) and by 21 percentage points for purchases from other EU Member States (57.8%). Transparency about ranking criteria and other platform operational functionalities to consumers has been shown to positively influence consumer purchasing behaviour in an ongoing study on platform transparency and consumers.[35] The preferred options package may therefore, be expected to indirectly contribute to a continuation of this increase of consumer trust at an equivalent or higher pace in the future. This means that, should the proposed option package be implemented in four years' time and provided consumer confidence continues to grow at the same rate, 84% of consumers would be confident buying online cross-border by 2020.

4.1.5. Public authorities (national and European Commission)

Public authorities will bear costs linked to the implementation and enforcement of the preferred package of measures.

National authorities

National authorities will not be directly impacted by the preferred option. Over time, they may deal with the possible increase in cases brought before national mediation bodies. Mediation is however a private activity which will not impact public authorities. Member States will moreover not be required to adapt their existing certification schemes for mediators; those that already have such schemes in place will simply provide this existing service also for any new mediators that may enter the specialised area of P2B relations.

Any possible burden on national court systems is also expected to remain limited as a result of the layered design of the legal redress provisions. The preferred option relies on out-of-court, alternative dispute settlement mechanisms to solve substantive issues arising between business users and online platforms and the legal provision granting standing to business associations to effectively resolve disputes without having to resort to national courts. It will

[34] Consumer Conditions Scoreboard – Consumers at Home in the Single Market. 2017 Edition.

[35] LSE et al., *Behavioural Study on the Transparency of Online Platforms*, Request for Specific Services 2016 85 04 for the implementation of the Framework Contract no Chafea/2015/CP/01, forthcoming (commissioned by DG JUST))

not be possible for these associations, as representatives of the business users, to rely on the foreseen legal instrument to instigate court cases concerning substantive issues relevant to individual business users. Rather such cases shall be limited to the prevention or termination of non-compliance with the obligations in the foreseen legal instrument, which will be limited to those that do not make the necessary adaptations.

European Commission

The European Commission would be responsible for launching and supporting the EU Observatory and setting up the portal for receiving complaints from business users that have not been able to solve issues with online platforms through available redress mechanisms. The running costs of the portal would include costs for hosting the platform, maintenance, translations and a possible helpdesk manned by a dedicated support team. Setting up such a portal would be linked to one-off costs for the European Commission reaching up to €1,000,000.

4.2. Summary of cost and benefits of the preferred option

The main benefits and costs of the preferred option are summarized below

I. Overview of Benefits (total for all provisions) - Preferred Option(s)		
Description	***Amount***	***Comments***
Direct benefits		
Additional commissions	From EUR 38 to EUR 70.5 million OR From EUR 119 to EUR 476 million	Platforms would benefit from additional commissions due to increase in turnover realized on platforms. The two ranges depend on whether the 10% commissions are calculated on the basis of increased turn-over only or also on reversed dampening effect.
Increased turn-over	EUR 0.381 billion to EUR 0.705 billion	Business users would increase the turn-over realized on platforms.
Reversed dampening effect	EUR 0.81 to EUR 4.05 billion per year	The positive impact on the platform economy would be strengthened.
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
Indirect benefits		
Consumer trust	Contributes to maintaining the upward trend in consumer trust.	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

II. Overview of costs - Preferred option(s)					
		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 redress mechanism	Direct costs	Depending on set up by platforms	Minimal	Not applicable	Not 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

4.3. Stakeholders' views

4.3.1. Business users[36]

Business users are generally supportive of the intervention proposed under the preferred option. As main beneficiaries of improved P2B relations, they are in favour of a stronger intervention as demonstrated during the dedicated focus group of 7 September 2017, the purpose of which was to explore the potential solutions to the problems arising in relations between platforms and businesses.

Business users are in favour of setting an **internal and external redress** mechanism. If the platform- internal mechanism proves insufficient, business users would like to benefit from effective external redress. According to them, they should be able to make a complaint to a 'business-protection organisation'[37], go to mediation or arbitration, and resort to the civil courts in case of inefficient mediation/arbitration process.

Business users generally argue 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.

Business users favour greater transparency of platforms' **ranking** practices. The definition of clear ranking criteria was stressed in this respect. Also, business users suggested the establishment of competitive ranking sites. This would allow comparing different platforms' ranking methodologies and defining industry-agreed clear ranking criteria. In addition, business users are of the view that platforms should inform their business users of the reasons having led to their de-ranking, when this occurs, and a procedure to challenge the correctness of the ranking. Some business users suggested legislation would need to set up a contact. Support function to deal with errors in rankings on the platform.

Regarding MFN, and in particular **price parity** clauses business users concerned are generally in favour of a legal ban. Some enterprises are of the view however that a ban on price parity clauses would be an inefficient 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. Therefore, business users are generally supportive of a transparency

[36] See also Annex 2.

[37] e.g. 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.

principle as an accompanying measure to legal bans. Business users consider that such transparency obligation would clearly show the extent to which commissions influence the ranking results displayed by platforms. In addition, some business users see the need for an education campaign aimed at the final customer to raise awareness about the existence of the issue and the platforms' role and benefits. As to redress possibilities, businesses expressed the view that for those instances in which price parity issues can't be solved on a bilateral P2B basis (internal escalation mechanism) an external body should be created. While smaller enterprises would not know what the specificities of such a body would be, more staffed business users generally support the establishment of a body meeting some effectiveness criteria. Such body would ideally be independent, affordable in terms of costs, accessible, confidential; have a clear and transparent (accountable) functioning. The body would 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[38]. In addition to acting upon received complaints, an external redress body should, in business users' view also monitor the market and be able to start its own research/investigation. According to some business users, such external redress mechanism should be set by the European Commission and financed by platforms.

Most business users are supportive of further clarity on **access to data**. Some argue for access to more data, such as customer details.

4.3.2. Platforms[39]

Most operators of online platforms would agree that providing an explanation to a business user upon delisting or take-down of an offer seems to be a reasonable legal obligation. A number of online platforms already do so. However, platforms do not support the imposition of any measures that would interfere with their obligations under the E-commerce Directive to expeditiously remove content signalled as illegal. They are also concerned that in certain circumstances (for example in criminal cases) transparency about grounds for removal may interfere with investigations by authorities.

Online platforms do not see the value added of external dispute resolution because they trust their own internal dispute resolution systems.

Regarding changes of terms and conditions, platforms do not see in general a problem with implementing notice periods. They consider that they already largely do so. Platform operators consider however that rigid notice periods may be a problem if immediate changes are required as a result of amendments to applicable law or recommendations of regulators. Platforms usually point to the "notification fatigue" of some users who do not wish to receive too many notifications. However, industry representatives seem open to look at possibilities of addressing these issues through self-regulation.

Regarding transparency around rankings and data use, platforms having expressed their views, claim that they are already implementing best practices which can serve as general requirements.

Online platforms expressed their interest in working with the Commission on raising awareness among business users about the legal framework already applicable to P2B

[38] Some business users are of the view that such organism would be competent for all platform-related issues, i.e. B2C and B2B.

[39] See also Annex 2.

relations. They would also welcome the establishment by the Commission of a repository of best practices and an initiative which would bring different platform work streams - from within the Commission and from other fora - together.

Generally platforms appear supportive of the idea to monitor the platform economy provided that such monitoring is not intrusive in their trade secret policies.

4.3.3. National authorities

A questionnaire was sent to national authorities in preparation of the 18th e-commerce expert group meeting. The latter meeting held on 24 October was dedicated to testing the preferred option with experts representing Member States. The main views on possible solutions around the issues of T&C, delisting, ranking, emerging issues (data, non-discrimination, MFNs), redress, and monitoring. are summarised below[40].

Many national experts are of the view that addressing issues around **T&C** is core to the entire P2B issue. Clear T&C and transparent changes to them could help address also the lack of redress issue. National representatives (expert level) consider that the proportionality of a transparency obligation would depend on the precise wording and on the size of the platform. Views strongly diverge depending on the experience at national level: while some experts consider that no regulation is needed, others are of the view that changes to terms and conditions should not only be announced with a prior notice but also that (i) such prior notice period should be specified (depending on the nature of the change to T&C), and that (ii) it was important to ensure the effectiveness of the means of announcing the change (in a way that it reaches the business user). Some national experts are also of the view that T&C should be simplified in order to make them transparent and user-friendly for businesses (link was made with B2C legislation).

National experts supporting a legal transparency obligation find legitimate the requirement on platforms to provide a statement of reasons for **delisting**. Some national experts are of the view that such statement should comprise an explanation on the procedure how to re-establish the user on the platform. Other experts are of the view that evidence around the occurrence of the issue and the definition of the scope of the initiative are needed to decide whether the proposed transparency requirement is proportionate. National experts share the general view that delisting-related requirements should be aligned with illegal content/N&A procedure. Some experts consider that the criteria for delisting should be specified in the T&C, which could also allow for automated responses thus limiting the burden of the transparency requirements.

A transparency obligation on **ranking** criteria is overall considered proportionate and legitimate. The experts with more experience on ranking issues are supportive of measures which would solve the problems encountered in a timely manner. Two experts from national authorities are of the view that ranking should not be covered by the initiative since this would equal intervention in the B2B space and should be left to commercial and COMP law. While most national experts have no strong views whether only paid-for ranking should be concerned, there is a general preference to (i) opt for a transparency obligation covering ranking practices in general, and (ii) work towards identifying best practices in ranking.

[40] See also Annex 2.

further reflection is needed on emerging issues such as **data, non-discrimination and MFN**s before imposing heavy legal obligations in these fields. Some experts stress the importance to ensure coherence, to avoid that a monitoring body on P2B would issue recommendations conflicting with other bodies. Some experts consider that issues like discrimination, data, bundling, price parity clauses were not platform specific. Data portability is usually identified as a specific issue for further analysis. A few national experts support the view that there was no evidence of problematic practices that could not be tackled by competition law.

There is an overall agreement among experts on the **importance of redress**. Some concerns exist that internal complaints mechanisms could be burdensome for SMEs. Some national experts are in favour of promoting existing best practices (possibly as part of a self-regulatory measure). A number of experts support the view that there is a clear link between transparency on T&C and delisting on the one hand, and internal complaints systems on the other: greater clarity on the former would lead to less complaints. The following incentives for non-mandatory mediation seem to be important for national experts: naming and shaming, threat of easier access to EU courts; easy, fast and cheap mediation mechanism (online mediation), encouragement measures (as the present initiative) to use mediation. Collective interest redress is generally perceived positively by national experts, also in terms of overcoming the fear factor. While improved 'access to EU Courts' is generally considered positively, some experts have doubts as to how many SMEs would find this a feasible option (in terms of costs, fear factor, etc). There seems to be an agreement, overall, that the 'threat of easier access to EU Courts' might be as important as the access itself, as it would make platforms take mediation more seriously.

Experts representing national authorities overall recognise the interest of the **monitoring** exercise. They are however generally opposed to the creation of a new body or European Agency created for that purpose. As regards the competencies of the monitoring organism, many experts consider that its activity should be linked to the proposal itself: i.e. to monitor the progress of the areas concerned by the text and the effect on the market players. Experts refer in particular to data gathering and analysis, with the possibility for the body to propose policy recommendations based on its findings. Experts also find important that the body liaise with national structures, to possibly benefit from already existing national-level data. Monitoring of data relating to redress mechanisms (number of cases filed, solved, satisfaction levels, etc.) is also considered important.

4.3.4. Consumers

As explained in Section 2 on the Problem Definition frictions in the P2B relations lead business users to limit their presence on platforms for reasons of fear or lack of trust. This could result in a situation where less business users would be present on platforms. This would in turn translate (especially in long term) in reduced competition and choice for consumers - especially for cross-border sales - as compared to a situation where business users would be able and prepared to reap the full potential of the platform economy.

This is the reason why consumers are expected to be supportive of the preferred option despite the high-quality products/services they are currently benefitting from. Longer term competition- and choice-related considerations have been put forward by a consumer association in one of the Commission's workshops. A representative of this association has in particular argued in favour of some stricter non-discrimination measures more in line with the telecommunications regulatory framework.

5. ANALYTICAL MODELS USED IN PREPARING THE IMPACT ASSESSMENT

Model of economic loss

The teams at DG CNECT and DG GROW as well as the JRC conducted separate calculations to estimate the negative impact of the problematic trading practices employed by online platforms. The methodology consisted in estimating the size of the various segments of the online platform ecosystem and calculating the impact of the different types of problematic practices depending on how often they occur.

These simple calculations are useful to understand the magnitude of the effects unfair practices may produce in the European economy.

Methodologically, the calculations below follow the same structure. From an estimated value of turnover in a given activity in the EU economy, the size of the current dampening effect is calculated that the uncertainty deriving from harmful trading practices and the general lack of available redress has on turnover generated via online platforms. This dampening effect is estimated by the JRC to be in the range of between 1% and 10%, which is conservative in light of the fact that some business users have identified significant negative effects currently occurring including impacts on their turnover or their innovation potential.[41] It is assumed that this effect is derived from the operations of the platform in terms of search costs and better matching between users, and not related to industry characteristics.

Marketplaces

According to Euromonitor[42], the online retail value generated by 3rd party sellers in the EU in 2016 was €54.566,5 Million, representing 22% of total online retail.

Using information about sellers' sales volumes and using data from Webretailer[43] and our own surveys (Ecorys), the average size of a 3rd party seller using platforms is estimated to be between € 250k and 1M. This would imply that, according to these figures, there are between 54.566 and 218.266 3rd party sellers operating with platforms in the EU in 2016.

According to Webretailer, 60% of sellers fear of being banned by platforms. Assuming that effectively 60% of sellers were banned from online marketplaces, that would amount to around € 30 billion lost sales by 3rd party sellers.

In addition, it is known from the surveys (Ecorys) that a large proportion of sellers have faced problems with platforms. If we assume that these problems have the effect of reducing revenue by a conservative range between 1% and 10%, we are talking about values between **€ 0.6 billion** and **€ 5.5 billion** in lost revenue for sellers. This is a deadweight loss (ie, a net welfare reduction for the society as a whole) since this is not captured by the platforms, it is simply the cost of the inefficiency/low quality.

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41 Ecorys, 'Business-to-Business relations in the online platform environment', FWC ENTR/300/PP/2013/FC-WIFO, Final Report, e.g. page 12: "*The lack of transparency in the search and ranking criteria and the perceived lack of consistency in application of the ranking criteria (discrimination) have a detrimental impact on innovation by business users, with efforts focused on meeting the criteria of the algorithm rather than meeting the actual consumer demand*".

42 Euromonitor International, Passport Database 2016 Edition.

43 Webretailer is a website for businesses who sell through online marketplaces. They conduct regular surveys on topics of interest to sellers. In 2016 they passed a questionnaire on sellers on Amazon (http://www.webretailer.com/lean-commerce/amazon-sellers-survey-2016/#/) and in 2014 one on sellers in several marketplaces. They claim to have circa 20k affiliates worldwide. In the last survey, they asked for problems and 61% replied the biggest concern was being banned from selling on Amazon.

This is only ecommerce marketplaces. If we add, for instance, online travel intermediaries, the figures above can reach much higher numbers.

Again, according to Euromonitor, the retail value of online travel intermediaries (including air, attractions, hotel, other lodging and short term rentals, car rental and other transportation intermediaries) in 22 EU countries[44] was € 73.4 billion in 2015. Applying again the assumption of a range between 1% and 10% of unmet potential additional turnover in a scenario without UTPs, this would amount to an additional **€ 0.7 billion** to **€ 7.3 billion** in retail value in online travel intermediation per year.

App stores

According to Vision Mobile[45], in 2014 there were in Europe 406 thousand professional app developers, with an aggregated revenue of € 16.5 billion. These developers supported 667 thousand direct jobs and around 1 million total jobs (including indirect jobs). In a survey of 673 app developers by the Application Developers Alliance[46], 25% of respondents view the app stores themselves as their greatest threat.

Using the same approach as before, we can assume that the uncertainty generated by opaque practices by the most important app stores undermines the full potential of the EU app economy. In this case, the missed range of 1% to 10% of turnover would generate and additional **€ 0.2 billion** to **€ 1.7 billion** in additional turnover. This figure is conservative because the data refers to 2014[47], and although we do not have more precise figures, turnover in the industry has been growing at high rates.

In this case, this would imply, if the average size of a professional developer remains unchanged, an increase of about 40 thousand new app developers, along with 50 thousand additional direct jobs and more than 100 thousand total jobs.

Social networks

Finally, the role of social networks is more difficult to assess. This is so because from a business perspective, social networks are used to increase brand awareness, to expand the potential customer base, to promote sales, both offline and online, and stimulate app usage, for instance. Hence, social networks have a horizontal and indirect effect over the other three categories[48].

In this case, the assumption is that there is going to be an additional impulse to marketplaces through the impact of social networks on the promotion of online sales; an effect on app stores due to its use in the promotion of apps; and an impact on online advertising through their role on brand awareness and on the engagement and expansion of the customer base.

The assumption is that the three impacts computed before would be magnified again by a range between 1% to 10% if trust towards social networks would increase. However, the impact would not be direct, since the effect of social networks is likely to be more pronounced

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[44] Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Spain, Sweden, United Kingdom.

[45] Vision Mobile, THE EUROPEAN APP ECONOMY 2014.

[46] Application Developers Alliance (2016), Competition in the Mobile App Ecosystem. Global survey of 673 Mobile App Publishers and Developers.

[47] Unfortunately, a similar report produced for the year 2015 does not provide figures about turnover.

[48] Social commerce, i.e., the direct effect of social media on e-commerce is still relatively low. In Spain, for instance, according to eMarket Services, only 14% of social media users shopped directly on social media networks in 2013; 74% of them have made purchases on Facebook, a phenomenon termed F-Commerce.

for online advertising, then for marketplaces and finally for app stores. In this case, we compute a weighted measure of the likely impact of social networks when the impact goes though the other categories of platforms. In order to determine the effect of social networks on the other categories of platforms, we computed the proportion of internet traffic from social networks to the other categories. Implicitly, our assumption is that there is a correlation between traffic and the economic impact of social networks. Using data from Similarweb[49], we found the following weights: 0.55 for online advertising, 0.3 for marketplaces, and 0.15 for app stores.

Using these proportions and the range of impacts from 1% to 19%, we compute the resulting impact of social networks as: (1.3*0.3)+(0.2*0.15)+(0.06*0.55) and (12.8*0.3)+(1.7*0.15)+(0.6*0.55) , resulting in an estimated impact of social networks of **€ 0.4 billion** to **€ 4.4 billion**.

Summary

If we sum all the figures calculated above, we have an aggregated impact in the EU economy due to the uncertainty derived from opaque practices by online platforms in the range of **€ 2.0 billion** and **€ 19.5 billion per year**. These calculations are rough and only intended to give an approximate figure of the impact. More detailed data and more precise methodologies would be required in order to produce more accurate estimations.

Separate calculations undertaken by the Commission staff arrived at a similar figure by adding the direct loss calculated based on the survey data (occurrence of each type of practice multiplied by the impact on turnover and the total turnover on platforms in a given segment) and the dampening effect (applying an assumption of platform sales being 1-5% lower due to business users concerns about problematic platform practices).

The direct reduction of sales through platforms for EU business users caused by the practices at stake was estimated to amount to between **€ 1.27** and **€ 2.35 billion per year** and the dampening effect estimated to amount to between **€ 2.7** and **€ 13.5 billion per year** amounting to a total of between **€ 3.97** and **€ 15.85** billion per year.

6. SYNTHESIS OF JRC ECONOMIC RESEARCH PAPERS

The Impact Assessment was informed by two reports authored by economic experts at the Joint Research Center in Sevilla.

The first report, entitled "Quality discrimination in multi-sided markets", explains the incentives that platform operators have to provide a better standard of support to consumers than to business users. Its aim is to explain evidence of unfair practices by online platforms towards business users, particularly SME's. First, using survey data, it shows that sellers operating with four different categories of platforms multi-home (marketplaces, app stores, social networks and online advertising). Hence, the appropriate competitive framework is the "competitive bottleneck" model. Second, it develops an empirical model of platform competition adding service quality as an additional dimension. The results indicate that the costs of providing quality to sellers are higher than the costs of providing quality to buyers. These differences may reflect different needs or preferences across groups. While buyers would require simple functionalities sellers would need more sophisticated services. When

[49] www.similarweb.com

sellers' multi-home, platforms care more about buyers than sellers and while buyers will get an efficient level of quality, quality to sellers will be "degraded". The authors argue that this service quality degradation explains unfair trading practices simply because platforms are not willing to invest to take care of sellers[50].

The second report, entitled "Platform to business relations in online ecosystem", presents evidence on the relationship between online platforms and businesses using these platforms to reach consumers or conduct their operations. It reviews the literature on vertical relationships both from a classic approach and from a multi-sided market perspective. Second, it uses survey data to explain the factors behind firms' choice of online channel. Third, it explores the results of a survey passed to firms using platforms to understand their concerns about the behaviour of some of these online gatekeepers. It concludes that companies using online marketplaces that consider that the terms and conditions for online marketplaces are clear will use platforms more intensively. It concludes that the aggregated impact in the EU economy due to the uncertainty derived from opaque practices by online platforms can be in the range from € 2.0 billion to € 19.5 billion per year[51].

[50] Duch-Brown, Nestor, "Quality discrimination in multi-sided markets", JRC report (to be published).
[51] Duch-Brown, Nestor, "Platform to business relations in online ecosystem", JRC report (to be published).

7. DESCRIPTION OF MAIN MARKET PLAYERS AND ANALYSIS

7.1. Growing digital trade is increasingly intermediated by online platforms

In 2016, 85% of EU households had access to the internet from home - up from 55% in 2007[52]. Internet connectivity drives digital trade; for example, online retail has been growing by 15-20% per year over the last years in Europe. Already in 2015, EU companies generated 17.5% of the turnover online and 61% of EU SMEs rely on social media to promote their products and services. As regards the business user respondents to a recent survey on P2B practices, 90% use social media for business purposes.[53]

The Commission's fact-finding shows that online platforms have become central to the businesses using them: almost half (42%) of SME respondents to a recent Eurobarometer survey on online platforms use online marketplaces[54] to sell their products and services. 82% rely on search engines to promote products and/or services online and 66% indicate that their position in the search results has a significant impact on their sales. Indeed, 20.56% of business user respondents to the (ECORYS, 2017 - forthcoming) P2B surveys generate more than half of their total turnover through online platforms.[55]

Online platforms have also become enablers for cross-border trade: a developer can reach billions of potential buyers globally through Google Play and Apple's App Store, an SME can sell goods to many more potential buyers that are outside of their country of origin. In fact, according to a study, the effect of distance is on average 65% smaller due to reduction in search costs.[56]

This tendency is exacerbated by the typical balance of power in a business user – platform relationship. Because of the existence of indirect network effects and their superior access to data[57], online platform ecosystems are prone to the appearance of a limited number of successful players capturing entire specialised 'segments' – which can be either wide or narrow in scope. Their position as central intermediary is in this regard, from a business user's perspective, complementary to that of other online platforms (i.e. business users need to be present on all successful platforms within certain segments).

Conversely, the platforms' business users tend to be rather fragmented. For example, in December 2016, there were 724 000 active developers developing for Google Play, 494 000 for iOS App Store and 69 000 for Amazon Appstore, i.e. almost 1 million three hundred developers for three app stores. In 2016, more than 412 thousand new developers released their first app. Roughly 60% of those new developers released apps for Google Play with the

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52 Eurostat, Internet access and use statistics, 2016: http://ec.europa.eu/eurostat/statistics-explained/index.php/Internet_access_and_use_statistics_-_households_and_individuals

53 Ecorys, 'Business-to-Business relations in the online platform environment', FWC ENTR/300/PP/2013/FC-WIFO, Final Report, forthcoming.

54 A recent survey among European SMEs showed that around 37% sell their products or services online, with 42% of these online sellers using third-party online market places to do so: Flash Eurobarometer 439 'The use of online marketplaces and search engines by SMEs' of April/June 2016. Also, latest Eurostat figures show that 39% of all European businesses used online social media in 2015, with social networks being the dominant outlet.

55 Ecorys, 'Business-to-Business relations in the online platform environment', FWC ENTR/300/PP/2013/FC-WIFO, Final Report, forthcoming.

56 A. Lendle, M. Olarreaga, S. Schropp, P.L. Vezina: There goes gravity: eBay and the death of distance, 2016.

57 See the explmanations in the IA

rest releasing their apps on the iOS App Store[58]. Also the hotel industry is highly fragmented. 200 000 hotels and 1.8 million cafés in Europe are selling their services on platforms,[59] where the three biggest Online Travel Agents held 83% of market share in worldwide OTA bookings in 2015[60]. 92% of hotels and cafés also employ less than 10 people[61], while around 60% of hotels have less than 25 rooms[62]. The Commission's e-commerce sector inquiry revealed that, in 2014, the overwhelming majority (89% for the EU as a whole) of businesses selling via online marketplaces generated an annual turnover lower or equal to EUR 50 000 irrespective of the Member State in which they were established.[63]

This growing digital trade is increasingly intermediated by online platforms. Some estimates[64] suggest that around 60% of private consumption and 30% of public consumption of digital goods and services (i.e. related to the total Internet economy) go via online intermediaries. According to another estimation, 40% of retail online sales will be conducted through online marketplaces by 2020[65]. Specifically regarding the hospitality industry, one study shows that independent hotels make up 67% of total room supply in the EU and that 71% of their online bookings are made through online platforms.[66] In the US, already today 45% of online retail purchases is carried through platforms and 55% through branded stores. That means platforms' business users increasingly have to reach their customers through a digital middleman. In some cases, this digital intermediated relationship replaces an offline direct relationship (for instance in e-commerce). In other cases, the digital intermediation has created a whole new business model, e.g. app stores or user review platforms.

Intermediation also exists in the offline economy, but its scale in the digital economy is unprecedented for several reasons. First, the digital economy provides consumers with such vast a choice of products and services that there is increasingly scope for intermediaries which assist consumers in making the right choice. Second, the business model of offline "intermediaries" such as supermarkets as a middleman between consumers and suppliers is not virtually endlessly scalable as is platform intermediation. Unlike most digital intermediaries, supermarkets deal with physical goods that they resell, which puts a limit to how many suppliers' products they can stock and how many customers they can serve without making considerable investments. Conversely, the online platform business model allows companies to scale quickly and at little marginal cost because additional customers, products and services do not require investment in production of the content, goods, services or other forms of capital they give access to. These resources are provided by other users, in some

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58 App figures – number of new developers by year, 2016.

59 HOTREC, Annual Report 2016/2017 p. 5.

60 Phocuswright, European Online Travel Overview Twelfth Edition, http://www.phocuswright.com/Travel-Research/Market-Overview-Sizing/European-Online-Travel-Overview-Twelfth-Edition

61 Hotrec Hospitality Europe, facts and figures

62 Eurostat, hotels and similar accommodation establishments by size class in 2015.

63 An exception to this situation is the travel booking sector (rail and air transport). Contrary to OTAs, online marketplaces or app stores, platforms which aggregate prices for air or rail tickets are often dependent on their business users for information on flight or train times and fares. Some platforms have reported cases of transport operators refusing to supply information or threatening to revoke licenses granted to the platform to issue tickets if some of the operator's conditions are not met. However these situations are exceptional and generally contrary to competition rules, as demonstrated in a recent case concerning ferry ticketing in Latvia.

64 Copenhagen Economics, 'Online Intermediaries Impact on the EU economy', EDiMA, October 2015.

65 The Rise of the Global Market Places. How to compete and prosper in the world of Amazon, Alibaba and other platforms, Ecommerce Foundation and Nyenrode Business Universiteit, 2015.

66 Hotel Management, 'The Digital Marketplace in Europe: Hotels and Third Party Intermediaries In the New Age of Travel', Excerpted from the forthcoming *Demystifying the Digital Marketplace*, due out in Q2 2016.

cases including professional users, of the platform.[67] Third, online platforms have created new (intermediation) business models in the digital economy that simply do not exist in the offline world.

7.2. Market dynamics

7.2.1. Online market places

There is **a large variety of online marketplace** business models in the EU. Marketplaces, from one side, enable online retailers to offset inherent issues in online retailing, i.e. small margins and insufficient profitability, from the other, they enable many businesses to sell goods and services online. With online marketplaces, online retailers are able to charge commission of between 7-25%, while also avoiding the cost of maintaining an inventory of products.[68] They also provide an opportunity for companies to engage in the concept of long tail, while offering consumers more choice in terms of products, prices and services.

Some online marketplaces specialise in certain types of products or services (e.g. travel, taxi, food, wellness, dining, finance, energy, health, jobs, cars, homes, fashion, domestic services, education etc.), other cover many products and/or services at the same time. Marketplaces also vary in terms of the extent of control they exercise over the transactions carried out on their platform. The spectrum ranges from comparison services, to classifieds platforms charging a listing fee, or transaction-based marketplaces charging a commission on transactions to so-called "full-stack" marketplaces controlling the price, presentation, insurance and other parameters of the transaction[69]. Some online marketplaces are also merchants on their own platform and thus compete on their own platforms with business users. In the retail segment alone, over 50 online platform operators (including Amazon and EBay) offer more than 220 retail marketplaces within Europe[70]. There are approximately 150,000 – 200,000 business users selling goods through those marketplaces[71]. Amazon has an important position in many national electronic marketplace markets, in particular Germany (40.8% of market share), UK (26.5%) and France (10.7%) (see the table below)..

According to Euromonitor, the retail value generated by 3rd party sellers on online marketplaces in the EU in 2016 was over €54 billion, i.e. 22% of total online retail, however the situation varies across Member States. In 2016, in Germany, 3rd party sellers on online marketplaces accounted for almost over 37% of total internet sales (up from 32% in 2011), in UK 27% (up from 12% in 2011), in France 21% (up from 12% in 2011), in Croatia over 38% (up from 17% in 2011), and in Italy 29% (up from 22% in 2011).[72] Globally, Amazon and eBay represented 90.2% of the segment in 2015, up from 88.5% in 2006.[73] Other examples of

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67 Different business strategies exist. For instance, Google search fundamentally build on content from users, whereas others e.g. app stores, Amazon open the platform/marketplace gradually to other businesses.

68 Euromonitor, Internet retailing in France, 2016.

69 For more details and examples see: Dealroom, "Platforms and marketplaces", 31 July 2017, Report for the European Commission

70 Source: BVOH, Marketplaces across Europe – eCommerce is much more than just Amazon and eBay,, accessed on 22 August 2017.

71 According to JRC's figures there were up to 218266 3rd party sellers operating with platforms in the EU in 2016. According to Eurostat, there were 179119 enterprises selling via mail orders or the internet in the EU in 2014 (the most recent data). JRC, Nestor to provide reference.

72 Euromonitor, 2016. Retail value RSP excluding sales tax.

73 JRC, The competitive landscape of online platforms.

online marketplaces active within the European Economic Area include Allegro, Spartoo[74], Zalando[75], Alibaba and Vente-privee.com.

E-commerce market by selected Member States (% of market share in 2016, retail value RSP excluding VAT)

Member State	Top 1	Top 2	Top 3	Top 4
United Kingdom	Amazon.co.uk 26.5%	eBay 10.1%	Tesco 6.6%	Home Retail Group 4.1%
Germany	Amazon.de 40.8%	eBay 15%	Otto Group 11.2%	Apple 3.6%
France	Amazon.fr 10.7%	Casino 9.9%	E Leclerc 7.5%	Vente-privee 5.3%
Netherlands	Ahold 15.9%	Coolblue 7.2%	RFS 7.1%	eBay 2.1%
Italy	eBay 23,6%	Amazon 14,4%	Apple 4.5%	Esselunga 4.2%
Spain	Amazon 7.9%	Vente-privee 5.7%	eBay 4.2%	Apple 3.9%
Poland	Allegro 37.4%	eBay 3.1%	Amazon 3.0%	Ottogroup 1.7%

Source: Euromonitor

7.2.2. App stores

App stores are online platforms which enable users to download particular software-enabled services – known as apps – to mobile devices. It is estimated that there are currently more than 5 million different apps available to consumers on the two major app stores, Google Play and Apple's App Store.[76]

App stores have been registering dramatic growth, as users have been shifting online activity patterns from PCs to smartphones and tablets. Currently, smartphone devices are outselling PCs 5 to 1, and this ratio is predicted to rise to 10 to 1 in the next few years.[77] Analysts forecast the number of smartphone users will reach almost 3 billion users by 2020, and consumers will increasingly spend more time on their mobile devices - between 2008 and 2015 the proportion of time spent online using mobile devices increased from 12.7% to 54.6%[78].

[74] Spartoo marketplace – see: https://www.spartoo.com/marketplace_mentions.php
[75] Zalando marketplace – see: https://m.zalando.de/faq/partnerprogramm/
[76] 2.8 million in Google Play and 2.2 million apps in the App Store.. Statista Webpage, "Statistics and facts about App Stores". Retrieved from: https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/, accessed on 25 September 2017.
[77] Evans Benedict, "Mobile is eating the world" (March 2016).
[78] Pakman David, "May I Have Your Attention, Please?" (Medium, August 2015).

In line with this trend, mobile app revenues have been increasing rapidly in the past years. In 2015, global mobile app revenues amounted to $69.7 billion, projected to almost triple by 2020. The industry is likely to experience further dynamic growth as app stores move beyond smartphones and mobile operating systems or their adapted versions are increasingly used to run other devices from smart TVs to in-car systems and smart wearable devices.

Currently Google's Android and Apple's iOS operating systems are used on respectively 86.1% and 13.7% of all smartphones sold in Q1 2017, with the implication that the two major app stores divide the total sales of apps between them.[79]

A study by Gigaom for the European Commission found that in 2013 EU developers took in €17.5 billion in revenue and it was forecasted to increase to €63 billion in 2018. In addition to €6 billion from in app sales, in-app spending for virtual goods and advertising, EU developers recognized €11.5 billion in 2013 from contract labour.[80] The global mobile apps revenue is estimated to increase from $69.7 billion in 2015 to $188.9 billion in 2020.[81]

The study estimated that the EU app-developer workforce would grow from 1 million in 2013 to 2.8 million in 2018 with additional support and marketing staff resulting in total app economy jobs of 1,8 million in 2013, growing to 4.8 million in 2018. By comparison, the European film industry employs over 373 000 people, and reached revenues of some €60 billion in 2011. A recent study from Plum Consulting shows that App store revenues attributable to European developers are 30% of the global total.[82]

7.2.3. Social media, content and communication platforms

This category has experienced a significant growth in consumer users, as well as business users that see it as a tool to reach consumers in particular through online advertising. Currently, there are around 2.5 billion of people using social networks worldwide, or around 30% of the world's population, forecast to reach ~3 billion by 2020.[83] At present, the average social media user spends 2 hours and 25 minutes per day using social networks and microblogs.

At a global level, Facebook has a clear market lead in this category, claiming over 2 billion active users (in June 2017). While regional services such as the Russian service VKontakte or Chinese social networks such as Qzone and Renren have also garnered mainstream appeal in their regions due to local context and content with many hundreds of millions of users[84]. Within the EEA, Facebook would similarly be the largest social media platform, with ~333 million users (data from April 2016).[85]

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79 Gartner, Statista.

80 Gigaom Research, "Sizing the EU App Economy", 2014.

81 Statista, Worldwide App Revenues, https://www.statista.com/statistics/269025/worldwide-mobile-app-revenue-forecast/

82 Williamson Brian, Chan Yi Shen, Wood Sam, "A policy toolkit for the app economy – where online meets off-line" (2016). Retrieved from: http://www.lisboncouncil.net/index.php?option=com_downloads&id=1245

83 Statista – Number of social media users worldwide from 2010 to 2021

84 Statista – Number of users by social network as of April 2017

85 Facebook investor relations: http://investor.fb.com/secfiling.cfm?filingID=1326801-16-67&CIK=1326801

Other major EEA players are video-sharing platforms such as YouTube (with over one billion users worldwide) and Wordpress (which is used by around 25% of all websites present on the worldwide web). According to the Future of Business Survey[86], over 60 million of SMEs are using Facebook to market directly to potential customers, 35% of which on a cross-border scale. In line with the overall market trends, platforms such as Facebook continue to expand its functionalities facilitating not only advertising and marketing, but also e-Commerce functions such as sales, customer support and payments.

7.2.4. Online travel and hospitality platforms

There are a number of platforms in the hospitality and travel sector that facilitate the interaction between hotels, airlines, car rental companies etc. on the one side and consumers on the other side, such as Online Travel Agencies (OTAs) and fare aggregators or metasearch engines.

OTAs specialise in offering online services to find and book hotel rooms, flight tickets, car rentals, cruises etc. In general, OTAs generate revenues by charging hotels and other business users commissions for rooms, car rental and flights sold.

So-called fare aggregators and metasearch engines can also search or scrape[87] for information across multiple search engines (also online travel agents) to get up-to-date availability and pricing of flights. Fare aggregators then redirect the consumer to an OTA, airline, hotel website or car rental website for the final purchase. The business models of aggregators include getting feeds from major OTAs, then displaying to the users all of the results on one screen, while the OTA then fulfils the ticket.

Aggregators generate revenues through advertising and similar models of charging OTAs for referring clients.[88] Examples of such services include Kayak, Skyscanner, Momondo, Google Flights etc.

The importance of OTAs, fare aggregators and metasearch engines is growing, in line with overall trends for increased online e-Commerce. For instance, the share of hotel booking revenue coming from bookings made through online travel agencies in Europe grew from 16.4% in 2012 to 22.7% in 2016.[89] In 2016, online booking channels captured 49% of all travel bookings in Europe. By 2020, the online share of travel bookings is expected to increase to 58%, while both OTAs and direct online supplier bookings are expected to gain significant market share.[90] The hotel booking segment in Europe valued at €75 billion is dominated by two large platforms which service 250,000 hotels[91]. Priceline and Expedia now have over 60% European market share of Online Travel Agents (OTAs)[92].

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86 Future of Business Survey – Trade Report, January 2017.

87 "Screen scraping" is a process of collecting data by crawling through websites and extracting content from the same HTML feed used by consumers for browsing, as opposed to using an API provided by the feeder company (e.g. an airline).

88 https://en.wikipedia.org/wiki/Travel_website#Online_travel_agencies (source Wikipedia)

89 Statista: Online travel agency share of gross hotel booking revenue in Europe: https://www.statista.com/statistics/543906/ota-share-of-hotel-booking-sales-europe-eu/

90 Idem

91 Dealroom, "Platforms and marketplaces", 31 July 2017, Report for the European Commission

92 Dealroom, "Online travel: A deep dive", June 2016.

Other platforms in the hospitality and travel category include restaurant booking and food delivery platforms. The restaurant booking market size is estimated at ~ €425 billion EUR and includes about 500,000 restaurants. Online penetration in this segment amounts to about16% at present. Like many other vertical online platform markets, this online segment is highly concentrated and dominated by a limited number of major players (OpenTable, Quandoo, Bookatable, Resdiary)[93] who intermediate online access to the many restaurants.

7.2.5. Search engines

Internet search engines are services that help Internet users find the relevant answers to their search requests from among tens of billions of web pages on the internet. They facilitate direct interaction between internet users seeking information, website operators seeking an audience for their content, and online advertisers targeting potential customers. The fundamental purpose of a search engine is to make it easier for users to find information on the internet. Given the fact that the number of web pages is constantly increasing (approximately 46 billion indexed and searchable pages in March 2016[94]) and that the random assignment of web addresses (URLs) does not provide any practical way of identifying their contents, a search for information would be impossible without technical assistance.

Currently, most of the main general search services are free of charge and general search services earn money through advertising. In the case of Google, the main search engine used in the EU, advertising has contributed to more than 90 percent of Google's total revenue within the last decade.

In a "pay per click" model adopted by the main general search engines advertisers pay each time a user clicks on the link to their web page. Advertised links can be displayed, for example, above or below organic search on the search results page. The price paid by advertisers in this model is the product of the number of times users click on the ad times the price per click, which is determined in a competitive bidding process.

As of October 2017, Google is leading search engine – it has 86.87% of worldwide desktop market share, with other search engines (such as Yahoo!, bing and Baidu) sharing the remaining part of the market[95]. As illustrated below, Google's market share was stable since 2010. In Europe, Google's market share was 92,5%, bing 3.3% in May 2017.[96] Furthermore, according to Alexa, a source of web statistics data, there are three search engines among the top five most visited web sites.[97] Google is the most visited site, followed by Yahoo, YouTube, Facebook, and Bing.

In terms of distribution of internet traffic, after direct traffic (users inserting directly in the navigation bar the url of the desired website), the second most relevant source of internet

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93 Dealroom, "Platforms and marketplaces", 31 July 2017, Report for the European Commission.

94 Official WorldWideWebSize Webpage, "The size of the World Wide Web (The Internet)" (March 2016). Retrieved from: http://www.worldwidewebsize.com, accessed on 14 March 2016

95 Statista – worldwide desktop market share of leading search engines. Retrieved from: https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/

96 StatCounter GlobalStats: http://gs.statcounter.com/search-engine-market-share/all/europe/#monthly-201605-201705-bar

97 Official Alexa Webpage, "The top 500 sites on the web". Retrieved from: http://www.alexa.com/topsites. It must be noted that Alexa does not include mobile app traffic which may alter the ranking of most visited websites.

traffic in eight EU countries is organic search. As indicated by figure 1, it represents, on average, 17% of all traffic – varying from 14.6 in NL to 20.3 in IT.

Figure X: Distribution of internet traffic on desktops, by source (total in %)

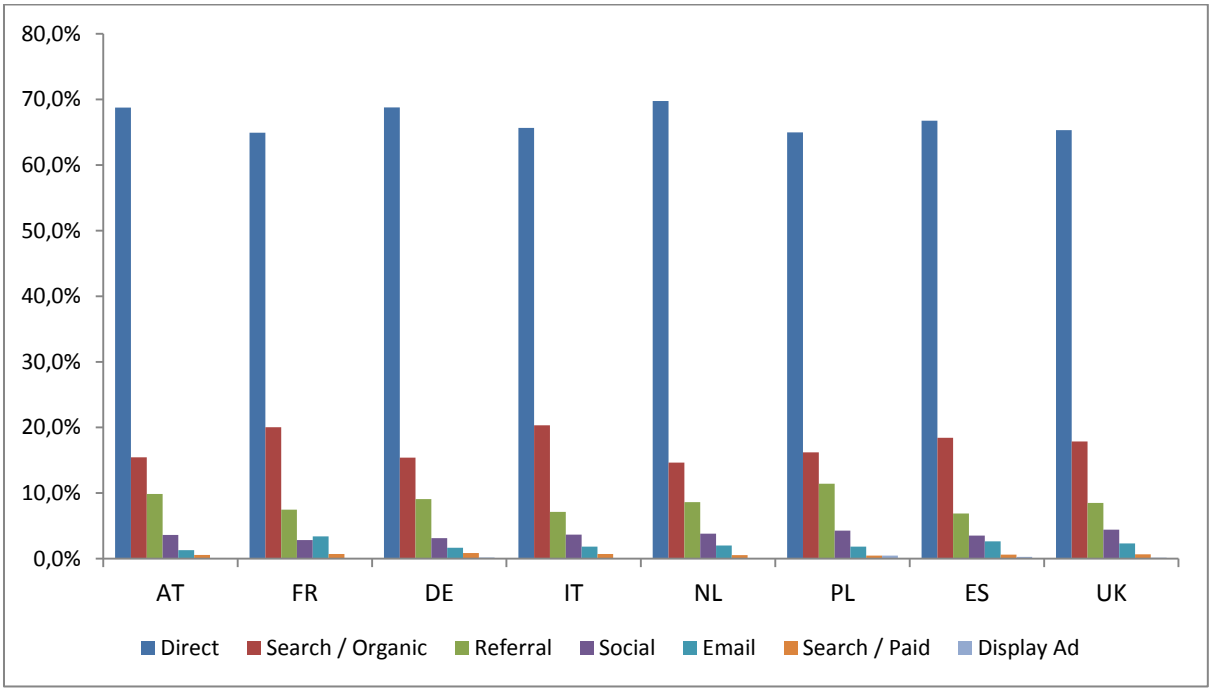


Figure based on Similarweb's index of the top 100 websites for December 2017.

When taking into account different categories of websites, the relevance of organic search as a source of traffic grows. In the case of (i) accommodation and hotels, one quarter of all traffic is generated by organic search results, (ii) online retail, 28.6% is generated by organic search results, while (iii) for government sites, 43% of all traffic comes from organic search.[98]

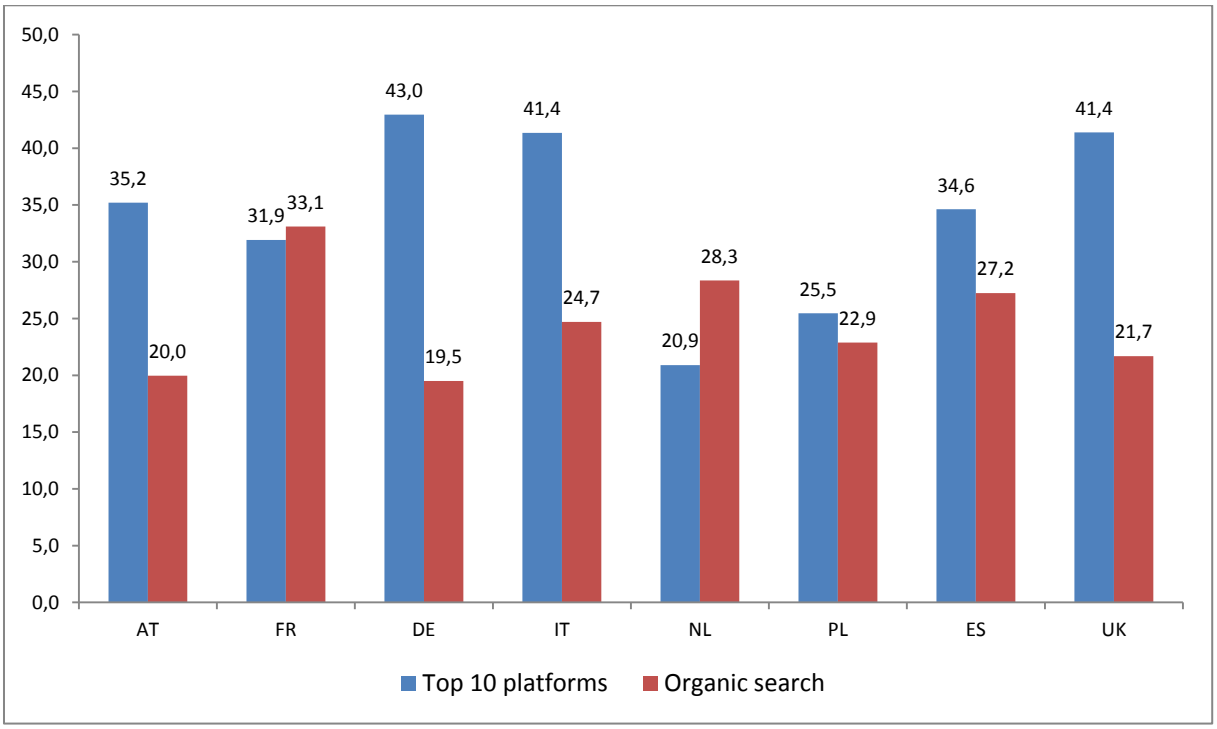
Moreover, there is a correlation between the page rank and the average traffic share. Data shows that websites ranked on the first page, receive 32.5% of average traffic, while those positioned on the second and third, 17.6% and 11.4% respectively. The average traffic share drops to only 0.4% when a website finds itself on 15th page of search results. Websites that are located on the first page of Google Search are also much more dependent on traffic coming from Google Search – 92% of all traffic in this case comes from a search. When the website drops from page one to page two, the traffic drops by 95%, and by 79% and 58% for the subsequent pages.[99]

When considering sources of internet traffic for the online retail platforms, the retail sector shows a high degree of dependency. For example in Germany, 43% of total Internet traffic related to eCommerce goes to the top 10 online platforms in this space. Notwithstanding,

[98] Figure based on Similarweb's index of the top 100 websites for December 2017.
[99] https://chitika.com/2013/06/07/the-value-of-google-result-positioning-2/

organic search still does constitute a major source of traffic, including for online platforms – in France, over 33% of total traffic of the top 10 online retail platforms is referred by organic search (see the table below).

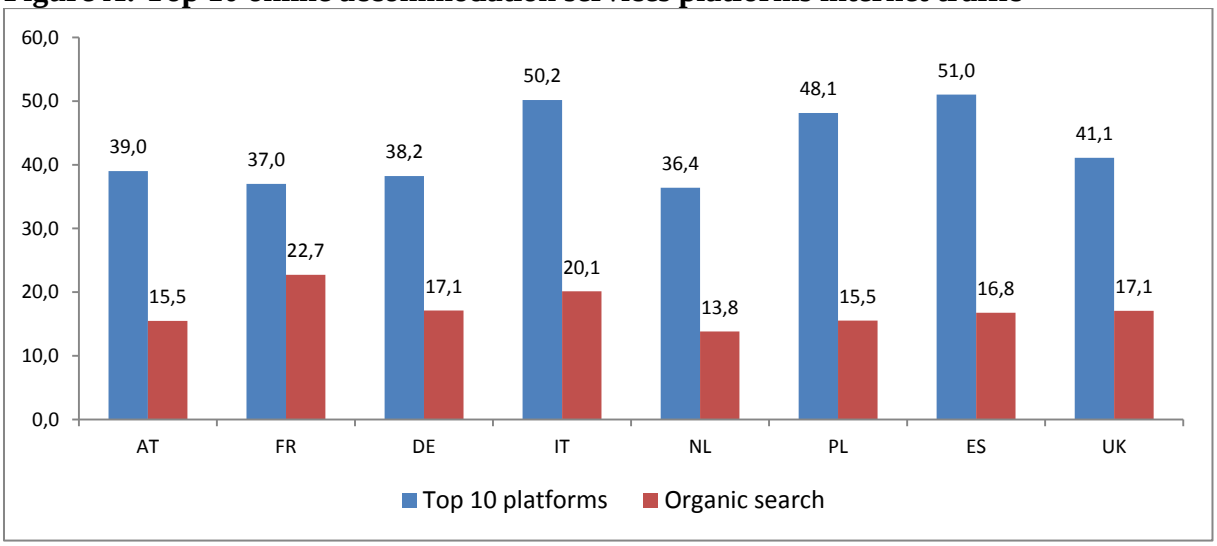
Figure X: Top 10 online retail platforms internet traffic



Note: **Top 10 platforms** refer to the share of total traffic represented by the top 10 platforms. **Organic share** represents the share of the top 10 platforms accounted for by organic search results. Source: JRC.

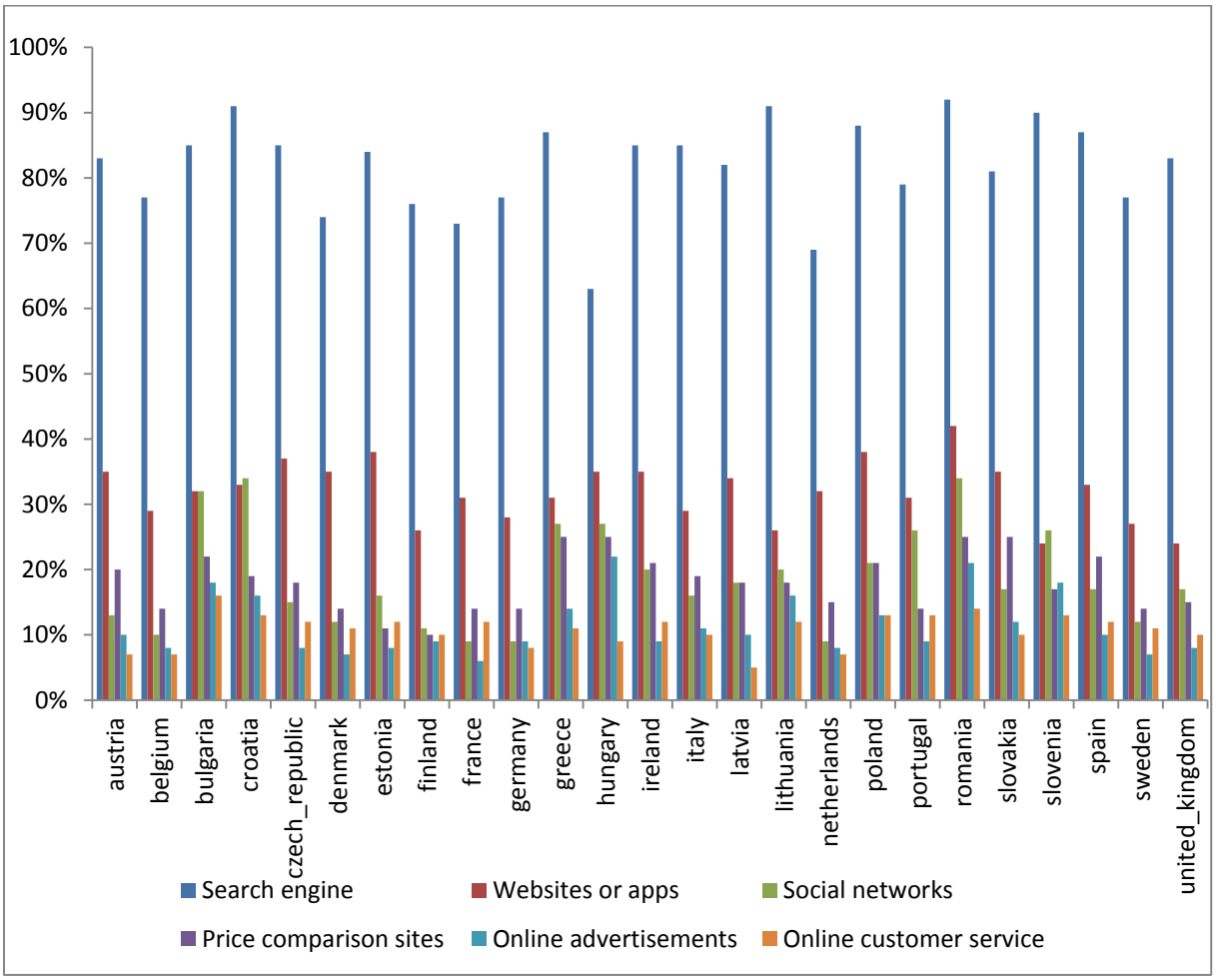
The share of traffic of top 10 online accommodation services platforms is even higher. In Spain and Italy, over 50% of total traffic to online accommodation services' websites goes to one of the top 10 online platforms in this sector. Whereas, respectively 27% and 25% of traffic is referred by organic search.

Figure X: Top 10 online accommodation services platforms internet traffic



Note: **Top 10 platforms** refer to the share of total traffic represented by the top 10 platforms. **Organic share** represents the share of the top 10 platforms accounted for by organic search results. Source: JRC.
On the other hand, according to a Google barometer, between 80% and 90% of people use a search engine when looking for local information.

Figure X: Google barometer on <u>What online sources did people use to find local information? Selected sources only</u>



Source: Google, JRC.

7.2.6. Overview of main market players

Name of the company	Estimated market share/number of users	Number of employees (2016)	Annual Revenue (2016)
Amazon	See section 6.2.1.	341.400	$136 bn
eBay	See section 6.2.1.	12.600 (2017)	$8.98 bn
Zalando	See section 6.2.1.	11.998	€3.64 bn

Apple	13,7%* (2017)	123.000 (2017)	$216 bn
Alphabet (incl. Google)	86,9%* (2017)	88.110 (2017)	$110.9 bn (2017)
Facebook	2 bn active users (2017)	17.048	$27.6 bn
YouTube (part of Alphabet)	1.5 bn active users (2017)	n/a	$12 bn
WhatsApp (part of Facebook)	1.3 bn active users	n/a	$0.7 bn (estimated)
Priceline (incl. Booking.com, Kayak, Agoda, Rentalcars)	$68 bn of gross bookings (2016)	18.500	$10.74 bn
Expedia (incl. HomeAway, Trivago, Orbitz, Travelocity, Hotels.com)	$72.5 bn of gross bookings (2016)	20.000	$8.77 bn
Ctrip (incl. Skyscanner)	$26.8 bn of gross bookings (2015)	30.000	$2.91 bn
AirBNB	$9.64 bn of gross bookings (2015)	3.100	$2.8 bn (est. 2017)
eDreams (incl. Opodo, eDreams, GoVoyages)	$5.12 bn of gross bokings (2015)	1.700	$463 m
Bing	5,11% (Oct 2017)	see Microsoft	see Microsoft
Microsoft	-	124.000 (2017)	$89.95 bn (2017)
Yahoo	3,94 % (Oct 2017)	8.500	$5.17 bn
Baidu	0,87 % (Oct 2017)	45.887	$10,16 bn

7.3. Transparency of online general search engines

The most well-known online general search engines already provide some transparency on ranking by displaying information on their webpages about the criteria they use for ranking.

Google

Google's business users can use Google's Webmaster Guidelines to better understand how the search engine functions and to increase the likelihood to appear higher in search results. Google's Webmaster Guidelines provide general design, technical, and quality guidelines. Google's General Guidelines help find, index, and rank a business site. The Quality guidelines outline some of the illicit practices that may lead to a site being removed entirely from the Google index or otherwise affected by an algorithmic or manual spam action. The Guidelines

also outline some best practices that can help webmasters avoid common pitfalls and improve site's ranking.

Under its Content Guidelines, Google explains what steps webmasters can take to help Google find the high-quality, in-depth content and best present it to users in the search results page. This would allow appearing in the "In-depth articles" feature. Google also provides more detailed tips for creating a Google-friendly site: things to do and/or avoid, on how to make a site easily accessible and how to make sure that other sites link to yours. Google Search Console is a free service offered by Google that helps you monitor and maintain your site's presence in Google Search results. You don't have to sign up for Search Console for your site to be included in Google's search results, but doing so can help you understand how Google views your site and optimize its performance in search results. Google has also published a 32 p. Search Engine Optimization Starter Guide*;* a document which Google explains "first began as an effort to help teams within Google". The optimization topics covered in the guide are intended to apply to sites of all sizes and types. Questions, feedback, and success stories are proposed to be discussed in the Google Webmaster Help Forum. Topics cover SEO basics, SEO for mobile, improving site structure, optimising content, dealing with crawlers, promotion and analysis (including use of free webmaster tools).
www.google.com/webmasters/.../search-engine-optimization-starte...

Google also explains the three key processes in delivering search results:

- Crawling: Does Google know about a site? Can it find it?
- Indexing: Can Google index a site?
- Serving: Does the site have good and useful content that is relevant to the user's search?

How does delivery of search results work? Crawling is the process by which Googlebot discovers new and updated pages to be added to the Google index. Googlebot processes each of the pages it crawls in order to compile a massive index of all the words it sees and their location on each page. When a user enters a query, Google machines search the index for matching pages and return the results Google believes are the most relevant to the user. Relevancy is determined by over 200 factors, one of which is the PageRank[100] for a given page. PageRank is the measure of the importance of a page based on the incoming links from other pages. In simple terms, each link to a page on your site from another site adds to your site's PageRank. Not all links are equal: Google works to improve the user experience by identifying spam links and other practices that negatively impact search results. The best types of links are those that are given based on the quality of content.

[100] PageRank, Google's best known algorithm to rank websites in their search engine results, works by counting the number and quality of links to a page to determine a rough estimate of how important the website is. PageRank is a way of measuring the importance of website pages. The underlying assumption is that more important websites are likely to receive more links from other websites. PageRank (PR) is a calculation, famously invented by Google founders Larry Page and Sergey Brin, which evaluates the quality and quantity of links to a webpage to determine a relative score of that page's importance and authority on a 0 to 10 scale. Google Panda is a change to Google's search results ranking algorithm that was first released in February 2011. The change aimed to lower the rank of "low-quality sites" or "thin sites", in particular "content farms", and return higher-quality sites near the top of the search results.

In addition, Google tools ask a number of questions to webmasters to allow them optimising relevant pages, e.g.

- Is my website showing up on Google?
- Do I serve high-quality content to users?
- Is my local business showing up on Google?
- Is my content fast and easy to access on all devices?
- Is my website secure?

In addition, Google explains in its Search Engine Optimisation (SEO) Starter Guide a number of technical parameter influencing ranking such as the readiness of the site for mobile and the better presentation of images.

Regarding demotion and removal of websites from the search results Google explains that those are done by via its algorithm and also manually. Regarding automatic demotion and removal Google uses dedicated algorithms to identify and demote automatically websites that do not comply with its Webmaster Guidelines. The reasons set out in the Webmaster Guidelines are not exhaustive. For instance, Google indicates in its Quality Guidelines that those only enumerate ***some of the illicit practices*** that may lead to a site being removed entirely from the Google index or otherwise affected by an algorithmic or manual spam action[101]. Google also explains the scope of manual demotions and removal of websites and the internal redress, explaining for instance that this covers: "*hacked site, user-generated spam, spammy freehosts spammy structured markup; Unnatural links to your site, thin content with little or no added value, cloaking and/or sneaky redirects, subscription and paywalled content, unnatural links from your site, pure spam, cloaked images, hidden text* ***and****/or keyword stuffing".* [102]

Yahoo

In terms of optimisation, Yahoo has developed two pages – "Search Content Quality Guidelines" and "Get a higher website rank".

The "Get a higher website rank" page starts with the explanation that the best way to improve a website's ranking is to publish unique content targeted to a given audience. It is mentioned that following the guidelines would help a web pages to be more easily found. The list of best practices is however preceded by an Advertise box on search advertising: "Advertise! – Target your high-value audience with search advertising…."
The advanced tips include a suggestion for users to familiarize with the tools available in the Bing Webmaster Center (see Section on Bing) since the organic search listings on Yahoo Search are powered in part by Bing.

[101] As of 6 February 2018, https://support.google.com/webmasters/answer/35769?hl=en
[102] Manual Actions report, https://support.google.com/webmasters/answer/2604824

The Search Content Quality Guidelines specify that Yahoo is focused on delivering relevant, high-quality content. The Guidelines include short explanations/examples of high- and low-quality content and redirects to a page where more can be learnt about using robots metadata.

There is also a webmaster resources page where Yahoo redirects to pages to learn how to dispute a SearchScan warning for a website, on how to get the rundown and on how redirects are handled in the Yahoo Search Index. This page also contains a disclaimer that "Yahoo is unable to provide any status updates or assistance regarding organic listings that are powered by Bing.

Regarding demotion and delisting the Guidelines indicate that the search engine does not want low quality websites to appear in the search results [103]

Bing

The Bing Webmaster Guidelines cover a number of topics and are intended to help content to be found and indexed within Bing. The Bing Webmaster tools include SEO Reports and SEO Analyser. Both tools are based on a set of approximately 15 best practices. The SEO reports tool provides with bulk reports for the entire site. The guidelines allow for understanding the SEO reports. Checking these reports would allow the webmaster/user to identify what should be looked at and improved. The reports include SEO Suggestions based on items found by Bing as non-compliant. The SEO analyser is an on-demand tool which can scan a single page at a time, thus allowing checking and improving new pages. The tool is intended to fetch the page from the site, analyse it against best practices and display a compliance report. The guidelines also explain that unlike Bingbot, SEO analyser ignores any robots.txt directives in place for a site and fetch the page. This allows the webmaster to also check the compliance of pages which are not allowed to be crawled by Bing normal crawler.

The SEO section clarifies that performing SEO-related work is no guarantee of improving rankings or receiving more traffic from Bing. The SEO section lists a number of optimisation areas to focus on. The Section on "Abuse and Examples of Things to Avoid" explains that sites which engage in abuse such as the practices outlined by Bing are considered to be low quality. As a result these sites can incur ranking penalties, have mark-up ignored, or not be selected for the index. These Bing Webmaster Guidelines describe only some of the most widespread forms of inappropriate, manipulative or misleading behaviours. It is set out that Microsoft may take action against the content provider or the respective site for any other inappropriate or deceptive practices not described in the SEO section. If a webmaster feels action has been taken against his site the webmaster tools could be used to contact Bing's support. In addition users can report abuse of any of these practices using the feedback link in the footer of bing.com after doing a search which reproduces the issue.

[103] https://help.yahoo.com/kb/SLN2245.htm, as of 8 February 2018.

Regarding demotion and removal, Bing indicates that "keywork stuffing" would be a reason for demotion. The Webmaster Guidelines do however neither provide a list of reasons for demotion and removal nor do they indicate whether the criteria listed for ranking/demotion/removal are exhaustive or not.

7.4. Benefits of B2C online platforms for consumers, businesses and the economy as a whole

B2C online platforms benefit greatly all sides of the market(s) they serve. They increase consumer choice and consumer convenience. They increase price competition among suppliers, to the benefit of consumers[104]. Beyond the general advantages of e-commerce (accessibility at any hour of the day, home delivery), they save time by facilitating comparisons, offering personalised services and simplifying transaction systems. It is estimated that, when comparing time spent on physical and online searches and extending this value to the European consumer base, online search platforms alone generate EUR 140 billion in time saved for European consumers[105]. Online platforms also reduce information asymmetries between consumers and suppliers/manufacturers through rating systems, user reviews and comparison tools. Many platforms provide free services to consumers, e.g. Facebook, Youtube, Wikipedia, LinkedIn and Craigslist. The overall consumer welfare gain from such free platform services was estimated in 2015 to amount to EUR 135 billion per year.[106]

B2C online platforms also create new market opportunities for business users, especially for SMEs by offering easy, borderless access to millions of potential customers. For example, information gathered for the Commission's sector inquiry into e-commerce (E-commerce Sector Inquiry) indicates that online marketplaces are particularly useful for small and very small retailers. In 2014, the overwhelming majority (89% for the EU as a whole) of businesses selling via these marketplaces generated an annual turnover lower than or equal to EUR 50 000 irrespective of the Member State in which they were established. Small sellers are attracted by the low initial investment required for being active on platforms. For example, it spares them the cost of having to set up an own website, enabling them to first scale up through platform sales. B2C online platforms also reduce other costs borne by businesses. For example, a study shows that online platforms can reduce the search costs for employers by 75% as compared to commissioning external recruiters.[107]

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[104] See Staff Working Document on Online Platforms accompanying the document "Communication on Online Platforms and the Digital Single Market", 25 May 2016.

[105] EDiMA and Copenhagen institute (2015), Online intermediaries – Impact on the EU economy. Retrieved from: http://www.europeandigitalmediaassociation.org/pdfs/EDiMA%20-%20Online%20intermediaries%20-%20EU%20Growth%20Engines.pdf

[106] *Brynjolfsson and Oh*, The attention economy: measuring the value of free digital services on the Internet, 2012, providing an estimate for the USA (over $ 100 billion/year), scaled to the European economy by *Plum* (2015), The Internet – the new helping the old, as cited by *Copenhagen Economics*, Online Intermediaries. Impacts on the EU economy.

[107] *McKinsey & Company*, A labour market that works, June 2015.

More generally, online platforms drive innovation and growth in the digital economy. They invest massively in R&D[108]. They are also a magnet for innovation. For example, new apps are constantly being developed and made available in app stores. In March 2017, there were 2.8 million apps available in Google Play, 2.2 million in the Apple App Store, 669 000 in the Windows Store and 600 000 in the Amazon Appstore.[109] Some studies estimate that the EU app industry will amount to EUR 63 billion by 2018.[110]

8. REGULATORY ANALYSIS: STATUS QUO

This Annex sets out in detail why the existing legal framework at both EU and Member State-level cannot be used to address the problem statement described in this Impact Assessment. In doing so, it also confirms the consistency of the present policy initiative with the relevant EU acquis. Finally, it addresses the issue of emerging regulatory fragmentation in the specific area of online platforms and its likely development in the absence of any policy intervention by the EU.

8.1 EU competition law

The problem statement formulated in the present Impact Assessment goes beyond the remit of EU competition law.

Competition law focuses on anticompetitive behaviour and mergers. The EU antitrust rules are aimed at tackling anticompetitive agreements (Article 101 TFEU) or abuses of dominant position (Article 102 TFEU). However, the trading practices described in Section 2.1.1 do not necessarily have an anticompetitive object or effect under Article 101 TFEU. As regards the applicability of Article 102 TFEU, the existence of a dominant position in the relevant market would need to be established. However, these trading practices are common to the wider online platform-business model and can result in significant harm to individual businesses also in situations where the platform cannot be considered dominant.

8.2 Jurisdiction of courts and applicable law: diverging national approaches

The use by online platforms of exclusive jurisdiction and choice of law clauses in their contractual relations with business users in principle falls under the freedom to contract. This freedom to contract is reflected inter alia in Article 3 of Regulation (EC) 593/2008 (the "Rome 1 Regulation") and Article 14(1)(b) of Regulation (EC) 864/2007 (the "Rome II Regulation") .

The harmful P2B trading practices described in the present Impact Assessment largely arise within an existing contractual relationship between online platforms and their business users, and such commercial conflicts should therefore in principle be (i) brought before the court or arbitrator selected in the applicable terms and conditions, and (ii) reviewed on the basis of the law that has been rendered applicable to them. Choice of law, including third country law is

[108] Average per year from 2013 to 2017: Facebook: 904.84 million USD, Alphabet 2.721 billion USD, Amazon: 2.811 billion USD, and strongly increasing over the years. Retrieved from https://ycharts.com

[109] See Statistica webpage: https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/

[110] Gigacom Research 'Sizing the EU app economy', February 2014.

covered by the Rome I Regulation and Rome II Regulation[111]. Choice of jurisdiction however, is covered by the BXL Ibis Regulation only where an EU court has been designated. Choice of jurisdiction of third countries is covered by the international private law of the Member States. Some EU Member States that have B2B unfair commercial practices legislation in place[112] appear to have provisions banning the use of exclusive jurisdiction[113] .

This means that business users of online platforms will - in the absence of any specific national legal provision on which they can rely - have to risk bringing an unsuccessful case before their national courts to establish on a case-by-case basis the validity of the exclusive jurisdiction and/or choice of law clauses included in their terms and conditions with online platforms. This is only a first step that can take many months and is required before a case on substance in their home Member State could potentially proceed.

The inherent cross-border nature of most online platforms also means that exclusive jurisdiction and choice of law clauses for example in favour of the online platforms' home Member State are not necessarily invalid or unfair assuming the status quo – even if these have been imposed unilaterally.

Member States' authorities could nonetheless attempt to enforce national B2B unfair commercial practices legislation against national as well as foreign online platform operators regardless of the law these firms have applied to their commercial relations with their business users. Such enforcement actions however equally suffer from the lack of clarity of existing B2B unfair commercial practices legislation as well as from the cross-border operation of platforms. To the extent specific enforcement bodies have been appointed (rather than Member States relying on civil enforcement), these authorities would namely have to ultimately prove in court that the P2B trading practices fall within the scope of their general B2B unfairness legislation, as well as that they constitute non-contractual acts of quasi-delict or potentially unfair competition that occurred on their territory – or resorted an actual effect on their national market in the case of unfair competition – such that have jurisdiction over them in accordance with Article 4(1) or Article 6(1) of the Rome II Regulation. As regards non-EU platforms having selected extra-EU courts, the situation is even more complicated, as international law is silent on how to deal with such choice of jurisdiction clauses. The relevant Hague Convention on Choice of Courts does not namely contain explicit rules dealing with jurisdiction for B2B unfair commercial practices. Such practices could be covered under "tort" which is however explicitly excluded from the scope of the Hague Convention on Choice of Courts[114]. It will therefore depend on the legislation and the courts of the Member State deciding on jurisdiction whether or not the terms and conditions providing for the choice of the jurisdiction of a third country will be upheld. The same applies where the third country the jurisdiction of which has been chosen has not ratified the Hague Convention on Choice of Courts. Member States have taken different approaches to choice jurisdictions of third

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111 Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), JO L 299 of 31 July 2007, p. 40-49.

112 See section 8.4,

113 For example: Austria: § 104 (2) JN (Jurisdiktionsnorm); Belgium: under Article 11 procedural law there is a reasonableness test: The weaker party can claim Belgian jurisdiction if it would be unreasonable to launch proceedings in a third country; France: The French Courts are competent by virtue of pursuit of public order Article 442-6 III Code du Commerce; Germany: Article 14 II Unfair Commercial Practices Act (UWG) provides for exclusive competency which cannot be derogated from.

114 Article 2(2 k) Hague Convention on Choice of Courts.

countries in B2B relationships. Some national courts have annulled such clauses[115], however following the questionable logic that, inter alia, Article 25 Regulation (EU) 2015/2012 (the "Brussels I bis Regulation") does not apply to choice of third country jurisdictions and that therefore the default jurisdiction under Article 7.2 BXL Ibis applies.[116] This is questionable in light of the fact that the Brussels I bis Regulation constitutes EU law that is without prejudice to international private law as well as EU Member States' obligations deriving from international conventions, and it cannot therefore be assumed that courts in other Member States will follow this approach. Rather, for some other EU Member States it seems that, a priori, choice of jurisdiction clauses favouring extra-EU courts in a B2B relationship are likely to be upheld[117].

In light of the foregoing, existing provisions of EU and international law do not provide business users of online platforms with sufficient certainty to be able to effectively bring court proceedings to challenge online platforms' decisions[118] – even if the business users in question were to be domiciled in EU Member States that have some form of legal protections against B2B unfairness.

8.3 EU acquis: other relevant acts

Directive 31/2000/EC: intermediary liability

The delisting, suspension or suppression of business users' accounts (or services/products) can result from the need for certain online platforms (i.e. those that constitute hosting services providers as understood in Article 14 of the E-commerce Directive 31/2000/EC) to expeditiously remove or disable access to content once they become aware of the illegal nature thereof, in order to maintain their exemption from intermediary liability.

However, the illegal nature of content is not the only reason why online platforms decide to remove content; sometimes this is due to infringement of the platforms' own terms and

[115] For France see case Expedia (2017) cited; see also Cour d'appel de Paris 15 September 2015, no rep. 15/07435, Booking; for Spain see Case P-0082-2016, Mon Orxata S.L. v. Facebook Ireland Limited and Facebook Spain S.L. In June 2017 the first Instance Court of Montecada, Valencia decided affirmatively that it has jurisdiction, there was a choice of jurisdiction clause in the T&C of Facebook for US.

[116] Under this provision the specific jurisdiction relating to tort, delict or quasi-delict, of the courts is applicable, i.e. the courts of the country of the place where the harmful event occurred or may occur must decide the case.

[117] Rauscher, Europäisches Zivilprozess- und Kollisionsrecht, 4h ed 2016, Article 25, no 62,footnote 317 refering inter alia to the German jurisprudence.of lower level courts.

[118] Although Article 25 of the Brussels Ibis Regulation determines that the validity of the choice of court agreement must be assessed under the legislation of the country chosen, it remains unclear whether this refers to the entire legislation of the country chosen or only to the rules determining whether the clause on choice of courts has been included in the contract and not to mandatory rules; in relation to the latter, doctrine has outlined that the question which law should govern the validity of choice of court agreements such as law governing the validity of terms and conditions, remains unresolved, see Helene Gaudement Tallon, Competence et execution des jugements en Europe, 2015, 165f.; Fentiman, International Commercial Litigation, 2nd ed 2015, 2.111 indicating that uncertainty on the applicable law for mandatory rules under Article 25 BXL Ibis will prevail until the Court of Justice resolves the matter. See also opinion of Rauscher, Europäisches Zivilprozess- und Kollisionsrecht, 4h ed 2016, Article 25, no 61-73 advocating that Article 25 BXLbis does not allow for revision of terms and conditions on choice of court under a law other than the chosen one of a given MS. The German Highest Civil Court (Bundesgerichtshof, BGH) advocated the possibility to disregard the choice of third country jurisdiction where the third country does not guarantee the respect of the European mandatory rules, BGH, judgment of 5.9.2012. VII ZR 25/12, implementing ECJ, judgment of 9.11.2000 - C-381/98, para 21).

conditions (e.g. on undesirable content), technical failure or as a result of unilateral decisions by the platform[119]. This concerns content uploaded on the platform by all types of users – both natural persons and business users.

Insofar as delisting practices involve alleged illegal content, no harmonised counter-notice procedures currently exist that could be used by users of online platforms to effectively and quickly challenge takedown decisions. Rather, the Commission has identified a degree of fragmentation existing in this respect, as only a limited number of Member States have introduced in their legislation the possibility to issue counter-notices, generally with regards to copyrighted content and applying different procedural rules.

When consumers are concerned by the content take-down, under the Consumer Protection Cooperation Regulation (2006/2004/EC) the CPC authorities have clarified that social media online platforms cannot have unlimited and discretionary powers over the user-generated content and that standard terms and conditions should clearly state the main grounds on which content can be removed and how consumers are informed about and how they can appeal the removal. The 2017 revision of the CPC Regulation (EU) 2017/2394[120] addresses the need to better enforce EU consumer law, especially in the fast evolving digital sphere, but given its scope does not touch upon the problems identified in a P2B relationship.

The Guidelines issued by the Commission on 28 September 2017 through the Communication on *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms* COM(2017) 555[121] request further transparency on the platforms' content removal policy. This includes clearer general conditions, as well as the rights of the users to contest or appeal a content removal decision and the need for platforms to give a clear explanation to the user on the exact grounds for removal of their content.

As such, while there is no overlap in between the preferred option in the Impact Assessment and the provisions of the E-Commerce Directive on the intermediary liability regime, nor with the Commission's guidelines on illegal content removal, the design of the preferred option with regards to delisting of business users and their content was conceived not to create contradicting incentives for the platforms for over-removal of content (assumed to be illegal), or for restraining from voluntary actions to identify and remove content deemed illegal.

Directive 2011/7/EU: fairness in payments

Directive 2011/7/EU on combating late payment in commercial transactions introduced a standard for fairness in B2B relations based on the academic Draft Common Frame of Reference. The application of this fairness standard is however explicitly limited to the area of late payments and therefore does not harmonise wider B2B fairness legislation within the EU's internal market.[122]

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119 As indicated by (ECORYS, 2017 - forthcoming)

120 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (Text with EEA relevance). available here: http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/cpc-revision-proposal_en.pdf

121 https://ec.europa.eu/digital-single-market/en/news/communication-tackling-illegal-content-online-towards-enhanced-responsibility-online-platforms

122 Directive 2011/7/EU, recital 28.

Directive 2016/943/EU: trade secrets

The Trade Secrets Directive[123] constitutes an example of EU – B2B legislation that also applies to online platforms and their business users. The Directive embodies rules on the protection against the unlawful acquisition, use and disclosure of trade secrets in the EU. The Trade Secrets Directive is designed to help individual trade secrets holders to protect and enforce their respective rights and not as a general venue to achieve a general horizontal fairness standard. The various deliberately embedded open legal concepts[124] and the wording underline this emphasis on stipulating a case-by-case assessment for specific scenarios and to take the peculiarities of the respective relationships, business models and sectors into account. Given that it is possible to contractually agree on the lawful acquisition and use of a business user's potential trade secrets by a platform the Trade Secrets Directive is not suitable as a policy tool to address the cross-sectoral practices identified. Nevertheless, an increase in transparency on certain platforms' policies has the potential, in case of conflict, to encourage more individual trade secrets holding business users to bring a claim before a court by relying on trade secrets protection, e.g. in relation to certain contractual clauses or an online platform competing directly with the respective business user.

Directive 2008/52/EC: mediation

The aim of the Mediation Directive[125] is to facilitate access to alternative dispute resolution for all cross-border commercial and civil disputes. Mediation is defined as a attempt on the settlement of a dispute with the assistance of a mediator.MS are requested to encourage the use of mediation without imposing it. However Member States may impose mediation as a precondition for access to courts. The Mediation Directive covers the P2B relationship, i.e., P2B problems are "civil and commercial matters" in the sense of the Mediation Directive. However, the obligations under this Directive is not sufficiently specific to resolve those problems. Also, there is a too broad discretion left to MS as to the use of mediation to overcome the fragmentation observed in the regulation of MS in the P2B relationship.

Directive 2013/11/EU: dispute settlement B2C

The ADR-Directive[126] has as an objective to offer a low cost and accessible out of court conflict resolution in business-to-consumer relationships. Achieving the same objectives than those the ODR- Regulation[127] and the ADR-Directive within the P2B-relationship would require a more targeted design for conflict solution. More particularly, this initiative builds on a higher level of co-operation and investment on the side of the platforms to achieve conflict solution. It builds on the incentives of platforms to settle disputes with their business clients.

[123] Directive 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, 15.6.2016, pp. 1–18.

[124] E.g. "honest commercial practices" and "under the circumstances" in Art. 4(2)(b) Trade Secrets Directive.

[125] Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, p. 3- 8.

[126] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18.6.2013, p. 63–79.

[127] Regulation 524/2013/EC of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165, 18.6.2013, p. 1-12.

Regulation 524/2013/EC on online dispute resolution for consumer disputes

The aim of the ODR-Regulation is to ensure that the dispute settlement offered to consumers under the dispute resolution directive is also available as an online facility. It provides for an online platform via which disputes can be assigned to the specific competent bodies, in compliance with the Consumer Dispute Resolution Directive (ADR-Directive). As to the need for a more specific instrument in the P2B relationship the reasons are similar than the in relation to the ADR-Directive.

Directive 2009/22/EC: injunctions

The aim of the Injunction Directive[128] is to ensure speedy enforcement of obligations covered by EU- consumer protection law[129] in cross-border cases. It sets harmonised rules for the cessation or prohibition of an infringement. Injunctions should be obtained within proceedings carried out with all due expediency. Injunctions can be introduced by associations. Member States may foresee a consultation with a maximum duration of 2 weeks preceding the injunction proceedings.

Regulation 80/2009/EC: Computerised reservation systems (CRS)

The aim of Regulation 80/2009/EC[130] is to enable airlines is to ensure that consumers can do an unbiased choice of air fares while preventing abuse of market power in the market for computerised reservation systems. The CRS-Regulation contains a set of obligations for a specific type of B2B platforms (computerised reservation systems, also called Global Distribution Systems, GDS) that allow travel agencies to compare information and book tickets from a large number of travel service providers worldwide. It therefore covers a specific part of the P2B relationship covered by the present initiative. Overlap will be avoided and coherence will be ensured.

The table below summarizes a comprehensive and exhaustive list of definitions in current rules, and in draft rules and proposals.

A comparison of definitions

Legal instrument /draft	Definition	Platforms in scope	Platforms out- of -scope
Art. 4(17) of Directive 2016/1148 concerning measures for a high common level of	**Online market places** *'online marketplace' means a digital service that allows consumers and/or traders as respectively defined in point (a) and in point (b) of Article 4(1) of Directive 2013/11/EU of the European Parliament and of the Council (1) to conclude*	B2B/B2C e-commerce platforms, app stores	Social media, local search for businesses, price comparison tools

[128] Directive 2009/22/EC of the European Parliament and of the Council of 23 april 2009 on injunctions for the protection of consumers' interests, OJ L 110 of 1.5.2009, p. 30-36.

[129] As referred to in the Annex to Directive 2009/22/EC. The Annex covers inter alia the Directive on unfair terms in consumer contract, the E-Commerce Directive and the Unfair Commercial Practices Directive.

[130] Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89, OJ L 35, 4.2.2009, p. 47–55.

security of network and information systems across the Union)	*online sales or service contracts with traders either on the online marketplace's website or on a trader's website that uses computing services provided by the online marketplace* This definition identifies one specific type of *online intermediation services* and is therefore encompassed by the wider definition of online intermediation services. The distinct purposes of the P2B initiative and the NIS Directive at the same time ensures that a concurrent application of the two definitions will not be conflictual.		
Art. 2(16) of the **Geo-blocking Regulation**	**Online interface** *'online interface' means any software, including a website or a part thereof and applications, including mobile applications, operated by or on behalf of a trader, which serves to give customers access to the trader's goods or services with a view to engaging in a transaction with respect to those goods or services;* This definition is not targeted at intermediation and serves merely to provide customers with cross-border access to information. All online intermediation services targeted in the P2B initiative are offered through online interfaces, but the obligations that the providers thereof face under the respective legal instruments are wholly complementary. If anything, the improved cross-border access that the Geoblocking Regulation could achieve may further increase the importance of online platforms as a gateway to accessing cross-border consumer markets, thus reinforcing the need for the framework protecting businesses.	Any mobile apps, websites as well as online platforms used to offer goods and services	N/A
Art. 2(5) of Regulation 2017/1128 on **content portability**	**Online content service** *'online content service' means a service as defined in Articles 56 and 57 TFEU that a provider lawfully provides to subscribers in their Member State of residence on agreed terms and online, which is portable and which is: (i) an audiovisual media service as defined in point (a) of Article 1 of Directive 2010/13/EU, or (ii) a service the main feature of which is the provision of access to, and the use of, works, other protected subject- matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner;* This definition is not targeted at intermediation but rather at the resale of licensed audio-visual content, i.e. the Netflix-model.	No online platforms covered, but rather subscription-based resale of audio-visual content	All o*nline intermediatio n services*
EC	**Video-sharing platform service**	Video-sharing	App stores, e-

PROPOSAL Art. 1(1)(aa) Revised Directive 2010/13/EU (**AVMSD**)	*'video-sharing platform service' means a service, as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, which meets the following requirements: (i) the service consists of the storage of a large amount of programmes or user-generated videos, for which the videosharing platform provider does not have editorial responsibility; (ii) the organisation of the stored content is determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing; (iii) the principal purpose of the service or a dissociable section thereof is devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate; (iv) the service is made available by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC.* Narrowly targets video-sharing platforms, approaching these firms from the content-angle ("user generated videos"). This definition covers one specific type of online platform and formulates stricter requirements for the notion of "intermediation" than the P2B initiative, by requiring that the relevant provider does not have editorial responsibility. The Proposed Directive at the same time regulates AV sector-specific issues that lie outside the scope of the business-facing P2B initiative.	–platforms	commerce market places, social media (other than in their potential capacity of video-sharing platform), price comparison tools
EC PROPOSAL Art. 10 & 13 Directive **Copyright** in Digital Single Market	**No self-standing definition**, but concept of "*video-on-demand platforms*" introduced in Art. 10 establishing a negotiation mechanism. **No self-standing definition**, but concept of "*Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*" introduced in Art. 13 on the value gap. This definition narrowly targets video-on-demand platforms, or user-generated content platforms, which are **not defined**.	N/A (no definition) *Targeted*: Video-on-demand platforms (reseller model), video-sharing platforms	N/A (no definition) *Excluded*: App stores, e-commerce market places, social media (other than in their potential capacity of video-sharing platform), price comparison tools
DRAFT PROPOSAL Art. 3(1)(a) of Council Directive	***Multi-sided digital interface*** *the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which*	B2B, B2C, C2C/P2P online platforms	All online platforms below this **turnover threshold**:

establishing a Digital Services Tax (Digitax)	*facilitate the provision of underlying supplies of goods or services directly between those users, irrespective of where the transactions are ultimately concluded* Although borrowing from the definition of *online intermediation services* in the P2B initiative, this definition of *multi-sided digital interfaces* has a slightly broader scope (as it includes B2B & C2C/P2P platforms) in light of its purpose which is to identify taxable revenues, rather than contractual imbalances in bargaining power. Whereas pure C2C/P2P platforms are frequently provided for-profit, which can be subject to the digital service tax, they do not exhibit the harmful commercial issues targeted by the P2B initiative. The definition in the Digitax proposal will therefore *include* online intermediation services for the purpose of levying the digital service tax (DST), but not conflict with the definition used in the P2B initiative. The slight difference in intended scope between the respective proposals is implemented in the Digitax proposal by defining the term *user* as *any individual or business*, as opposed to using the separate definitions of *business users* and *consumers* in the P2B proposal. Apart from this, the definition of *multi-sided digital interface* will be aligned with the definition of *online intermediation services*, both of which target the intermediaries' role in facilitating direct transactions between their users.	for the purposes of levying the digital services tax (DST)	> EUR 750 million global revenues; and > EUR 50 million EU taxable revenues
DRAFT PROPOSAL Art. 2(19) of Directive 2011/83/EU (Consumer Rights Directive - revised CRD)	***Online market place*** *'online marketplace' means a service provider, as defined in point (b) of Article 2 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), which allows consumers to conclude distance contracts on the online marketplace's online interface* This definition identifies one specific type of online intermediation services for the purpose of tackling the targeted issue of private providers in the collaborative economy not identifying themselves as such vis-a-vis buyers – resulting in the latter not being aware that the CRD protections do not apply. This notwithstanding the conclusion of a contract on the platform's interface, which can give the impression that a contract is in fact concluded with a trader (i.e.	Goes beyond "intermediation" as any service providers' website could be covered All B2C and C2C/P2P online platforms as well as any website used to offer services (i.e. app stores, e-commerce market places, OTAs and webshops, to the extent they allow online	B2B online platforms

	the platform). The obligation that the revised CRD will impose on online market places by means of this definition is accordingly strictly meant to protect consumers, not businesses. The P2B proposal at the same time explicitly sets out that online market places are one type of online intermediation services, with the latter definition clearly going beyond for a different purpose (to protect businesses). The concurrent application of *online market places* and *online intermediation services* therefore will not involve any potential conflict.	contract conclusion)	
DRAFT Crowdfunding Regulation	***Crowdfunding platform*** *(a)"crowdfunding services" means any of the following:* *(i) the service of facilitating the granting of loans (lending-based crowdfunding);* *(ii) the reception and transmission of orders in relation to one or more financial instruments or the placing of financial instruments without a firm commitment bases as defined in points 1 and 7 of Section A of Annex I of Directive 2014/65/EU in relation to transferable securities (investment-based crowdfunding), where such services are provided over a crowdfunding platform, including on cross-border basis, and where each crowdfunding offer in relation to the above services does not have a total consideration in the Union that exceeds EUR 1 000 000, which shall be calculated over a period of 12 months.* *(b)"crowdfunding platform" means an electronic information system on which crowdfunding services are provided;* *(c)"crowdfunding provider" means any person who manages and/or operates a crowdfunding platform;* *(d)"crowdfunding offer" means a communication to persons over a crowdfunding platform or otherwise and presenting sufficient information so as to enable an investor to decide on the merits of entering into a crowdfunding transaction with regard to a particular project;* *(e)"crowdfunding process" means any set of arrangements established under the rules of the crowdfunding platform to conclude crowdfunding transactions;* *(f)"crowdfunding transaction" means a transaction concluded by and between an investor and a project owner under which the investor provides or undertakes to provide funds to the project owner through the provision of a loan to the project owner or through the acquisition of financial instruments issued by the*	C2P2B-crowdfunding platforms (peers investing in traders' ideas)	B2C, B2B, P2P online platforms (anything other than C2P2B crowdfunding platforms)

	project owner or by a special purpose vehicle, and the project owner or the special purpose vehicle issues financial instruments. This definition identifies a type of C2P2B-platform (peers investing in traders' ideas) and therefore lies outside the definition of *online intermediation services* used in the P2B initiative. It also serves a fundamentally different purpose. There is no risk therefore of any conflict between the obligations included for online intermediation services in the P2B initiative and the requirements for being recognised as an EU crowdfunding platform under the proposed Crowdfunding Regulation. The fact that dozens of national regimes already exist for crowdfunding platforms without these effectively limiting other types of online platforms' freedom to provide services throughout the Internal market underlines the complementarity of the definitions proposed.		
Recital 13 of the **DRAFT Enforcement Regulation / Goods Package** (laying down procedures for compliance with and enforcement of Union harmonisation legislation on products)	N/A – no definition *The development of e-commerce is also due to a great extent to the proliferation of information society service providers, normally through platforms and for remuneration, which offer intermediary services by storing third party content, but without exercising any control over such content, thus not acting on behalf of an economic operator.* No definition proposed, while the recital uses "intermediary services" in the sense of the P2B initiative. No potential for conflict.	N/A	N/A
DRAFT proposal for a Regulation on cross-border access to **electronic evidence** in criminal matters	**Service provider** *(c) 'service provider' means any natural or legal person that provides the following categories of services:* *(1) electronic communications service as defined in Article 2(4) of [Directive establishing the European Electronic Communications Code];* *(2) information society services as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535 that store data as part of the service provided to the user, including social networks, online marketplaces and hosting service providers;* *(3) services that provide internet infrastructure such as IP address and domain name registries, domain name registrars and*	All *online intermediation services*, as well as OTT communicatio ns platforms, registrars, Internet access providers, B2B e-commerce market places, Targets different relationship from P2B, focusing on	N/A

	associated privacy and proxy services. Service provider is meant to identify digital services that have some form of potential access to third-party users' information. In this context, online marketplaces and social media are identified as examples. The definition therefore targets a very broad range of online "intermediaries", including those at the infrastructure level (e.g. registrars). The foreseen obligations at the same time frame the relationship between all these online intermediaries and public authorities, rather than business users. There is therefore no potential conflict with the P2B initiative.	service providers' cooperation with **public authorities**	

8.4 B2B rules at EU and national level

B2B commercial practices such as the practices identified in the present Impact Assessment are not covered by EU consumer protection legislation. The **Unfair Commercial Practices Directive** (UCPD)[131] and the **Unfair Contract Terms Directiv**e (UCTD)[132] are particularly relevant in this regard as, although these do incorporate definitions of relevant concepts such as 'good commercial behaviour' and 'good faith', their scope is explicitly limited to business-to-consumer commercial practices. These legal instruments do apply to online platform providers, but only cover the consumer-side of their multi-sided markets whereas the B2B harmful practices observed only have indirect (longer-term) effects on consumers.

The **Misleading and Comparative Advertising Directive** (MCAD)[133] is one piece of EU consumer protection legislation that does cover certain specific B2B relations. It aims at protecting traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.[134] However, the provisions set forth in the MCAD, in essence an obligation for Member States to ensure that adequate and effective means exist to combat misleading advertising as defined in Article 3 MCAD and to enforce compliance with the provisions on comparative advertising set out in Article 4 MCAD, do not tackle any of the commercial practices identified in this Impact Assessment. Indeed, the problematic practices identified occur virtually entirely within an existing contractual relationship between online platforms and their business users, rather than at the advertising stage. Moreover, insofar as the B2B protections extend beyond the direct addressee of the misleading or comparative advertising concerned, which could constitute a private consumer as well as a business, the aim is to protect direct competitors of the advertiser. However, the problematic practices identified here – to the extent any of these

[131] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149/22.

[132] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29.

[133] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376/21.

[134] Article 1 MCAD.

could be qualified as advertising – are aimed at business partners of online platforms rather than their direct competitors.

Notwithstanding the foregoing, Member States remain free to establish **national B2B unfairness rules**, as is explicitly foreseen in the EU acquis (e.g. Directive 2005/29/EC, recital 6 or antitrust Regulation 1/2003[135]). In this regard, a number of Member States currently has any of four 'types' of B2B unfairness rules: (i) general unfair competition legislation; (ii) the relevant national act implementing the UCPD/UCTD/MCAD extended to B2B situations; (iii) a contract-law based review of general terms and conditions, and; (iv) weaker party protections in situations of economic dependency.

None of the four abovementioned categories however explicitly target platform-to-business trading practices, meaning that business users from different Member States would need to actively instigate legal proceedings to prove that a commercial practice carried out by an online platform is in fact "unfair" under any of these instruments, for example pursuant to the open norm of the UCPD (Article 5 et seq.).The mainly small businesses that suffer harmful P2B trading practices tend not to have sufficient resources to pursue such court proceedings, while the absence of clear rules applying to harmful P2B trading practices means that they are unlikely to overcome their dependency-induced fear of retaliation in the first place.

In addition, the different types of rules applying to B2B unfair commercial practices mean that a strong and multi-dimensional regulatory fragmentation currently exists within the EU's internal market. This results in a situation where some business users may potentially enjoy greater protections than other business users of one and the same cross-border online platform. At the same time, a situation arises in which it is unclear for business users of cross-border online platforms which B2B protections apply to them – if at all.

Finally, online platforms can use their superior bargaining power to leverage this regulatory fragmentation, for example by imposing choice of law and forum clauses in favour of jurisdictions with the least stringent B2B unfairness rules. Such choice of law and forum clauses namely further raise the barrier to accessing justice for business users, as these firms are led to consider that their national B2B protections do not apply at all. Moreover, even if seized by a business user, national courts will always have to settle the complex question of whether they are competent to deal with the case at hand notwithstanding the law and forum chosen under the contract. Given that any individual case also always relates in some way to an existing contractual relationship with an online platforms, it may in addition be very difficult for business users to prove that the case does not concern contractual but rather tortuous obligations, which would be needed to override the applicable choice of forum and law clauses. Indeed, in some Member States where concurrent claims in tort and contract are excluded, it may even be impossible to override these contractual clauses. The German government in this respect recently noted that the relatively strict nature of its civil code insofar as it applies to general terms and conditions leads international firms to opt for applying non-German law to their B2B contracts with German firms.[136]

More specifically on the issue of fragmentation, it is noted that just ten Member States currently apply the rules provided for in the **UCPD** also **to B2B relations**, and in different

[135] Council Regulation (EC) 1/2003, recital 9. See also MCAD, Article 8(1).
[136] Bundesministerium für Wirtschaft und Energie, Weissbuch Digitale Plattformen of March 2017, p. 78.

ways both at the legislative[137] and application level.[138] Whereas quite a number of Member States in addition have some form of protection in place to protect business from **unfair contract terms**, seven Member States do not explicitly forbid unfair terms in B2B contracts.[139] For the first group of EU Member States, the rules also target different issues, have different degrees of the in-depth nature of the review performed as well as a different scope (specific categories of traders), and they apply different sanctions.[140] Similarly, the legal systems of thirteen EU Member States[141] provide for some form of **weaker party protection** in situations of economic dependency. Among these, five EU Member States[142] foresee a possibility to intervene horizontally, whereas the other Member States' legislation is limited either to specific types of firms (e.g. SMEs or microenterprises), to specific industry sectors or even to specific types of practices by platforms (e.g. price parity in online booking[143]). Moreover, weaker party protection is in some cases limited to the objective of protecting the structure of competition.[144] Finally, in some other jurisdiction like Belgium and Croatia, courts have formulated a notion of **relative dominance**, but with widely diverging interpretations.[145]

[137] Study for the Fitness Check of EU consumer and marketing law, May 2017, page 191 (available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332): **Austria** and **Sweden** have extended all UCPD provisions to B2B transactions. In **Denmark**, businesses are protected by provisions on both misleading and aggressive practices. **France** only extends the general prohibition of misleading actions and the blacklisted misleading practices to B2B transactions. In **Germany**, parts of the Directive also apply to business-to-business commercial practices. In **Italy**, the provisions implementing the UCPD apply not only to B2C commercial practices but also to commercial practices between businesses and so-called "micro-enterprises" (defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million). In **Belgium**, certain practices on the blacklist are also blacklisted in B2B transactions; in addition, an outright prohibition of the practices of misleading directory companies was introduced. This example was partly followed in the **Netherlands**, where an important statutory extension of the UCPD regime to B2B situations was introduced in 2016. Likewise, in **Portugal**, the legislation implementing the UCPD was amended in 2015 so as to broaden its scope to cover some misleading actions in B2B relations. In the **Czech Republic**, the UCPD is also extended to B2B transactions.

[138] At the application level fragmentation results also from the different organisational enforcement frameworks in place leading to a different intensity of enforcement of B2B legislation in MS. For instance, in Germany, among the approximately 10500 cases handled by the Wettbewerbszentrale (institution in Germany entitled under the Unfair Commercial Practices Act to pursue violations of the UCP-Act) dealing with unfair commercial practices in 2017 59% of the cases involved online advertising on homepages, onlineshops, and platforms (including market places, comparison sites, booking platforms), Social Media, see Annual Report 2017(forthcoming). This proportion of UCP - online cases has increased if compared to 2016 (54%). In a number of other MS there is no institution entitled to handle neither individually nor collectively complaints relating to UCP B2B. This also translates into fragmentation at the application level of B2B UCP-law applicable in the P2B area.

[139] Belgium, Bulgaria, Ireland, Latvia, Malta, Romania and Slovakia.

[140] Study for the Fitness Check of EU consumer and marketing law, May 2017, page 200.

[141] Austria, Bulgaria, Cyprus, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, the Netherlands, Spain and the UK.

[142] Bulgaria, Cyprus, France, Greece and Spain.

[143] Austria recently blacklisted internal most-favourite-nation clauses included in online platforms' terms and conditions.

[144] For example, in Germany undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market position to impede their competitors directly or indirectly in an unfair manner.

[145] EY, platforms' terms and conditions, SMART/2017/0041, forthcoming.

8.5 Emerging national legislation for the platforms' environment: relevance for P2B

As set out in the preceding sections existing rules at EU and Member State level do not sufficiently address the harmful P2B trading practices identified in this Impact Assessment - neither in terms of limiting their occurrence nor in terms of minimising their impact.

The inability of business users as well as governments to effectively tackle harmful P2B trading practices is fuelling further fragmentation of the Single Market, specifically in the area of online platforms. Given the inherent cross-border nature of online platforms such national rules will not be effective in tackling harmful P2B trading practices and rather render it more difficult for the 1000s of existing online platform start-ups in the EU[146] to successfully compete with the established players. In the absence of EU intervention this situation is expected to deteriorate – in line with the foreseen development of the core problems.

A limited number of Member States (Austria, Belgium, France, Italy and Germany) have indeed already adopted or are considering **online platform-specific legislation**.

In 2016, France adopted Law N. 1321[147] introducing a broad definition for online platform operators as any natural or legal person that offers for business purposes, for free or in exchange for compensation, an online communication service to the public that is based either on the ranking and listing using digital algorithms of content, goods or services offered or put online by third parties or on establishing relationships between parties in view of the sale of goods, the offering of services or the exchange or sharing of content, goods and services. This definition can include, *inter alia*, search engines, online auction sites, e-commerce platforms as well as online market places or online social media platforms. Given that the law stipulates that all provisions of the relevant chapter are of public order they can be applied irrespective of the law which may be applicable to a contract concluded between a French consumer and a business user. The Law requires such operators to inform consumers in a fair, clear and transparent manner on various issues. For example, in case the platform allows the conclusion of contracts between a consumer and another consumer or a business user the, applicable terms and conditions setting out the parties' rights and obligations have to be displayed adequately. Platforms must also provide business users and consumers, if both can engage with each other on the platform, with a way to communicate pre-contractually to provide

[146] Dealroom, "Platforms and marketplaces", 31 July 2017, Report for the European Commission.

[147] Loi pour une République numérique of 7 October 2016, Article 49, introduisant le nouveau Article 117 dans le code de la consommation: Art. L. 111-7. - I. - Est qualifiée d'opérateur de plateforme en ligne toute personne physique ou morale proposant, à titre professionnel, de manière rémunérée ou non, un service de communication au public en ligne reposant sur :
« 1° Le classement ou le référencement, au moyen d'algorithmes informatiques, de contenus, de biens ou de services proposés ou mis en ligne par des tiers ;
« 2° Ou la mise en relation de plusieurs parties en vue de la vente d'un bien, de la fourniture d'un service ou de l'échange ou du partage d'un contenu, d'un bien ou d'un service…..;
For the fairness standard see Article 117-7 II at
https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033202746&categorieLien=id.
and implementing decrees "Décret n° 2017-1436 du 29 septembre 2017 relatif aux obligations d'information relatives aux avis en ligne de consommateurs; Décret n° 2017-1435 du 29 septembre 2017 relatif à la fixation d'un seuil de connexions à partir duquel les opérateurs de plateformes en ligne élaborent et diffusent des bonnes pratiques pour renforcer la loyauté, la clarté et la transparence des informations transmises aux consommateurs ; Décret n° 2017-1436 du 29 septembre 2017 relatif aux obligations d'information relatives aux avis en ligne de consommateurs., https://www.economie.gouv.fr/transparence-plateformes-numeriques-decrets-renforcent-legislation

mandatory pre- information including explaining, for example, the right to withdraw and the specific procedure, Furthermore, platforms must explain to consumers the way in which content, goods or services are ranked, referenced, delisted or classified as well as any contractual or financial relationships influencing this. Platforms are also obliged to outline their data retention policy and to provide means for data subjects to exercise their rights related to personal data electronically, e.g. the right to data portability and data recovery or the right to be forgotten, Other regulated issues include, for example, online reviews that are authored by consumers, the confidentiality of private electronic correspondence, and improved cooperation between relevant national authorities. Several aspects have yet to be specified by an implementing decree.

The Italian Parliament is currently discussing two proposals that aim to regulate some platform-relevant aspects. The Proposal N.2520[148] waits for approval by the Senate of the Republic and, if it passes, it will abolish certain restrictions imposed by platforms, specifically app stores, impeding mobile device users' freedom and ability to access or remove apps as well as to switch services. The second Proposal N. 3564[149] is still debated in the Chamber of Deputies and focuses on the sharing economy in which digital platforms play a crucial role. The main objective of the envisaged law is to ensure fairness and transparency regarding security, health, taxation and the rights and obligations linked to services to support those active in the collaborative economy, both business users and consumers. It comprises a definition of "sharing economy" as an economic system generated by the optimization and shared allocation of space, time, goods and services through digital platforms and of "sharing economy platforms" as a platform facilitating the connection between users, regardless of whether it provides added value services, as long as the users exclusively own the assets generating the value for the platform. Importantly, platforms intermediating connections between consumers and business users are expressly excluded in the Proposal, because the focus is solely on relationships between consumers. The Proposal also requires platforms to publish a policy document comprising its general terms and conditions, which is subject to the opinion and approval of the Italian Competition Authority and which will be included in a "National Electronic Register of Digital Platforms of the Sharing Economy". The Proposal also includes a blacklist of contract terms, e.g. exclusion of access to platform without legitimate reason, as well as a definition of traders[150] to ensure fiscal transparency. It also comprises privacy requirements for online platforms to agree to the assignment of personal data with third parties, to inform data subjects in case of a sale or transfer of the underlying business as well as to disclose acquired personal data and to delete such data on request of the data subject.

France, Austria and Italy have adopted laws regulating the contractual relationships between hotels and OTAs. Belgium in addition notified a draft law to the Commission on 4 December

[148] Proposta di legge "Disposizioni in materia di fornitura dei servizi della rete internet per la tutela della concorrenza e della libertà di accesso degli utenti" (2520), status quo of the legislative process: http://www.camera.it/leg17/126?tab=1&leg=17&idDocumento=2520.

[149] Proposta di legge "Disciplina delle piattaforme digitali per la condivisione di beni e servizi e disposizioni per la promozione dell'economia della condivisione" (3564), status quo of the legislative process: http://www.camera.it/leg17/126?tab=5&leg=17&idDocumento=3564.

[150] The Proposal defines a trader's activity as beginning with a revenue of €10,000 per year. Annual income below this threshold would be subject to a 10% tax rate and when exceeding this level the annual income above would be counted towards other professional income and the respective tax rate. Linked to this is also the requirement for platforms to have a permanent establishment in Italy.

2017, which contains a similar MFN-ban.[151] These national initiatives even differ amongst themselves. All laws prohibit narrow most favoured nation (MFN) clauses thereby allowing hotels to grant any discount or pricing advantages to their customers via other sales channels The French law, however, also prescribes that the room prices shall be specified in a "mandate contract".

The German Parliament adopted the "Netzwerkdurchsetzungsgesetz"[152] on 30 June 2017 to tackle hate speech on social media platforms active in Germany. It entered into force in October 2017. The German legislator decided to limit the application of the law to social media platforms having more than 2 million users in Germany as well as falling under the definition of information society service providers operating a for-profit platform online, which allows users to exchange or share any content with other users or to make any content available to the public. Other crucial elements of the new law include, inter alia, fines up to 50 million Euro for late (exceeding 24 hours after notice as a general rule) deletion of illegal content, a to be established independent committee for controversial cases as well as a mandatory point of contact representing the respective platforms in Germany with the obligation to react within 48 hours. Shortly before the adoption of this law Germany published a White Paper on Digital Platforms[153] in March 2017. The White Paper envisages the establishment of a "Digital Agency" to safeguard effective and systematic market control of digital platforms. It also proposes to design a comprehensive framework for the use of data and to introduce basic transparency and information duties for digital platforms. In June 2017, the latest revision of the German GWB entered into force, as part of which the national competition authority has been granted the ability to have special regard for indirect network effects and other platform-relevant features in their pursuit of possible abuse of dominance cases.

None of the already enacted or envisaged national measures and fact-finding exercises covers the set of harmful P2B trading practices identified comprehensively and adequately, while their geographic scope is limited to individual Member States. These rules therefore do not provide business users of online platforms with additional legal certainty that could help them in finding effective redress against harmful P2B trading practices. Their existence however demonstrates that EU Member States increasingly recognise that existing rules are not fit for purpose in the online platform space. In light of the foreseen growth of online trade and the increasing intermediation by online platforms, the trend of legal fragmentation within the EU will likely continue or worsen.

8.6. P2B Fairness standards in third countries

The Ernst&Young Study on contractual relationships between online platforms and their professional users covers also law and its application in third countries regarding unfair commercial practices and unfair terms and conditions (legislation, industry standards, pre-contractual sphere, unfairness standards, enforcement, relative dominance). The countries covered are Australia, China, Mexico, Switzerland and the United States. In Australia, Mexico, the US and Switzerland, there is no P2B specific legislation, however there are voluntary standards in Australia. .

[151] See notification 2017/570/B under Directive 2015/1535/EU.

[152] Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz - NetzDG), BGBl. I 2017 S. 3352.

[153] BMWi, Weißbuch Digitale Plattformen, available here: https://www.bmwi.de/Redaktion/DE/Publikationen/Digitale-Welt/weissbuch-digitale-plattformen.html.

The Ernst&Young study comes to the conclusion that t most relevant fairness benchmark could be found in **Australia**. Although the Australian courts have not expressly defined the level of 'unfairness' required to constitute an unfair term under the Australian Consumer Law (ACL) that is also applicable to small business contracts. However, there are guidelines issued by the Australian Competition and Consumer Commission on the interpretation of the ACL, according to which a contract is unfair if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In deciding whether a term is unfair, a court may take into account the matters that it considers relevant but must take into account:

- the extent to which the term is transparent; and
- the contract as a whole.

8.7. Landscape in the Member States illustrating standing given to representative associations.

This part of the Annex illustrates how representative associations have legal standing across the Union.

Representative associations of SMEs in the Member States have the possibility for legal standing under national law, usually in the relevant Civil Procedure Codes, in the manner described in table 1 below. France and Poland take a different approach to the other Member States. The table also illustrates how the legal systems of the Member States accommodate giving legal standing to representatives associations.

Table 1

Member State	**Standing given to organisations representing SMEs[154]**	**Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]**

[154] Extract based on Annex 7 of the Commission Staff Working Document – Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (recast) Impact Assessment (COM(2009) 126 final, SEC (2009 316), and

[155] Based on the analysis of the state of collective redress in the European Union in the context of the implementation of the Recommendation of the Commission on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (request for services JUST/2016/JCOO/FW/CIVI/0099, Lot1/2016/06) prepared by the British Institute of International and Comparative Law (BIICL), in a research consortium with Civic Consulting and Risk & Policy Analysts (RPA), and supported by the Office for Economic Policy and Regional Development (EPRD), (forthcoming).

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
Austria	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	No horizontal mechanism tailored to collective redress and no special provisions on standing exist. However, traditional devices of multi-party procedures are available (joinder, consolidation of cases, test cases and assignment of claims). A practice has developed known as the 'Austrian model of group litigation' to handle mass damages claims. This is a combination of either a joinder of claims or a mass assignment of claims to an association backed up by litigation finance. The procedure was created for monetary damages in the investment sector but is not limited to a specific sector. The mechanisms are horizontal in the sense that they are not restricted to a particular area of law. In general, both injunctive and compensatory claims are possible. All the mechanisms mentioned above fit into the traditional civil procedure (i.e. by combining several parties, combining several lawsuits, or by 'collectivising' mass claims by way of assignment to an institution). The Austrian Supreme Court has established certain conditions that have to be met in order to raise several claims in one action. Most claimants demand monetary compensation but declaratory judgments are also possible. In light of increased mass litigation, a draft for a group procedure was prepared by the Austrian Ministry of Justice in 2007 (the proposed Civil Procedure Amendment 2007), but was never voted on in Parliament.
Belgium	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction	No general collective redress mechanism. Claims that involve multiple claimants may be brought by joining individual actions under the regular rules of civil procedure or commencing a claim by multiple claimants

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
	against contractual terms drawn up for general use on the ground they are grossly unfair.	under a single petition.
Bulgaria	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	Horizontal collective redress mechanism is available, which is applicable to any area of the law. Relevant provisions are in Code of Civil Procedure. Any harmed persons, or organisations established with a purpose to defend the interests allegedly infringed can raise a claim. The action can lead to both injunctive and compensatory relief.
Croatia	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	There is a general collective redress mechanism. This is contained in the Civil Procedure Act, which was introduced in 2011. The general mechanism operates on the basis of representative action, provided that the sector specific mechanism (for consumer law and anti-discrimination) do not apply. The mechanisms are injunctive only. The Civil Procedure Act also contains traditional rules on multi-party litigation such as joinder of parties and consolidation of proceedings.
Cyprus	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	No horizontal collective redress system exists. Traditional mechanisms of multi-party proceedings are available (joinder of actions). Cypriot civil practice places an emphasis on compensation but an increasing number of injunctions are sought as remedies. The relatively low cost of court expenses and easy access to the appellate jurisdiction

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
		allow claimants to pursue cases freely.
Czech Republic	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	There is no horizontal redress mechanism and mass damages claims are dealt with by means of classic principles of civil procedure, such as joinder. There is no comprehensive approach to collective redress. Only some specific aspects are regulated, in particular in the Code of Civil Procedure and in some special legal acts. Special legal acts provide for the distinct procedural role of specialised bodies (representative entities) authorising them to initiate selected types of proceedings. The concern subjects (right holders) are not parties to the dispute. Where a representative entity is the claimant, the judicial proceedings and hearing follow the classical principles and rules of civil contentious proceedings without any special features or distinctions. However, these mechanisms cannot be considered as propose collective redress mechanisms. Extended lis pendens and res iudicata effect.
Denmark	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	There is a horizontal mechanism which allows injunctive and compensatory relief. In addition, there is a test case procedure, where an organisation can act as a representative ("mandatar") in a test case on behalf of one or more of its members. The Danish legal system also contains traditional rules on multi-party litigation, such as joinder. Both compensatory and injunctive relief are available through these mechanisms.
Estonia	Possibility exists under national law, but the role of representative organisations is	No specific horizontal collective redress mechanism exists. However, general rules of joinder and consolidation of proceedings are

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
	strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	provided for in the Code of Administrative Court Procedure (in force since 1 January 2012) and by the Code of Civil Procedure. The Code of Administrative Court Procedure (sections 16 and 19) provides that an association of persons possesses standing as an applicant only in the cases provided in the law and special rules apply for multiple parties.
Finland	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	No specific horizontal collective redress mechanism. The legal system includes general provisions on joinder of claims, regulated by the Code of Judicial procedure. These provisions are not limited to B2C relationships nor consumer sales.
France	Professional organisations may introduce an action before the civil or commercial courts on the basis of facts which cause direct or indirect detriment to the collective interests of the profession or sector which they represent, or to fair competition.	No specific horizontal collective redress mechanism. Sectoral (similar mechanisms) exist in consumer protection, competition, health, discrimination, environment and personal data.
Germany	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	No horizontal collective redress mechanism, but joinder of parties, joinder of claims and stay of proceedings. Ongoing reform plans to introduce a general collective redress mechanism based on the model of the Capital Market Model Claims Act (for mass investor claims) have been supported by associations, but remain yet without any concrete legislative results.[156]

[156] In June 2017, it was reported that no common position on the collective action mechanism proposed by the German Ministry of Justice could yet be found.

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
Greece	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	No horizontal collective redress mechanism. The provisions of the Greek Code of Civil Procedure (CCP) contains rules on multi-party disputes, such as the joinder of parties, third party intervention and consolidation of proceedings. In the field of unfair competition, a special legislative provision allows trade and industry associations, and chambers of commerce, to bring an action before the courts seeking an injunction against traders for unfair competition. The procedural right does not qualify as a genuine form of collective redress, but it is a form of self-regulation of the industry.
Hungary	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	No specific horizontal collective redress mechanism. The new Code of Civil Procedure, entering into force in January 2018, provides for special procedural rules for collective actions conducted in the public interest and will also create a new category of actions, group actions, where the public interest is not required. This shall be sectoral (injunctive and compensatory) for claims arising from consumer contracts, from health damages caused by unforeseen environmental incidents and in labour cases.
Ireland	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	No horizontal or sectoral collective redress mechanism. Mass claims are dealt with under the general rules of civil procedure, which only allow for collective claims in very limited circumstances. These take the form of representative actions. In a representative action, a person can initiate proceedings on behalf of a number of people however, the application of this mechanism is, in practice, very limited. The representative must be authorised by each member of the class and the claim can only lead to an injunction. The members of the

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
		group on whose behalf the representative action is conducted must have the 'same interest'. This requirement is applied restrictively by the courts. The judgement only binds those represented by the representative. Public funding is not allowed for representative actions. There are no detailed procedural rules. Test cases have also been used to deal with instances where a number of individual claims are brought against a defendant alleging essentially the same harm.
Italy	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	There is no general collective redress mechanism. Multiple claims may be joined together under the regular rules of civil procedure.
Latvia	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	No specific horizontal collective redress mechanism.
Lithuania	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	There are two general collective redress mechanisms. One mechanism is the Protection of Public Interest proceeding (Article 49 of the Lithuanian Civil Procedure Code) and the second mechanism is a Group Action Proceeding (Chapter 24/1 CPC). In practice, the protection of the Public Interest mechanism is used to gain injunctive relief whereas the group action proceeding is used for both injunctive and compensatory relief. One of the key differences between both

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
		mechanisms is standing. Legal standing for claims to protect the public interest, are restricted to a prosecutor, state, municipal authority, or other persons identified in law. Precise conditions for standing under this mechanism is contained in specific laws. Under the group action procedure, there are no specific provisions on standing. In addition, joinder of claims is possible through which both injunctive and compensatory relief is available. This can be compulsory joinder, where a claim is brought by several co-claimants together or against several defendants, if the subject of a claim is rights or liabilities assumed by them together in accordance with the laws. Optional joinder is used where a claim is brought in the same way, when it concerns rights or liabilities of the same nature, when each separate demand could be the subject of an independent claim.
Luxembourg	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	No specific horizontal class action mechanism. Traditional devices for multi-party proceedings are available (joinder). A specific type of representative action may be brought by a duly authorised entity to request the judicial review of an administrative decision issued by a public body. Such action can only be brought if is restricted to the protection of the collective interests of the organisations and does not extend to cover those of is individual members.
Malta	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the	There are two types of horizontal collective redress mechanisms. A Collective Action, which allows two or more claimants to bring their actions in one application if the subject matter of the actions is connected or the decision of one of the actions may affect the decision of the

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
	ground they are grossly unfair.	other action. Also, if the evidence in support of one action is generally the same for each action. Collective Proceedings, which is limited to actions asking for the cessation of an infringement, the rectification of the consequences of an infringement or compensation for harm. An action can be brought on behalf of a class of members by a registered consumer association/ad hoc constituted body or by a class representative. This is available for breaches of consumer law and competition law. Both mechanisms allow for injunctive and compensatory relief.
The Netherlands	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	There are three general collective redress mechanisms. The Collective Settlements of Mass Claims Acts (WCAM). These are primarily monetary damages but can include other obligations that require specific performance as these are compensation of damage in kind. The collective action procedure based on articles 3:305a-305d Dutch Civil Code. Only injunctive or declaratory relief is possible. (solely injunctive/declaratory). Action on the basis of mandate/power of attorney and/or transfer/assignment of claims to a special purpose vehicle. The mechanism is not specifically tailored to mass claims but is used in practice for collective redress. On standing, only non-profit entities, either ad-hoc or pre-existing, that meet certain criteria can act in collective actions or conclude collective settlements under the WCAM. The entities under the special purpose vehicle do not need to be of a non-

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
		profit character. A new legislative proposal on collective actions, including damages actions, started on 16 November 2016. The proposal covers all substantive areas of law. It proposes compensatory relief via the collective action procedure.
Poland	The payment of interest referred to in Articles 5 to 7 may be claimed in the name and on behalf of the creditor referred to in Article 3 by the national or regional organisation acting on his request, provided that the Statute of the organisation concerned provides for the protection of interests of the entities such as the creditor.	Polish civil procedure provides for: • A class action procedure of judicial nature (injunctive and compensatory) available for: consumer law, product liability, other tort liability cases (environmental protection law, competition law, IP law, labour law, as far as they concern tortious acts). • A representative procedure of an administrative nature in consumer cases (injunctive)
Portugal	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	No general collective redress mechanism but sectoral in public health, environment, quality of life, protection of consumers, cultural heritage and public domain. With specific standing rules. This is known as a popular action. Once admitted, a popular action proceeds according to general rules of civil procedure, set out in the Code of Civil Procedure, which is supplemented in group claims by Law 83/95. The claimant may therefore, obtain all the remedies which would ordinarily be available in civil actions, including compensatory damages and injunction as well as declaratory relief and interim relief. Any individual or association with legal personality may bring a popular action as a representative regardless of whether they have a direct interest in the dispute. There are no formal rules on standing, just that the associations bringing claims must not have a conflict of interest and their articles of

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
		association state that one of their purposes is the defending of the relevant interests at stake. In addition, local authorities have standing regarding the interests of their residents. In addition, there are procedures specific to the administrative courts, which are designed to deal with mass claims on a 'test case' type basis. This is a type of test case mechanism that is designed to accommodate large numbers of related claims being brought at any one time.
Romania	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	No horizontal mechanism but procedural mechanisms of co-participation and voluntary intervention available in the Romanian Civil Procedure Code. Both injunctive and compensatory relief are available. In co-participation, several people may be claimants or defendants if the case refers to a common right or obligations, if the rights of obligations have a common cause or if between them, there is a close connection. In voluntary intervention, an intervention in support of the rights of its authority, or ancillary or in support of the main claimant is allowed. The Romanian Civil Procedure Code permits, in joint actions introduced by undertakings, compensation for non-realised profit (lucrum cessans) in addition to the effective damage (damnum energens). It is possible to seek an injunction and compensation in one single action. The injunction is of an interim nature.
Slovakia	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the	No comprehensive collective redress regime. The Code of Civil Procedure (sec. 126 CSP) contains elements of collective protection of rights in the procedure for representative actions. These are contained in the rules for the management of mass judicial claims where at least 10 submissions are addressed

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
	ground they are grossly unfair.	to the same court by the same entity during one day to deal with practical problems associated with mass submissions. Some special legal acts provide for the distinct role of specialised bodes in judicial proceedings (representative entities) authorising them to initiate selected types of procedure. This can be a lead claimant, a lawyer or association, depending on the type of claim. Despite the limitation of standing of such entities, proceedings follow the classical principles and rules of civil contentious proceedings with any special features of distinction. More over some of these proceedings involve a widespread application of lis pendens and res judicata principles. Only injunctive relief is available through these proceedings, restraining a defendant's further conduct or the removal of unlawful situations.
Slovenia	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	There is currently no horizontal collective redress mechanism. However, the Civil Procedure Act contains measures regarding the joinder of claims and, as of 2008, a so-called 'model procedure'. Although dealing with multi-party litigation, these mechanisms do not allow an action to be brought by a representative claimant, rather they seek to case managed existing claims in a more efficient and economic manner. It is expected that a broader mechanism of collective redress shall be established in Slovenia, based on the Commission Recommendation. This Collective Redress Act will enter into force six months after is publication in the Official Gazette (presumably sometime in 2018) and will apply to events of mass damage occurring after its entry into force. The new act is supposed to serve as a basis for collective redress (injunctive and compensatory) in

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
		specific civil, commercial and labour law matters.
Spain	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	The Code of Civil Procedure provides some rules on collective redress which are considered to be of general application. However, there is no specific horizontal or general collective redress mechanism. In addition to specific rules on collective redress, it is possible to join claims of any type which are similar in nature under the regular rules of civil procedure at the discretion of the court. The claims must be identical or connected and arise out of the same facts and it must not be convenient for them to be heard separately.
Sweden	Possibility exists under national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	General mechanism under the Group Proceedings Act. Collective proceedings in all types of civil claims may be brought under this Act. Both compensatory and injunctive relief is available. Collective proceedings may be brought by : • An individual member of the affected group, which can either be a natural or a legal person. • An association of consumers as part of an organisation group action. • A public authority designated by the Government as competent to bring collective proceedings on behalf of the public in certain fields. Following an application by a prospective claimant, the Court will consider the commonality of the claims between members, whether the group is suitably identifiable and well defined and whether there is a clear advantage in bringing a group claim rather than the group members bringing separate individual actions.
The United	Possibility exists under	Both general and sector specific collective

Member State	Standing given to organisations representing SMEs[154]	Features of the legal systems of the Member States, which accommodate standing given to representative organisations.[155]
Kingdom	national law, but the role of representative organisations is strictly limited to asking the court to grant an injunction against contractual terms drawn up for general use on the ground they are grossly unfair.	redress mechanisms exist. Group Litigation Orders and representative proceedings can be used in all type of claims. Group Litigation Orders can be used in all types of claims and allows the court to group together cases which raise one or more common issues. There is no formal requirement for standing under the general collective redress mechanisms, it is enough for the claimants to have normal legal capacity. Under the Civil Procedure Rules, a representative claimant is required to have the same interest in the claim as those represented. Ultimately, whether or not a party may act as a representative is at the discretion of the court.

9. OVERVIEW OF OPTION ELEMENTS TO ADDRESS THE INDIVIDUAL PROBLEMS

This Section provides an overview of the option elements available to address the specific problems identified in the problem analysis. For each specific problem a set of option elements is available. Table 1 lists option elements available to address each particular potentially harmful trading practice, while Table 2 focuses on the option elements available to address the lack of effective redress.

Table 1: Option elements addressing the specific potentially harmful trading practices. Option elements discarded at an earlier stage of the Initiative are highlighted in a darker shade.

Potentially harmful trading practice	Option elements	What would the option elements entail?
Sudden, unilateral changes to terms and conditions	Transparency	Platforms to inform business users of significant changes to terms and conditions in clear, layman language and to grant them a minimum notice or grace period for the introduction of changes. This option would be without prejudice to overriding reasons of public interest (e.g. security).
	Fixed, mandatory notice periods	Imposition of fixed, mandatory notice periods for changes of Terms and Conditions *This option is discarded as an inappropriate 'one-size fits all' approach unsuitable to the diversity of different platform business models, which could imply unpredictable burdens on the side of platforms.*
Delisting/suspension	Transparency	Online platforms to state clear reasons for suspending or delisting their trader users' accounts or services/products – except for overriding reasons of public security.
	Regulating the reasons for delisting/ termination	Establishing a list of permitted or forbidden reasons for delisting/suspension. *This option is discarded as it would be burdensome, is not future-proof and could be circumvented by stipulating 'false' reasons.*

Ranking	Industry standards and trust marks	Stakeholder group to share best practices on natural and paid-for ranking functionalities. Encourage the development of industry standards for trusted ranking, trust marks and auditing.
	Disclosure of the general criteria for ranking traders, on the platform	Online platforms would explain in their contractual terms and conditions the high-level criteria for natural and paid-for ranking mechanism on the platforms, with due safeguards to trade secrets.
	Paid-for-ranking transparency in relation to general conditions and expected effects of	Online platforms would make transparent the general conditions and expected effects of paid-for-ranking for the business users contracting to use the service.
	Transparency of the ranking algorithm	Requirement for platforms to disclose to their business users the algorithms used and changes to them. *This option is discarded as it would generally interfere with trade secrets and make the functioning of the ranking algorithm vulnerable to interference. It would not effectively address the problem faced by the business users.*[157]
Data	Monitoring of development of data-related issues in the platform-to-business relation	An EU Observatory of the Digital Platform Economy ('EU Observatory') set up through an expert group would have as part of its mandate to monitor the evolution and emergence of issues related to data access and use by both platforms and their business users. This would include sharing of both non-personal and personal data, e.g. e-mail addresses, with business users, and to what extent business users request access to such data in full compliance with the GDPR.
	Supporting measures would encourage industry sharing, access and use of non-personal data	This would be part of a wider Commission initiative on the data economy in 2018. It would include a series of complementary measures that would encourage fair policies of non-personal data sharing, e.g. by guidelines, provide technical support, e.g. by establishing data support body and spread good practices in the industry. The process and effectiveness of the measures would inform the monitoring mandate of the EU Observatory.
	Transparency of platforms' data policy	Platforms to provide business users with a clear, accessible explanation of the platforms' data access and use policy in their terms and conditions.
	Data access (for business users) obligations imposed on platforms	Platforms to extend data access rights to business users for specific categories of data *The measure would have significant legal and technical costs for platforms. Importantly, the impact of mandated access to specific sets of data for business users on the platforms' business model cannot be precisely quantified. The option is therefore discarded at this stage as disproportionate in light of available evidence.*
	Ban on contractual clauses that prevent business users from retrieving and/or using specific types of data outside the platform	Requirement for platforms not to prevent business users from using data accessed from, or through their activity on the platform outside the platform. *This option is discarded as such clauses cover a too broad variety of reasons why the platform is protecting its business secrets or, more generally, its business model as an intermediary. A wide block ban of such clauses would favour business users (beyond general fairness principles) but create significant risk of harm to platforms and consumers.*
	Possibility for	Platforms to give business users the opportunity, after the completion of a

[157] SMEs do not usually have the ability to understand the algorithms, and disclosing them would normally not allow using data (to comply with GDPR regulation), which makes the disclosure useless.

	business users to ask for customers' consent to obtain and process e-mail addresses	transaction and the payment of the commission, to ask consumers for their consent for both obtaining and for processing their e-mail addresses in full compliance with the GDPR.
Discrimination	Transparency on differential treatment	Platforms to publish general policy guidelines spelling out any differential treatment they apply as regards entities controlled by them as compared to (third party) business users.
	Transparency on conditions for use principal and auxiliary services	For advertising and billing purposes, platforms shall clearly separate auxiliary services and conditions for their use from the principal online intermediation service.
	General non-discrimination obligation	Platforms would be banned from favouring certain businesses active on their market places, including platform-owned business users or bundled, auxiliary services (e.g. payment, advertising), be it in terms of transparency, access or any other conditions. *This option is discarded as it would be disproportionate, as platforms would not be free to determine their price structure and bundle services.*
Most-favoured-nation clauses	Transparency on use of MFN-clauses and requirement to justify their use	Platforms would be required to explicitly justify the use of MFN clauses in their contractual terms and conditions.
	Ban of MFN-clauses	The use by online platforms of most-favoured-nation clauses (whether on price, availability, quality) would be banned, either outright or in specific forms. *This option is discarded at this stage as it would be disproportionate in view of current evidence.*

Table 2: Option elements for addressing the lack of effective redress. Options discarded at an earlier stage of the Initiative are highlighted in a darker shade.

Problem	Option elements	What would the option element entail?
Ineffective internal escalation procedures	Requirement for an effective internal escalation mechanism	Platforms to provide an internal complaint-handling mechanism, which should comply with certain effectiveness principles: speed, accessibility, accountability.
Inexistent external **redress mechanisms**	Industry-led alternative dispute resolution (mediation)	Call on industry to create and fund an EU-wide external Alternative Dispute Resolution (ADR) mechanism to provide quick, independent and confidential outcomes. It should comply with certain quality requirements to ensure its effectiveness: independence, fairness, speed, transparency (i.e. procedural outcomes to be published, public decisions), accessibility, affordability.
	Platforms to list existing EU mediation bodies or the industry-led alternative dispute resolution mechanism in their contractual terms and conditions coupled with an obligation to act in good faith in relation to such proceedings	Platforms to inform business-users in their contractual terms and conditions of either (i) existing EU mediation bodies that adhere to the European Code of Conduct of sectorial mediation codes of conduct that have been inspired by the former, or to bodies that are accredited under any national accreditation and registration procedures or (ii) the industry-led alternative dispute resolution mechanism if set up, that can be used for dispute resolution. This would be coupled by an obligation for platforms to act in good faith in relation to such proceedings.

	National competent authorities to be designated by Member States to be used for dispute resolution.	Obligations for Member States to ensure effective enforcement and efficient dispute resolution of the P2B rules by designating competent authorities. *This option is discarded, as it would have a disproportionately high costs for Member States who would need to either create a new authority or designate an existing one and in both cases provide sufficient resources for the authority to fulfil its (additional) tasks.*
	EU level monitoring, coordination or enforcement	Setting up an EU Observatory of the Digital Platform Economy ('EU Observatory') through an expert group to monitor online platform ecosystems, with the possibility of publishing opinions and recommendations. An Internet portal will be launched in parallel where business users can anonymously register specific problems they have encountered in their dealings with online platforms.
		Legal reporting obligation on platforms on the use and effectiveness of their internal complaint-handling mechanisms.
		Review clause in legal instrument to (i) set a time frame for additional measures to improve redress for business users in case of non-compliance or lack of effectiveness including any industry-led mechanism, and (ii) assess the effectiveness of industry-action on P2B problems involving ranking, discrimination and data.
		EU-level ombudsman to be set-up to deal with referrals from national mediators, and to assess recurring transversal and cross-border issues. *This option is discarded as it is disproportionate.*
		Creation of a fully-fledged EU agency to enforce the proposed fairness P2B principles. *This option is discarded as it is disproportionate.*
Limited access to judicial remedies	Improved access to injunction proceedings	Improved access to injunction proceedings to ensure more expeditious and effective cessation of infringements of P2B rules. *This option is discarded as most Member States have in place injunction proceedings that can be used by business-users for B2B disputes[158]. Therefore, there is little added value in introducing a dedicated instrument where more legal certainty on P2B rules is required to give business-users the required confidence and predictability in using existing injunction procedures to provide an effective remedy.[159]*
	Ban of exclusive choice of law/forum clauses in favour of extra-EU law/jurisdictions	Platforms that intermediate EU businesses and consumers would be banned from using exclusive jurisdiction/law clauses in their terms and conditions. *This is discarded as such a ban would be inconsistent with businesses' freedom to contract.*[160]

158 Collective redress mechanisms for consumer matters for injunctive relief are in place in all the Member States, see Report from the Commission on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), forthcoming (in ISC), p. 4 ff..

159 It is noted that the Commission is currently separately reflecting on possibilities to enlarge the scope of the existing Injunctions Directive including by enabling business representatives to bring action to defend the collective interest of consumers, see: Inception Impact Assessment, A New Deal for Consumers – revision of the Injunctions Directive, Ares(2017)5324969. Such actions, if anything, improve the effectiveness of existing injunctions procedures but obviously serve to protect consumers rather than businesses.

160 This freedom to contract is reflected inter alia in Article 3 of Regulation (EC) 593/2008 (the 'Rome 1 Regulation') and Article 14(1)(b) of Regulation (EC) 864/2007 (the 'Rome II Regulation') and in Article 3 of the Hague Convention on Choice of Court Agreements (the 'Hague Convention'. The EU deposited its instrument of acceptance to the Convention in June 2015. The Convention entered into force in respect of Mexico and the EU Member States (excluding Denmark) on 1 October 2015.

	Provisions to improve business user's access to court[161]	Harmonised EU rules that are specific to P2B relations will provide more legal clarity than any general B2B rules. Their effective application will in addition not be impaired solely as a result of the cross-border nature of P2B relations, as is the case for existing national B2B legislation. The enforceability of these rules in court will therefore face lower barriers than any existing legislation. Provisions giving associations representing businesses a right to seek redress can further improve the enforceability of any harmonised EU rules on P2B relations. Given their dependency-induced fear of retaliation, business users themselves may namely continue to leave issues unresolved. Such collective interest redress possibilities to enforce mandatory EU rules on P2B in addition optimise the likelihood that any court in the Member State of the business user (and of their representative bodies) declare themselves competent to deal with cases brought under such rules regardless of whether the contract between the platform and the business user declares another forum and law applicable. Harmonised, non-contractual P2B obligations cannot namely, in principle, be derogated from by contract and renders courts competent in the Member State of any business user that suffered harm resulting from a breach of those same rules. If a case is brought by a representative body with the aim of remedying or preventing widespread harm to business users of platforms, the likelihood that national courts accept that such cases are brought in the public interest and lie outside any individual contractual relationship between platforms and their business users will be further increased.[162] Collective interest redress thus improves the enforceability of any EU rules on P2B relations in full compliance with the applicable rules on jurisdiction (notably Brussels, Rome Regulations, and the Hague Convention). This is the case regardless of whether EU or extra-EU courts and laws have been declared by contract to apply to *contractual* obligations.

[161] This option would be limited to providing standing in court for business representatives to enforce specific P2B legislation. It will complement any collective redress possibilities that the Commission is considering in the consumer protection area (cf. fn. 161), where business representatives could be given standing to enforce consumer protection legislation.

[162] Cf. case C-167/00 *Henkel* 2002 I-08111.

10. INDIVIDUAL ASSESSMENT OF OPTION ELEMENTS

Table 1 and 2 below assess the individual option elements based on their effectiveness, cost efficiency and coherence.

Based on analysis carried out in these tables, Table 3 gives an overview of discarded policy elements.

Table 1 Assessment of option elements to address potentially harmful practices

Practices	Option elements	Effectiveness *To what extent would the option element attain the specific objectives?*	Cost efficiency *What is the cost/benefit ratio in attaining the specific objective?*	Coherence/ /Fundamental Rights/Consumer Protection/Data protection/ Innovation *Is the option element coherent with the objective for the healthy platform ecosystem?*
Sudden, unilateral changes to terms and conditions absent notice period	**Transparency:** Platforms[163] to (i) inform business users of significant changes to terms and conditions, and (ii) grant a reasonable notice or grace period for firms to adapt.	• Ensures transparency of terms and conditions changes for business users • Contributes to a more predictable business environment: a reasonable notice period allows businesses to adequately prepare to announced changes thus limiting possible negative effects.	• Operational and financial impacts can be expected to be minimal, i.e. one-off effort for platforms to adapt their implementation and communication of their terms and conditions policy. • Could reduce platforms' and businesses' litigation costs if the option results in a reduced number of P2B disputes. • Would reduce legal uncertainty for business users (especially small enterprises), i.e. decreased costs for external legal expertise used for complying with contractual obligations at	• Platforms remain free to set their general policy and to organise their business. • Innovation potential is not impacted since platforms may upgrade the functionality of the product/service proposed. Most often, these functionality upgrades are minor and do not trigger changes in the terms and conditions, but are simply rolled out to the business users and consumers. Major

[163] The term of platforms is not used here as a legal definition and is meant to broadly cover for instance e-commerce platforms, social media platforms, app stores and online general search engines.

			a short notice.	innovating features that involve terms and conditions changes can still be implemented in schedules fully controlled by the platforms, if needed with predictable grace periods for adaptation. • This increased transparency in the contractual platform to business relationship will positively impact on the data subjects' rights relating to information on changes in the data processing policy of platforms.
Delisting of products, services or businesses or suspension of accounts without clear statement of reasons	**Transparency:** Platforms to provide relevant business users with an actionable statement of reasons upon delisting of accounts/individual products/ services.	• Clear justification of the delisting (with reference to the relevant clause in terms and conditions), or additional explanations where necessary to make the justification actionable. This would give the business user the possibility, when content is removed, to appeal that decision or to take the necessary measures to be reenlisted as soon as possible. • Increase of the perceived fairness of the online platform ecosystem.	• Costs for platforms would be linked to the one-off adjustment in the platforms' information systems. • More transparency on delisting could lead to fewer complaints for businesses and thus to reduced administrative and legal costs for platforms. • Reduced costs for businesses when remedying issues: both less direct costs in resources spent pinpointing the exact issue, and less downtime until the problem is solved, in case of associated suspensions or product delistings. • Platforms could face additional costs in safeguarding their customers and businesses against fraudulent businesses who might use the additional information	• Platforms remain free to delist or suspend when they deem necessary. • This measure has no direct impact on innovation. Improving information on delisting contributes to safeguarding the fundamental freedom to conduct a business in Article 16 of the Charter[164]

[164] On the guarantee of the minimum essence of Article 16 Charter in contractual relationships See ECJ, Case C 426/11, 18 July 2013, Mark Alemo-Herron and Others v Parkwood Leisure Ltd; Case C-283/11 Sky Österreich 22 January 2013.

			received to circumvent or 'game' existing safeguarding measures.	
Ranking	**Transparency** in relation to general conditions and expected effects of paid-for ranking.	• Increase to the predictability for business users, and allow them to make better informed business decisions, avoiding them unnecessary spending on platform features that under-deliver or do not deliver a return.	• Limited cost burden on the platforms[165] for rendering transparent in their terms and conditions and possibly other supporting media the specific conditions of their ranking mechanisms. • The businesses on the other hand would in part save money, improving the ecosystem's overall efficiency. [166]	• The obligation would not include in any way revealing trade secrets such as or other sensitive data. It would thus have a positive effect on the trust in the platform economy, without creating vulnerabilities for the ranking algorithm, security of the platform, or its business model. It would allow for innovation (business or technical), while ensuring the general principle of transparency towards the business users of any emerging system.
	Industry dialogues, standards and trust marks, both for natural and paid-for ranking	• A prerequisite for the effectiveness of this measure is the alignment of all interest involved and the existence of sufficient incentives for both business users and platforms to participate. Achieving this, particularly regarding ranking, is not realistic. In addition, stakeholders need to be represented equally, a criterion that leaves the much less organized business stakeholders at a disadvantage. • Could in theory allow for the possibility to issue-specific technical solutions and give	• Low participation cost from platforms to industry structured dialogues. • A call to engage in voluntary audits would place a moderate cost burden on platforms.	• Could have positive effects on the platforms' ability to retain and attract business users, through enhanced transparency and trust in the platforms' services. • Particularly beneficial to small platforms, opting into transparency and being exposed to dialogues on best practice with competitors and users.

[165] Given the specificities of ranking in online general search engines beyond contractual relationships and intermediation on the one hand see the more detailed problem description and estimation of costs in the IA under chapter 2.1.1.3 and 6.2.1.1. respectively.

[166] Regarding the importance for businesses in of ranking by online general search engines see explanations in the IA under chapter 6.2.2.

		flexibility in adapting to fast-evolving technologies. • Could support industry-trust, through dialogues and voluntary auditing, in addition to the transparency of paid-for-ranking legally required by consumer law.		
	Disclosure of the criteria for natural and paid-for ranking	• Such disclosure would assure business users of a predictable environment for how their offers are presented to consumers on the platform, for both natural and paid-for ranking.	• Limited cost burden on the platforms for rendering transparent in their terms and conditions.	• The disclosure requirement would not be as prescriptive as to hinder the platforms' trade secrets concerning their ranking algorithms, or lead to inadvertent manipulation. It would give up-front clarity to the service the platform offers to its business users and should lead to enhancing trust of both business users and consumers in the platform.
Data	**Supporting measures** would encourage industry sharing, access and use of non-personal data	• Supporting measures would address practical technical or legal issues encountered by businesses (both platforms and their business users) and aim at offering practical solutions. • Structured dialogues with industry will surface good practices, and could lead to sector or issue-specific recommendations. This would punctually solve issues pointed at by businesses. • The coordination and sharing of good practices would have positive effects on the lack of awareness and clarity on the policy on non-personal data in relation to the business users. • The option would not, however, address issues related to the access to and the sharing of personal data in a P2B relationship, e.g. customer e-mail	• This would have minimal cost implications on the platforms' side, but potentially significant benefits in terms of improving clarity and awareness of data policy, as well as surfacing emerging issues related to data.	• Through the involvement of industry – platforms, business users, and data intermediaries – the option would include by its design safeguards for platform innovation. • It should encourage innovative solutions to allow for increasing access to and sharing of non-personal data and expansion of good practices across industries. • The option would not only target a fairness objective in business relations, but would support data-driven innovation across the value chain, supporting European businesses in developing their capability

		addresses.		for data-driven innovation.
	Monitoring of development of data-related issues in the platform-to-business relation	• The monitoring function of the EU Observatory would help surface and raise awareness of the issues emerging. • The monitoring function would ensure that adaptive and responsive intervention is designed as the data-related issues evolve, and particularly the issue of access to and sharing of customers' e-mail addresses.	• Cost implications for the EU Observatory will arise for the European Commission.	• The monitoring function would directly address the need for coherence and proportionality of measures as the issues evolve. • In particular, the EU Observatory would integrate findings from the evolution of the supporting measures for the data economy. • Monitoring developments of data usage would further complement and support the implementation of the GDPR. More specifically, such monitoring may better inform the Commission in formulating standard conditions in the relationship between data controllers and data processors[167] and help data controllersdemonstrate they have complied with their obligations under the GDPR. •
	Transparency on data policy	• The legal provision could bring more certainty and predictability to both business users and to platforms in the use of data. • The measure could lead to more restrictive data policies imposed in the terms and conditions of online platforms.	• The initial cost on the platform should be limited to legal expertise and revision of the terms and conditions, where unclear language is used currently. • The measure could be burdensome, however, for small platforms who have not defined clearly a data policy. They	• As the core of the measure is transparency of the data policy in what concerns data collected and used by the platform and by the business user, the measure should have limited effect on the platform's ability

[167] Article 28 (7) in conjunctions with Article 93(2) GDPR.

		Platforms would be incentivized to spell out clearly their right to collect and use for wide purposes data from their business users and the transactions they generate on the platform, while defining more restrictively what data business users can access and use.	would be incentivized to adopt broad clauses, restrictive on their business users, to limit risks and legal costs.	to innovate. • An increase in transparency can have positive effects for the innovation potential of business users.
	Possibility for business users to ask for customers' consent to process e-mail addresses	• This would effectively solve the issue of business users not being able to directly contact customers via e-mail. • This in turn would enable the most successful business users to scale up and, ultimately, to become more independent of platforms.	• The measure would entail costs for platforms to ensure an adequate technical solution and for business users to safeguard full compliance of their request with the GDPR.	• Intermediating between customers and business users by limiting direct contact significantly or channelling it exclusively via the platform is an integral part of the platforms' business model. If customers consent, a negative effect on the platforms' business model could be possible. Arguably, providing this possibility can also have a positive effect on competition and innovation, if platforms increase their efforts to keep both business users and consumers on their platforms. • At this point of time it is difficult to assess this potential negative impact due to a lack of evidence whether consumers are keen on consenting to such a processing, and whether, and to what extent, are prepared to disintermediate.
Discrimination of businesses and favouring of	**Transparency on differential treatment**	• Businesses could publicise the disadvantageous treatment imposed on them or decide to focus on platforms that differentiate less or in areas that are less important to the business users. • The now-savvy end customers could move from the platform to the business'	• The platforms would face the costs of firstly reviewing their business processes to identify those involving differential treatment, and secondly, the costs linked to the publication of the measures. • However, overall, such transparency could drive down the final cost of the	• No change of business model required for platforms that use differential treatment for different groups of users. • The impact on innovation would likely be positive. Service platforms could be led

platform's own competing services		own distribution channel. In turn, this could lead to platforms changing their practices in this area.	product or service to the consumer.	to improve their own offer. • Enabling businesses users to better understand the strategy contributes to strengthening the right of free competition under Article 16 of the Charter.[168] •
	Transparency on conditions to use principal and auxiliary services	• Would enable business users to compare the costs of different services at the advertising stage and make a better informed choice.	• Good level of cost-efficiency as would entail limited costs for platforms (one-off cost for adapting format of advertising and billing, but no extra processes needed)..	• Proportionate since would leave platforms free to determine their price structure and to bundle services.
MFNs	**Transparency on use of MFN-clauses, and requirement to justify their use**	• Increased clarity for business users on the platform's use of MFNs. They could then take an informed decision to contract (or not) with the platform. • Increased scrutiny over platforms' use of MFN clauses, including as a potential additional competitive parameter, could have a dissuasive effect particularly on the use of very restrictive clauses.	• Would contribute to a more predictable business environment for users without interfering with platforms' business models. Would allow for increased external scrutiny.	• Would not interfere with platforms' business models since platforms would be left free to decide on MFNs' use. Would allow better understanding of MFNs' role (e.g. pros/cons) for market entry.

[168] This is based on an understanding of Article 16 Charter comprising three rights: on the one hand the individual fundamental the right to conduct a business and the freedom of contract. Those individual rigths are complemented by the right of free competition which has a programmatic character requiring the safeguarding of an economic and social program for the establishment of equality of opportunity which guarantees existential dignity within the context of a market society.

Table 2 Assessment of option elements to address lack of effective redress

Lack of Redress	Option elements	Effectiveness *To what extent would the option elements attain the specific objectives?*	Cost-Efficiency *What is the cost/benefit ratio in attaining the specific objective?*	Coherence/innovation *Is the option element coherent with the objective of an healthy platform ecosystem?*
Ineffective internal complaint-handling mechanisms	**Requirements for an effective internal complaint-handling mechanism**	• Effective, would offer businesses a means to tackle the current lack of redress with the possibility for tailor-made replies and a quick and easy process.	• Would entail one-off effects for all platforms as most platforms can be expected to improve existing complaints systems. • Additional staffing costs to man the mechanism possible where internal redeployment is not possible or not sufficient. This is likely in particular in case of very small or start-up platforms. • Could reduce platforms' and businesses' litigation costs if the option results in a reduced number of P2B disputes and businesses were encouraged to use it. • Provided that very small platforms are excluded, the cost-efficiency ratio is overall positive since a more effective internal redress is the form of redress which is expected to address the greatest number of issues that business users experience on online platforms.	• If technology-neutral, the obligation could it give platforms flexibility to decide how they introduce such a mechanism, which could include automated systems such as chatbots for the initial screening of complaints and leaving only justified claims, to be dealt with by a person. • Could raise barriers for start-up platforms when they try to scale up (see also under cost-efficiency).
Inexistent external redress mechanisms	**Industry-led alternative dispute resolution (mediation)**	• Effective, provides a quick, accessible and affordable alternative means of dispute resolution for both platforms and businesses, while leaving businesses and platforms free to bring their case before a competent court, either in parallel with or after the end of the proceedings at the external redress mechanism.	• Would entail some costs to create a new mechanism, but since these are to be shared between multiple platforms, the contribution for each individual platform will be minimal. • Where an effective internal redress mechanism exists, this may limit the number of referrals made to such a mechanism. • Could reduce platforms' and businesses' litigation costs if the option results in a	• Provides an alternative means for dispute resolution that can lead to a mutually agreed outcome quickly that can enable a business-relationship to continue.

			reduced number of P2B disputes and businesses were encouraged to use it.	
	Platforms to list existing EU mediation bodies in their contractual terms and conditions or invite participation in industry-led mediation coupled with an obligation to act in good faith in relation to such proceedings	• Would increase the use of an alternative dispute resolution mechanism with the best proven track record in solving P2B disputes.[169] Would leave businesses and platforms free to bring their case before a competent court, either in parallel with or after the end of the proceedings at the external redress mechanism. • Introducing an obligation on platforms to act in good faith in relation to identified mediators encourages constructive dialogue and resolution in such proceedings.	• Operational and financial terms can be expected, i.e. one-off effort for platforms to adapt their terms and conditions. • Could reduce platforms' and businesses' litigation costs if the number of P2B disputes and businesses were encouraged to use it.	• Provides an alternative means for dispute resolution that can lead to a mutually agreed outcome quickly that can enable a business-relationship to continue.
	Establishment of an EU Observatory through an expert group	• No immediate impact on quality of redress but mid- and long-term, the measure would improve redress possibilities for business users, both by issuing recommendations and by providing data that businesses can use to substantiate their claims in complaint procedures or court proceedings. • An independent body dedicated to monitoring the platforms/businesses ecosystem is likely to be perceived positively by the stakeholders, and to reinforce their trust.	• Depending on the legal and administrative forms of the **EU Observatory**, associated costs would be borne by the European Commission and (less so) by the Member States, and could be in line with the costs for similar groups set up by the Commission. In return, the group would (among other) produce valuable data, analyses and recommendations that would offset other future expenditure for the Commission.	• The direct impact on innovation is negligible, but indirect impact could be positive, as the measure would enforce businesses' trust in the ecosystem, leading to more participation on their behalf to the Digital Single Market.
	Legal reporting obligation for platforms on the use and effectiveness of their internal	• The measure would be beneficial for the businesses selling on platforms, as they would be provided with data allowing them to foresee potential issues, rates of success of potential claims, etc. Internal	• The costs for platforms would consist in the set-up of reporting systems, and to ensure the reports are publishes regularly. These costs are estimated to be low to very low, as the information is	• No impact on innovation is foreseen for this measure.

[169] Where online platforms and their business users did engage in mediation already, disputes were solved completely in without difficulties in 64% of cases, cf. ECORYS 2017.

	complaint-handling	redress systems would become one of the parameters a business would consider when choosing platforms, leading these to improve their systems to keep/increase the number of active businesses. • In addition, the measure would empower businesses choosing to file complaints against a platform, by providing a source of information to potentially substantiate their claims. • Would inform the Commission and the **EU Observatory** in their assessment as whether further steps are required to improve redress.	already available and needs only to be compiled and posted on a website. The businesses are not foreseen to incur any costs.	
	Review clause in legal instrument	• This measure would increase the trust of the stakeholders in the legislator's willingness to act if the situation warrants it. Platforms would have a strong incentive to self-regulate or apply the new rules in such a way as to ensure that developments are effective.	• No costs are foreseen for the businesses or platforms. The Commission would incur the usual review costs – assessment and analysis of the situation in advance of the review term, potential changes to the legislation if needed, etc. These costs can however be considered as part of the regular activity of the legislating bodies.	• The review clause could concern innovation as well, leading the stakeholders to keep this aspect in mind. Overall, the indirect impact, if any, is likely to be positive.
	Legal provisions inherently improve business users' access to (EU) courts. To be combined with	• Improves the ability for businesses to bring proceedings against the platform in the (EU) courts by putting in place P2B rules that can be interpreted by EU courts as tort law[170] (which would allow EU Courts to discard exclusive choice	• Reduces the cost for businesses to bring a legal challenge. • Addresses the fear of retaliation, as representative bodies can act on behalf of business users, either at their own initiative or informed by (anonymous) complaints.	• Retains platforms' freedom to choose law and forum while offering businesses an alternative means to bring claims against platforms. • No real impact on innovation

[170] In *Ingmar v Eaton* (Case C-381/98 of 9 November 2000), in the context of the Commercial Agents Directive, which guarantees certain rights to commercial agents established in the Community after termination of their agency contract, the ECJ held that Community law is designed to protect commercial agents, in particular after termination of the contract and that the mandatory nature of the provisions in question obliges the Member States to put in place mechanisms for providing reparation. Where a commercial agent carries on his activity in the Community, he is therefore eligible, irrespective of the law by which the parties intended their contract to be governed, for the measures of reparation after termination of the contract which are provided for by Community law.

	collective redress, also to overcome fear of retaliation.	of court agreements) according to Member States' rules on jurisdiction in line with the Hague Convention[171], or as overriding mandatory provisions according to Rome I[172] and Rome II[173] (which would allow EU Courts to discard exclusive choice of law agreements). This is especially the case where a collective interest action is brought under the relevant EU P2B rules which is not directly linked to the contract concluded between individual businesses and the platform.[174]	• In cases where platforms' behaviour warrants a legal challenge, potentially increases legal costs if businesses seize the opportunity to bring more cases due to improved access to EU courts – but this is the logical consequence of improving business users' access to justice.	likely.

[171] Article 6(c) of the Hague Convention ("giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seized").

[172] Article 9 of the Rome I Regulation ("Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation").

[173] Articles 6(1), 6(4) or 26 of the Rome II Regulation, on Article 6(1) see ECJ, judgment of 28 July 2016, Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl: the main law governing the injunction launched a consumer protection organisation against T&C is governed by the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

[174] *Henkel* (Case C-167/00 of 1 October 2002).

Table 3: Overview of discarded policy elements

Policy option	**Reason for discarding**
Addressing potentially harmful trading practices	
Imposing by regulation fixed, mandatory notice periods for changes in terms and conditions on platform	This option is discarded as an inappropriate 'one-size fits all' approach unsuitable if changes in terms and conditions could be beneficial to business users that they may wish to opt-in for at an earlier point in time.
Establishing in a legislative instrument a list of permitted or prohibited grounds for delisting and suspension	This option is discarded as it would be burdensome, is not future-proof and could be circumvented by stipulating 'false' reasons.
An obligation for platforms to disclose to their business users the algorithms used for ranking and any changes to them	This option is discarded as it would generally interfere with trade secrets and make the functioning of the ranking algorithm vulnerable to interference. It would not effectively address the problem faced by the business users.[175]
A prohibition for platforms to favour certain businesses active on their market places, including platform-owned business users or bundled, auxiliary services (e.g. payment, advertising), be it in terms of transparency, access or any other conditions	This option is discarded as it would be disproportionate, as platforms would not be free to determine their price structure and bundle services.
Inefficient redress	
An obligation for Member States to ensure effective enforcement of, and efficient dispute resolution on, the P2B rules by designating competent authorities	This option is discarded, as it would have disproportionately high costs for Member States who would need to either create a new authority or designate an existing one and in both cases provide sufficient resources for the authority to fulfil its (additional) tasks.
EU-level ombudsman to be set-up to deal with referrals from national mediators, and to assess recurring transversal and cross-	This option is discarded as it would have disproportionately high costs for Member States who would need to provide sufficient

[175] SMEs do not usually have the ability to understand the algorithms, and disclosing them would normally not allow using data (to comply with GDPR regulation), which makes the disclosure useless.

border issues	resources for the creation and operation of the ombudsman or regulator. While a regulator or ombudsman could assist with ensuring independence and anonymity in terms of redress, which are criticisms of existing schemes like the Supply Chain Initiative, the alternatives of giving business associations standing and for platforms to act in good faith in relation to any mediation attempts and to report to the EU Observatory on the functioning of their redress systems, were considered more appropriate with the later taking on role of policing that a regulator or ombudsman would perform.
Creation of a fully-fledged EU agency to enforce the proposed fairness P2B principles	This option is discarded as it is manifestly disproportionate.
Improved access to injunction proceedings to ensure more expeditious and effective cessation of infringements of P2B rules	This option is discarded as most Member States have in place injunction proceedings that can be used by business-users for B2B disputes[176]. Therefore, there is little added value in introducing a dedicated instrument where more legal certainty on P2B rules is required to give business-users the required confidence and predictability in using existing injunction procedures to provide an effective remedy.[177]
Platforms that intermediate EU businesses and consumers would be banned from using exclusive jurisdiction/law clauses in their	This is discarded as such a ban would be inconsistent with businesses' freedom to contract.[178]

[176] Collective redress mechanisms for consumer matters for injunctive relief are in place in all the Member States, see Report from the Commission on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), forthcoming (in ISC), p. 4 ff. Also, see Annex 8.7.

[177] It is noted that the Commission is currently separately reflecting on possibilities to enlarge the scope of the existing Injunctions Directive including by enabling business representatives to bring action to defend the collective interest of consumers, see: Inception Impact Assessment, A New Deal for Consumers – revision of the Injunctions Directive, Ares(2017)5324969. Such actions, if anything, improve the effectiveness of existing injunctions procedures but obviously serve to protect consumers rather than businesses.

[178] This freedom to contract is reflected inter alia in Article 3 of Regulation (EC) 593/2008 (the 'Rome 1 Regulation') and Article 14(1)(b) of Regulation (EC) 864/2007 (the 'Rome II Regulation'), Article 25 of Regulation (EC) 1215/2012 (the 'Brussels 1 Regulation') and in Article 3 of the Hague Convention on

terms and conditions	

11. THE SME TEST – SUMMARY OF RESULTS

(1) Preliminary assessment of businesses likely to be affected	
The focus of the initiative is on improving fairness and transparency for business users of online intermediation services and/or online search engines, many of which are SMEs, who are affected by potentially harmful business practices that arise due to an imbalance in bargaining power and suffer from the lack of effective redress. As such, many SMEs are set to benefit from the initiative.	See sections 2 (*problems introduction*), 2.1.1.3 (*issues relating to ranking of business users or their offers*), 2.1.2 (*lack of effective redress*), 2.2.1 (*online platforms intermediate an increasing number of transactions and are increasingly the main vehicle for market access*), 2.2.4 (*imbalanced bargaining power and dependency of business users on online platforms*), 2.2.5 (*business users fear of retaliation)* and 2.3.3 (*fewer EU cross-border sales).*
It is recognised that relatively small online platforms, (including SMEs) can provide access for business users to very large consumer groups.	See sections 2.1.1 (potentially harmful trading practices).
(2) Consultation with SMEs representatives	
Impact on SME business users	See section 6.2.2 (*impact on business users)* based on replies to the Commission's consultation of SMEs through the Small Business Act Follow-up Group (based on a response to the questionnaire circulated through the Group on 11 August 2017 and discussions at the Small Business Act stakeholders meeting on 27 September 2017). See Annexes 2.4 (*evidence*), 3 (*stakeholder*

Choice of Court Agreements (the 'Hague Convention'. The EU deposited its instrument of acceptance to the Convention in June 2015. The Convention entered into force in respect of Mexico and the EU Member States (excluding Denmark) on 1 October 2015.

	consultation), 4.3.1 (*business users*)
Impact on SME online platforms	See Stakeholder's views in section 8.4.2 (*online platforms*) as well as Annexes 2.4 (*evidence*) and 3 (stakeholder consultation), 4.3.2 (*platforms*).
(3) Measurement of the impact on SMEs	
The impact of the retained options, as compared to the baseline, is analysed in Section 6 (*what are the impacts of the retained options*) for online platforms that can be SMEs. The impacts should be read bearing in mind that the overall outcome of the initiative is to improve fairness and transparency for business users of online intermediation services and/or online search engines, many of whom are SMEs (see for example, the positive effect on business users growth in section 6.1.1).	See sections 6.2.1.2 (*impact on smaller online platforms*), Table 5 (*summary of impacts of retained options*), 7.1.4 (*assessment of proportionality of the retained options*) and 8.3 (*Thresholds*). As well as Annex 4.1.2 (*online platforms*), 4.1.3 (*online general search engines*), 4.2 (*Summary of cost and benefits of the preferred option*) See also sections 6.2.2 (*impact on business users*) as well as Annexes 4.1.1 (*business users*), 4.2 (*Summary of cost and benefits of the preferred option*)
4) Assess alternative options and mitigating measures	
As the retained options impose some burdens on SMEs, an analysis of imposing different thresholds is undertaken.	(See section 6.2.1.3 (*options for thresholds for exemption*), 7.1.4 (*Assessment of proportionality of the retained options*) and 8.3 (*Thresholds*).

12. IN-DEPTH ANALYSIS OF IMPACTS ASSESSED IN SECTION 6

This Annex aims at expanding the reasoning and substantiating the estimates presented in Section 6.

It analyses the main impacts of the retained policy options as compared to the baseline, namely co-regulatory options 2a, 2b, 2c and 2d. As shown in Table 1 in Section 5.2, options 2c and 2d build on option 2b. Both option 2c and option 2d are composed of the legal transparency requirements in six areas of concern (changes to terms and conditions, delisting, discrimination/preferential treatment, ranking, general data policy and MFNs), but options 2c and 2d also include additional provisions. Option 2c provides for an extended scope of the transparency requirement for ranking to also cover online general search engines. Under option 2c, the redress-related measures applicable to online general search engines concern only the ranking transparency obligation and are limited to granting legal standing to business associations to act on behalf of professional website owners to enforce this transparency requirement only. In addition to this scope extension in 2c, option 2d foresees an obligation for platforms to give any business user the opportunity to ask, in line with the GDPR, for customers' consent to obtain and process their e-mail addresses after the completion of a transaction and the payment of the commission to the respective platform. Additionally, Annex 10 contains an in-depth assessment of all policy content elements retained for the individual options.

12.1. Impact on internal market

The impact on the Single Market of the co-regulatory options is essentially two-fold. On the one hand, the substantive rules proposed will provide business users with greater legal certainty when using online platforms to trade across the internal market, and with concrete tools to seek redress in case of problems, thus supporting the growth of the Digital Single Market. On the other hand, the monitoring and review clauses will allow regulators to adapt rules to the observed market reality to help business users find the appropriate support, gradually creating a common understanding of the issues identified and solutions to address them. This would possibly allow some aligning of platform-related rules across the EU. Further fragmentation will also be limited by encouraging Member States to cooperate through the EU Observatory.

12.1.1. Growth

The initiative will create EU-wide rules that are principles-based, leaving an important scope for implementation by industry – leveraging the frequent alignment of interests of platforms and their business users.[179] This design should limit compliance costs while effectively contributing to a more predictable environment for business users to grow their business on online platforms. While national rules on B2B relations will continue to apply where they exist, business users will benefit from additional legal certainty when dealing with online platforms in all Member States.

Thanks to the increased clarity in platforms' policies related to data and on ranking methods provided by the retained options 2b, 2c and 2d, business users will be able to better adjust their business models to platforms' practices.

[179] Annex 4.3.2 confirms online platforms' interest in engaging in self-regulation on the issues identified in this Impact Assessment report.

In all retained options, business users will also be able to more effectively address problems with online platforms thanks to the legal obligation for online platforms to state reasons for any delisting or suspension, and easier access to redress.

Albeit to a varying degree, the retained options can be expected to increase trust in the online environment, which will attract more business users, and benefit online platforms' turnover too. Through their role as enablers of cross-border trade, the growth of online platforms resulting from all retained options will therefore benefit the internal market growth.

The impact on growth of the options must take into account both the possible positive effects of the increase in trust in the platform environment, as well as downside risks resulting from the costs of the proposed measures and possible repercussions on online platforms' practices, fees to business users and consumer prices. Where option 2a implies, relatively speaking, the most limited compliance costs, it also incorporates the most pronounced risk for a further fragmentation of the internal market by leaving four out of six of the most frequently observed high-impact trading practices to be addressed through self-regulation (see also section 6.1.2.). Oppositely, the legal obligations foreseen under option 2d cover the broadest spectrum of issues observed in the online platform space, thus more effectively limiting the risk of further fragmentation, but it includes a data-sharing obligation that poses some risk for the viability of the online platform business model.[180]

Overall however, the costs created by the initiative are expected to be limited under all scenarios, as described in the section on compliance costs (cf. sections 6.2). Online platforms will therefore have little incentive to pass on costs to consumers or to limit access to (small) business users. These dynamics are assessed in more details in the relevant sections 6.2.2 (impact on businesses) and 6.6 (impact on consumers).

The initiative's aim is to increase legal certainty in the platforms environment; this is why all retained options can be expected to have a positive impact on user trust. As compared to the baseline, user trust can be expected to increasingly gain in strength from options 2a to 2d, with option 2d bringing potentially a higher trust level since comprising the most comprehensive set of business user–friendly measures. As a result, more business users can be expected to sell over platforms or to expand their share of online sales through platforms. All retained options would therefore contribute to optimising businesses' turn-over realised on platforms, thus limiting the chilling effect that the currently observed potentially harmful trading practices have on sales (see Section 2.1.1).

While it is unlikely that all issues will be resolved as a result of the proposed initiative, the impact of those potentially harmful trading practices which would continue taking place will be significantly reduced through more effective redress. The impact of the potentially harmful trading practices identified in the problem statement can be expected to drop by a minimum of

[180] In its assessment of the impact on platforms of a data sharing obligation, an independent contractor also found that "the collection and analysis of data constitutes an important competitive advantage for platform operators. A limitation thereof could reduce the ability to achieve differentiation from other platforms and, as a result, a platforms willingness to undertake investment. On the other hand, there are no reasons to solely attribute the ownership of information with regard to the transaction between business users and customers to the intermediary, i.e., platform owners. Defining and implementing clear data policies may initially be associated with some costs", see: Ernst & Young, Contractual Relationships between Online Platforms and Their Professional Users – SMART 2017/0041 (forthcoming).

30%.[181] The drop in the impact of potentially harmful trading practices will be reflected in the unrealised potential in terms of turnover and of the dampening effect that was previously identified. If one assumes on that basis that a similar share (30%) of unrealised potential in terms of turn-over businesses realise on platforms could be addressed and that the same share (30%) of the dampening effect as estimated in Section 2.3.2 could be reversed, this would lead to a positive impact on the platform economy of respectively between € 381 million and € 705 million per year in terms of increased turn-over, and of between € 810 million to € 4.05 billion per year of reversed dampening effect. These figures are likely to be higher in the future because trade on platforms is growing every year. The value of e-commerce in the European Union was estimated to more than 500 billion EUR in 2016, a 13.5% increase from 2015; in 2017 the growth is estimated at another 14% year on year.

22% of the 2016 e-commerce value is estimated to have been generated by EU third party sellers on online platforms. Trade intermediated through online platforms is expected to follow an upward trend as most consumers opt for platforms when purchasing goods and services online: in a recent study, 71% of them preferred platforms for their purchases[182]. A comparison of the above total 2016 value of e-commerce with the total offline retail value or 2.56 trillion EUR shows it is likely the current e-commerce growth trend will continue, and the growing importance of online platforms along with it. In light of these statistics, the growth of the platform economy can legitimately be expected to have a positive effect on overall growth in the Digital Single Market.

Business users will therefore be able to expand their sales on platforms and very likely their overall sales, since platforms allow them to reach markets and consumers that they could not serve offline. This positive impact on business users will also benefit **online platforms**. As the number of sales carried out over online platforms increase, so too will the commissions received by online platforms. Based on the calculations above, assuming that an average commission charged by platforms is 10%, platforms can be expected to receive additional commissions of between € 81 million to € 405 million. However, the impacts of option 2d on growth of the Digital Single Market are more difficult to predict. By allowing business users access to their customers' email addresses, and by providing sellers with their own sales channels, the risk of free-riding by business users may increase. Option 2d would thus have opposite effects on business users and platform operators. On the one hand, option 2d would limit the claimed negative effects on business users – access to their customers' contact details will allow them to build the individual customer base and improve their direct marketing, thus reducing their already high dependency on platforms. On the other hand, business users are likely to circumvent the platform more frequently, thus limiting platforms' scaling-up and consequently the positive impact on online intermediated trade.

[181] This is a conservative estimate that assumes that a fair share of currently unsolved problems would be resolved, along with part of the problems that are currently only resolved with difficulties. Indeed the study on business users of online platforms showed that 30% of all problems in P2B relations remain unsolved and a further 29% can only be resolved with difficulties. A drop of 30% is therefore a safe assumption to cover the resolution of most (if not all) of the unsolved problems, along with a reduction of the cases resolved with difficulties, which also cause damages to businesses.

[182] See footnote 106, LSE & Partners – forthcoming.

12.1.2. Preserving the cross-border nature of the platform economy – preventing fragmentation of the internal market

None of the retained options aim at harmonising national B2B fairness legislation which will be rather complemented by the high-level transparency rules proposed in all options. The proposed rules combined with the collaborative monitoring with Member States will nonetheless help prevent further fragmentation. The legal instrument envisaged under options 2a, 2b, 2c and 2d will establish entirely new B2B protections on general T&Cs, as well as on delisting and complaint-handling, which apply within valid contractual relations (beyond scope of fairness rules, also complementary to any counter-notice procedure applicable between content provider and notice provider), and with regard to ranking transparency in online general search under options 2c and 2d.

A more predictable and transparent environment for business users – including effective and agile redress for businesses - may be expected to lead to less P2B issues and reduced need to intervene at national level to resolve them. This would be achieved by limiting potential harm to EU businesses and by enabling well-informed policy responses at EU-level

As mentioned above, while already leading to increased legal certainty for business users through its legal transparency and redress measures, option 2a incorporates a more pronounced risk of fragmentation as opposed to options 2b, 2c and 2d. The risk of direct harm to businesses equally remains relatively important with various high-impact trading practices being left to self-regulation (ranking, data, discrimination, MFNs).

The effect of EU monitoring pushing on reputational levers to effectuate a more fair and predictable business environment for business users of online platforms would be limited under Option 2a as compared to the baseline given the absence of the regulatory backstop on key issues such as ranking, data access policies, discrimination and MFNs. Indeed, the legal transparency obligations on these issues foreseen under options 2b, 2c and 2d will be accompanied by enhanced external scrutiny of online platforms' trading practices which should incentivise these firms to pro-actively improve the situation for business users, for example by solving issues out-of-court (bilaterally or through mediation).

These rules will provide more clarity and regulatory predictability for platforms at EU level as to the requirements they need to comply with. It would allow preserving the existing cross-border dynamics of the platform economy by setting a common framework for Member States.

Options 2b, 2c and 2d would thus help to ensure a more harmonised approach to platform-to-business relationships within the EU. Both options would thus have a positive impact as compared to the baseline scenario in which Member States are increasingly adopting or considering legislation addressing specific platform-related aspects. The scope, addressees and level of intervention of these national measures vary significantly, which leads inevitably to a fragmentation of the inherently cross-border platform environment.

Should the expected benefits of the initiative not materialise or should it appear that more or less far-reaching rules might be necessary; the review clause included in the retained options would kick into action. It would allow regulators to amend and/or extend the legal instrument in light of the evolving economic and legal environment thus supporting a ***functioning internal market***. The monitoring function, and in particular the information that will flow

back to the **EU Observatory** from the online portal and platforms' reporting obligations, will allow regulators to take stock of progress in addressing potentially harmful trading practices in P2B relations, and prepare the fact-finding for reviewing the proposed regulation (second step). The monitoring of the platform economy would thus allow the possible establishment at a later stage of a fairness standard in case the work carried out by the Observatory were to demonstrate the need for such a more far-reaching regulatory intervention.

The new rules together with the EU observatory will already help allow building a common EU understanding of what issues are, thus allowing for more consistent regulatory approaches when such are deemed necessary at national level.

12.2. Impact on enterprises

12.2.1. Impact on online platforms

Compliance costs

The retained costs are expected to result from three main drivers:

- The implementation of the different transparency requirements with regard to changes in their terms and conditions, delisting, discrimination, ranking, general data policy and MFNs;
- The setting up of internal and external redress mechanisms; and
- The reporting obligation on the functioning of the internal redress mechanism.

The implementation of the transparency requirements will result in one-off costs to adapt the implementation and communication of platforms' terms and conditions, and updating these standard contracts where needed (costs related to the legal expertise, revision and publication of their terms and conditions). Once these procedures are carried out, platforms will face running costs when modifying and communicating changes to their terms and conditions. However as changes are not expected to occur more frequently, these costs are likely to be equivalent to those that online platforms currently face. Clearly, it is good business practice, even for very small platforms who want to build a customer base, to have clear and transparent terms and conditions on their different policies on matters such as delisting, ranking or access to data.

Different from policy option 2a, the options 2b, 2c and 2d foresee legal transparency obligations on more complex issues such as ranking, data access, discrimination and MFNs. Beyond the limited cost associated strictly with the need to adapt contractual terms and conditions, these legal transparency obligations in principle carry with them a more pronounced risk of legal uncertainty for online platforms, as transparency in the areas of discrimination and MFNs remains largely untested for the moment.[183] Notwithstanding, these obligations will be principles-based in order to leave significant room to industry to develop meaningful transparency tools. Platforms will moreover remain entirely free to determine

[183] It is noted that in France the Loi Lemaire addresses B2C transparency on discriminatory ranking practices, whereas several EU Member States have already introduced per se bans of MFN clauses. It is therefore unlikely that high-level transparency obligations on these issues will significantly alter the ability of online platforms to operate as opposed to the baseline scenario, while offering an important upside in that these obligations will help prevent further fragmentation.

their business policies also in these areas, thus limiting the risk of increased litigation for larger platforms, and the enhanced transparency can, if anything, benefit smaller online platforms as there will be more scope for competitive differentiation. Finally, annex 7.3 contains existing examples of transparency guidelines in the complicated area of ranking in online general search, which supports the notion that meaningful transparency can safely be provided by online platforms in these areas – and is indeed in their own interest.

An independent study contractor also proposed legal transparency obligations to be imposed on platforms, which would require clear and unambiguous contractual terms as well as aid to be provided to business users. In its impact assessment, the study contractor explains that such legal transparency measures should generally also be in the interest of the platform operator and that the range of estimated costs should not be of a discernible impact on large existing, established platforms' innovation and investment incentives. At the same time, it is explained that small platform operators would not have a strategic interest in maintaining (overly) complex contractual terms in the first place, given their more modest scope of operations.[184]

The same study contractor in addition proposes to legally oblige online platforms to (i) prominently communicate changes to contractual terms and conditions and to grant a notice period allowing business users to terminate the agreement prior to changes becoming effective; (ii) prohibit clauses that restrict business users' rights to legally challenge the content or interpretation of the agreement; (iii) establish clear and objective rules and mechanisms governing the delisting of offerings; (iv) provide access to data regarding transactions to business users, and (v) include a clear and transparent clause on data access or a separate data policy. These proposed legal transparency measures largely overlap with options 2a, 2b, 2c and 2d, and even go slightly beyond. The impact assessment performed by the study contractor nonetheless identifies major benefits for business users that would correspond to little or no impact for larger online platforms, especially as the legal framework would leave these firms free to change the rules applicable to their ecosystem, or even to delist large numbers of offerings, as long as this is done in line with pre-defined objective aims and in a non-discriminatory fashion. Exclusively the rule requiring data on transactions to be provided, which is similar to the data-relevant aspect of policy option 2d, is estimated to imply some initial costs for platforms and possibly impact their willingness to invest in innovation.[185]

Overall, the compliance costs for the transparency requirements are the least burdensome for option 2a as compared to the baseline since this option implies full self-regulation for four of the transparency-related measures, i.e. discrimination, ranking, general data policy and MFNs.

Oppositely, option 2c would extend the legal transparency obligation on ranking to the area of online general search, where complex algorithms determine the saliency of search results on the basis of an index that covers, in principle, the entire Internet. Providing meaningful transparency on ranking in this fast-moving area implies, in theory, more significant compliance costs. Transparency measures would namely have to capture the high frequency with which changes to the functioning of online general search engines' ranking mechanisms are implemented, and "translate" their functioning into useable guidance for the appropriate

[184] Ernst & Young, Contractual Relationships between Online Platforms and Their Professional Users – SMART 2017/0041 (forthcoming).

[185] Ernst & Young, Contractual Relationships between Online Platforms and Their Professional Users – SMART 2017/0041 (forthcoming).

audiences – which may cover a broad spectrum of businesses ranging from technologically illiterate firms to digital natives.

However, it should be noted that the major providers of online general search engines already today offer some transparency to inform webmasters how to achieve high quality search results, although the level of detail provided differs significantly. The main transparency tools developed by the three major online general search engines active in the EU are described in Annex 7.2.5. In addition, Search Engine Optimisation (SEO) strategies have developed around online general search engines, which could be leveraged for the purpose of "communicating" effectively with the target audiences.

A legal requirement to be transparent about ranking policies would give more prominence to these existing practices and give them legal character. The majority of tools allowing for search optimisation put in place by online general search engines are publicly available but, as mentioned above, the level of detail and exhaustiveness differs. In addition, the one example of detailed guidelines that exists and is public, actually targets professional website quality evaluators rather than enterprises or website owners themselves.[186] These are not, therefore, tailored to the business audience and their availability to the general public is not guaranteed. If online general search engines are to develop transparency tools specifically for enterprises, this could represent an additional cost also for those search engines which have already put in place some tools. Given that such new guidelines are in some cases likely to be of a lesser technical complexity as compared to the already existing tools aimed at quality evaluators, the effort of adapting them would however be limited.

An additional cost would result from the measure in option 2d that would require online platforms to ask consumers for their consent to share some data with business users. This measure would require a technical adjustment on the side of platforms to allow consumers to express their consent (the data itself can be shared through existing communication channels). The request would be conditional on the completion of a transaction on the respective platform and to the payment of the platform's commission. Nonetheless, if the sellers have their own sales channels, it may also allow them to circumvent the platform for future transactions and disrupt a core aspect of the platform business model.[187]

Setting up internal and external redress mechanisms will also be linked to compliance costs. These are also set out in Annex 4. Regarding internal redress, platforms that already have a dispute settlement mechanism may be required to upgrade their systems to comply with the quality standards set out in the legal act, notably speed and effectiveness (e.g. identifying a clear contact point for submitting complaints). Those that do not will face both set-up and running costs, which may be offset over time as a result of increased or more efficient platform-use. These are expected to be in the range of a 0.4 to 1% increase in the cost base for

[186] It has to be stressed though that some tools call on enterprises' leaders to be aware of search engine optimisation guidelines with a view to orienting the search strategy together with the webmaster.

[187] In its assessment of the impact on platforms of a data sharing obligation, an independent contractor also found that "the collection and analysis of data constitutes an important competitive advantage for platform operators. A limitation thereof could reduce the ability to achieve differentiation from other platforms and, as a result, a platforms willingness to undertake investment. On the other hand, there are no reasons to solely attribute the ownership of information with regard to the transaction between business users and customers to the intermediary, i.e., platform owners. Defining and implementing clear data policies may initially be associated with some costs",see: Ernst & Young, Contractual Relationships between Online Platforms and Their Professional Users – SMART 2017/0041 (forthcoming).

smaller platform companies[188], and a one-off cost of 0.03% of total turnover for larger ones[189]. While the administrative burden resulting from this particular measure may not always be completely offset, platforms may in many cases be able to develop intelligent solutions to lower costs, such as using the same or similar technologies and operational structures for customer support to also provide for internal redress for businesses. They are also likely to have a commercial incentive to follow the example of larger players. Therefore, the actual additional cost is likely to be lower and likely to be on top of sunk costs for investments already made[190].

The cost is therefore expected to be limited in all cases but can be estimated to be exponentially bigger for the smallest companies[191], which supports considering an exemption of certain categories of companies. The majority of platform business models generate income from commissions on transactions concluded between business users and consumers.

The obligation to allow for P2B disputes to be escalated internally is not likely to fundamentally change the economics of running an online platform: most platforms already possess such systems, meaning that they are fully compatible with the intermediary business model. The proposal also preserves the platform operators' flexibility and ability to curate the content and the sellers present on their platforms. It should also be noted in this regard that successful online intermediation involves large ecosystems where *each* of the entities, i.e. business users, consumers and the intermediary constitute a prerequisite element of the "virtuous circle" value creation. Online platforms are in this regard unable and unwilling to simply internalise the large value-added provided by their business users, which takes the form of, for example, the running of thousands of independent hotels, the creative development by hundreds of thousands of app developers[192] or unique handcrafted items sold by thousands of self-employed artists or their representatives.

Given that many platforms already have some internal dispute resolution systems in place, overall, the cost of ensuring that business users can file complaints and communicate with a platform representative to resolve their issues will not represent an excessive additional burden (see above for estimates). Those platforms that already have consumer-facing dispute resolution systems may in addition adapt such mechanisms to also deal with business users. In those cases, the costs of adapting existing systems to deal with the queries of business users as well as those of consumers will be limited.

The costs of the external redress mechanism will be determined by the set-up chosen by industry. However, they are likely to be limited, not least because online platforms will

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188 Assuming a cost of one additional FTE for small companies having between 50 and 250 employees.

189 Based on the actual example of a EUR 1.75 million one-off cost for a platform company achieving a EUR 6 billion annual turnover.

190 See Section 7.2.3 dealing with proportionality for more detail.

191 Using the definitions of the European Union of Small and Medium Enterprises (Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises C(2003) 1422) small platform businesses would be those with < 50 employees, and a turnover or balance-sheet total of < EUR10 million, while medium platform businesses are those with < 250 staff headcount, and < EUR 50 million annual turnover or < EUR 43 million balance sheet total.

192 Based on 1.5 million apps listed in the App Store, it is estimated that in order to re-create the same creative richness, it would have required Apple itself 519 000 years' worth of work, see: https://www.slideshare.net/faberNovel/gafanomics-season-2-4-superpowers-to-outperform-in-the-network-economy/42-42The_more_apps_available_the.

certainly choose the most cost-efficient solution. Contacts with industry show that industry is willing to take part in voluntary initiatives of this kind, mitigating the risk of low-industry buy-in. In addition, the use of mediation has been shown to limit costs when it is successful. Increased use of mediation may also lead to the creation of a professional mediation market, which could prevent platforms from having to develop dedicated systems. The costs will additionally be shared by a high number of platforms, as there are more than 7,000 platforms in the EU alone, and almost 20,000 globally[193].

By giving legal standing to business associations to act on behalf of the business users, the number of legal cases online platforms need to defend may, technically speaking, increase. This may increase the costs associated with increased litigation for online platforms who will potentially face more claims in national courts. However, it should be noted that this form of external redress that is foreseen under all co-regulatory options will exclusively serve to enforce the foreseen principles-based legal obligations to provide transparency and out-of-court redress. For online general search engines, the obligation will even be more limited in scope as the issue of transparency on ranking criteria will be the only subject of such claims. In this regard it constitutes a light-touch enforcement measure that is alternative to enforcement by national or EU authorities foreseen under (discarded) policy option 3. As such, this provision does not imply **any additional costs** over and above the legal obligations contained in each of the co-regulatory options. It is at the same time essential to ensure the effectiveness of the overall intervention in a proportionate manner, taking into account the important fear of retaliation of business users combined with the use of exclusive choice of law and forum contract clauses that would otherwise impede the enforcement of the foreseen rules by business users themselves.

Finally, the reporting obligation relating to the internal complaint-handling mechanism that is included in all co-regulatory policy options will be designed to limit costs for the platforms concerned. The reporting obligation would cover a limited number of elements such as the total number of complaints received, the subject matter of the complaints, the time period needed to process the complaints and the decision taken. Online platforms can largely automate data collection and reporting. Many collect this type of information already for quality management purposes and would, therefore, only incur very limited costs for transmitting the data to the EU Observatory on a regular basis.

Impact on smaller online platforms

SME online platforms will also benefit from the growth of the platforms environment.
At the same time, all retained co-regulatory options will entail limited, mostly one-off costs associated directly with changes to contractual terms and conditions to accommodate the legal obligations in relation to transparency. Option 2a implies in this regard, relative to the other co-regulatory options, the lowest number of legally binding obligations and therefore the most limited cost increase compared to the baseline.

In implementing changes to terms and conditions to accommodate the legal obligations in relation to transparency, platforms with smaller or inexistent legal teams would incur higher one-off implementation costs for measures proposed to address issues around changes in

[193] According to the Dealroom database there are 7,012 EU platform businesses and 19,526 global platform businesses.

terms and conditions, delisting and data. Nevertheless, as start-ups, they will in any case be faced with certain costs related to drafting legally sound terms and conditions and it makes good business sense to offer clear and transparent conditions regardless of the size of the platform, this would also be a part of the requirements when seeking seed- or risk funding. The latter measure could be more burdensome for those small platforms who have not defined clearly a data policy. At the same time, related costs should not exceed the cost of any significant amendment of terms and conditions which are part of normal business also for small companies. Also, implementation costs would be partly compensated by reduced litigation costs.

In addition, the implementation of the changes to terms and conditions to accommodate the legal transparency obligations regarding the platforms' practices with respect to the favouring of own services would be less burdensome for platforms offering fewer services or whose own services do not compete with professional users.[194] The MFN-related provision would not be more burdensome for small enterprises. Even if one was to assume relatively higher compliance costs for smaller platforms, the regulatory burden on them should be assessed in light of already existing regulation. The obligation proposed for paid-for-ranking under options 2b, 2c and 2d is a good example in this respect, showing that other legislations with which businesses need to comply may be more burdensome (e.g. transparency obligation towards consumers on the same topic subject to the Unfair Commercial Practices Directive).

As mentioned in the previous section, the enhanced transparency that would result from the implementation of the foreseen legal transparency obligations can benefit smaller online platforms as there will be more scope for competitive differentiation. At the same time, any costs resulting from possibly increased litigation are expected to be limited, given the principles-based nature of these obligations, and the important scope for implementation by industry. Small online platform providers will accordingly be able to exclude any significant litigation costs by providing transparency at a general level, while staying abreast of, or getting involved, should they voluntarily opt to do so, in industry discussions on codes of conduct on each of the various potentially harmful trading practices.

While the marginal cost of adding the transparency requirements should therefore not be overestimated, policy option 2d may create higher costs for small platforms. The need to share email addresses with business users who have obtained consumers' consent may put constraints on small platforms in their development phase, preventing them from scaling up. Option 2d may therefore have a negative impact on small platforms.

A more rigorous approach of online platforms to the selection of third party vendors reflects the preference for high quality of products, services and timely delivery to the benefit of consumers. Online platforms must also comply with the E-commerce Directive and expeditiously remove illegal content following third-party notices. The two options do not limit the ability of online platforms to curate content and select third-party business users meeting a high quality threshold. It simply requires that they do so in a transparent way.

[194] An independent study contractor also found that small platform operators would not have a strategic interest in maintaining (overly) complex contractual terms in the first place, given their more modest scope of operations, and that costs would accordingly be limited, cf. Ernst & Young, Contractual Relationships between Online Platforms and Their Professional Users – SMART 2017/0041 (forthcoming).

The compliance cost entailed by Option 2c could possibly be higher for smaller online general search engines which have not developed guidance for businesses on how to optimise their appearance in search results. These firms could however try to limit their compliance costs by using as an example the existing transparency provisions developed by bigger online general search engines. A transparency rule for search engines would indeed help spread best practices; it is also not excluded that it creates incentives for developing best practices and using quality saliency of information/data, or the guaranteed absence of any conflict of interests involved for example with advertising-based business models, as criteria of competitive differentiators. The main argument against ranking-related transparency obligations is that spammers could game online general search engines, which would be detrimental to society. The proposed transparency obligation would not, however, require disclosing any trade secrets and foresees an important scope for industry efforts to provide practical tools for meaningful transparency – including ways to prevent the gaming of search results.

Option 2b allows addressing the unfair practices identified while preserving platforms' ability to set freely their business strategies. Option 2d is more far reaching and disruptive as compared to the current situation; the additional obligation on platforms to process customers' mails to business users may be too interventionist in platforms' data policy.

Imposing new legislation could in theory lead to increased difficulties for new market entrants. In this case it can rather be expected that the provisions will provide start-ups with greater clarity on the requirements they need to comply with across the EU when entering the market thus benefitting from a more predictable regulatory environment. Such legal transparency requirements could also provide additional competitive parameters that can be leveraged to distinguish the start-up platforms from established players and thereby enhance market entry. While the regulatory burden on start-ups should not be over-estimated in this particular case, it is a valid question to ask whether micro-enterprises should not be exempted from the entire set of regulatory measures.

In addition, while an efficient and speedy internal dispute resolution process could be possibly ensured through automated systems - chatbots can be used for a first screening of complaints, with justified claims eventually being dealt with in person - the **creation of an internal escalation mechanism**, may require that small platforms put in place processes that go beyond their current capacities.

The above two paragraphs raise the question whether specific thresholds are needed to exempt some types of enterprises from the proposed regulation. Irrespective of which of the four retained options would appear as the most appropriate on the basis of the comparative analysis performed in Section 7, the evaluation of the regulatory burden of this Initiative requires an assessment of whether micro-enterprises or other categories of companies[195]

[195] Micro-enterprises are defined as having fewer than 10 employees and an annual turnover (the amount of money taken in a particular period) or balance sheet (a statement of a company's assets and liabilities) below €2 million. Small enterprises are defined as having less than 50 employees and a turnover or balance sheet total of less than EUR 10 million.

should be exempted from its scope in line with the Think Small First[196] and the Better Regulation principles[197]. The following section analyses this question.

12.2.2. Options for thresholds for exemption

Several questions arise when considering options for thresholds: For which measures are thresholds needed? If they are needed, how should they be set? Which measurements or proxies can be used to determine their level and to verify compliance easily?

The main considerations in relation to thresholds concern the degree to which the underlying problem analysis applies to smaller online platforms and the regulatory burden which would stem from the proposed intervention. Different "threshold" possibilities are considered below while Section 8 dealing with the preferred policy option presents the conclusions of the analysis.

(A): A targeted threshold exempting some categories of platforms from the most burdensome measures, based on impacts assessed in Section 6

(B): A horizontal threshold exempting some categories of platforms from the entire proposal

(C): A dual threshold combining (A) and (B)

(D): No threshold – all proposed measures would apply to all enterprises

(A): A threshold exempting some categories of online platforms from those measures for which a significant impact cannot be excluded, based on impacts assessed above

One option would be to exempt smaller platforms from those measures for which an administrative burden cannot be fully excluded, i.e. from the most burdensome measures in relative terms. This approach would mean that the relevant legal transparency obligations foreseen under the various co-regulatory options apply to all online platforms, while the internal redress mechanism which appears more costly (cf. Section 6.2.1.2) is not applicable to a certain category of smaller platforms.

As to the precise setting of the threshold, the SME definition based on the double criterion of staff headcount and turnover/balance sheet has been considered. The question is whether the threshold should be set at the level of a small or micro-enterprise? Available data does not allow drawing a clear distinction between the impacts of the internal redress on these two types of platforms. In order to avoid any disproportionate burden it seems therefore more appropriate to exempt all online platforms constituting a small enterprise (< 50 employees) from the obligation to provide for an internal complaint-handling mechanism. This would support the scaling up of both start-up and emerging small platforms.

[196] Principle embodied in the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - "Think Small First" - A "Small Business Act" for Europe, COM(2008), 394 final.

[197] Better Regulation Toolbox complementing the Better Regulation Guidelines presented in in SWD(2017), 350 final.

By excluding platforms with < 50 employees from the internal redress measure, 47%[198] of all EU platforms would be exempted from this specific obligation, while a large proportion of all transactions would nonetheless be covered[199]. This option would reflect the light-touch approach behind the transparency requirements which would apply to all companies. The extra burden associated with the initiative would be limited, and the measure may provide a competitive edge to very small platforms who want to build a customer base; they would be able to attract customers by offering them clear and transparent terms and conditions, similarly to bigger platforms.

Instead of using the staff headcount and/or turnover, an option would be to use different proxies when defining the thresholds, such as number of website visits/month (as in the Loi Lemaire), or number of registered users (as the German NetzDG definition). This would potentially allow targeting the exemption more narrowly to start-up and scale-up platforms that can be guaranteed not (yet) to have significant user bases. These metrics are however disconnected from need to limit the impact of the cost of internal complaint-handling, as even online platforms having significantly less than 50 employees may command relatively large user bases; these firms have frequently been seen not yet to generate any turnover and may precisely be unable to absorb such costs. Also, large variations in user numbers or website visits are possible depending on the date, either seasonal or due to fast growth periods, leading to uncertainty for the business on whether it is concerned or not by the rules. Basing thresholds on number of registered users would also decrease platforms' incentives to increase their user base thus artificially limiting network effects which are at the core of platforms' business models. Although the number of website visits and active users are routinely measured by online platforms themselves, they are not publicly reported. The criteria used in the SME definition seem therefore more appropriate for the purpose of setting a meaningful threshold.

(B): A horizontal threshold exempting some categories of platforms (micro- or small-) from the entire measure

This option may be designed to exempt from the entire measure those platforms which qualify either for micro- or for small-enterprises. Excluding exclusively micro-enterprises from the entire measure would risk putting the threshold too low, thus imposing the more burdensome internal redress obligations to platforms which may not be ready yet to absorb such measure. As explained above, the proportionality principle rather suggests for not only micro- but also small enterprises to be exempted from those measures for which the regulatory burden may be more significant. On the other hand, if a single horizontal threshold is set for all small platforms, this would imply that almost half of all existing online platforms are exempted. This may appear unjustified given the light touch approach of the legal transparency requirements proposed, the exemption of these platforms from the most burdensome obligation and the fact that platforms having between 10 and 50 employees can already fulfil an important gateway function. Thus, a horizontal threshold applicable to the entire initiative, while clear and simple for implementation, does not appear appropriate to the measures

[198] 3298 platforms under options 2a and 2b.. This number would be 3380 platforms under options 2c and 2d extending the scope to online general search engines.

[199] This can be indirectly inferred from a recent DG JUST study on the collaborative economy study showed that only 20 out of 485 platforms were very large, with over 100 000 daily unique visitors, and the companies that will be in scope of the initiative will therefore account for a very large share of total intermediation.

proposed. The latter rather call for a targeted threshold taking into consideration in particular the more burdensome nature of the internal redress rule.

(C) A dual threshold combining (A) and (B)

Another option would therefore be to combine the internal-redress related threshold with a general micro-enterprise exemption applicable to the entire measure (C). On the one hand, this option would be further in line with the "think small first" principle as the 1 772 existing micro-enterprise platforms would be exempted from the entire measure. Nearly 90% (1 526) of the online platform micro-enterprises identified by staff headcount alone are to be in the "seed" phase of growth referring to the very first part of the technology start-up cycle. While the turnover distribution of these online platforms is not known it could not be generally and automatically assumed that they hold significant relative market power over the business users they intermediate. This option would thus guarantee that the initiative is start-up and scale-up friendly by preventing any disproportionate and regulatory burden from emerging and small platforms. On the other hand, applying a horizontal micro-enterprise exemption could appear unjustified in light of the specific market dynamics of the platform economy and resulting dependency considerations. As the Instagram and other examples of Section 2.1.1 show, even very small online platforms could develop important relative market power. This would rather suggest that no threshold is needed for exempting emerging platforms from the light transparency requirements of the initiative. It is therefore difficult to conclude to what extent the underlying rationale behind this initiative applies to start-ups.

(D): No threshold – the proposed measure applies horizontally to all platforms

This option would imply that not only the relevant legal transparency requirements would be applicable to all types of platforms but all proposed obligations. In light of the above explained need to account for the more burdensome nature of the internal redress mechanism, option 4 does not appear to constitute an effective alternative.

Table 4 shows the distribution of employees in EU and Global Platform businesses, including search engines (red colour in the table)[200].

Table 4: Distribution of employees in EU and Global Platform businesses

Staff headcount	Number of EU Platform Businesses	Number of Global Platform Businesses
<10	1772 + 34 = 1806 = 25%	3333 + 82 = 3415
<50	3298 + 82 = 3380 = 47%	6472 + 160 = 6632
<200	3904 + 113 = 4017 = 56%	7871 + 194 = 8099
	Total EU Platform Businesses = 7012 + 113 = 7125	Total number of Global Platform Businesses = 19526 + 194 = 19720

[200] From the Dealroom.co database of November 2017, defining platforms as marketplaces and adjacent categories including classified listings, booking, lead generation, and performance-based business models, as well as search engines.

12.2.3. Impact on non-EU platforms

According to data available to the Commission there would currently be approximately 12 500 non-EU platforms active in the market world-wide[201]. The elements presented for the co-regulatory options are applicable to EU platforms and would apply equally to these non-EU platforms, if they intermediate between EU business users and consumers located in the EU. While the measures would not restrict the platforms' freedom to determine the law and forum applicable to *contractual* issues, these clauses should not prevent the enforcement in (EU) courts of the envisaged P2B rules by business users - obviously in full compliance with private international law, including the Hague Convention or the Rome I, Rome II and Brussels Ibis Regulations.[202] The mediation possibilities which would be offered constitute a considerable change to the current situation in which EU business users do not have any other choice but to revert to the extra-EU court set by a non-EU platform in its terms and conditions. However, it should be noted that submitting to the outcome of mediation proceedings will remain voluntary, both for EU and non-EU platforms.

The internal escalation mechanism foreseen in both options is expected to reduce the number of disputes. In case this proves insufficient and external redress is needed, mediation would be possible as an ultimate venue before entering court proceedings. Therefore, one would expect most disputes to be resolved by mediation with the consequence that court proceedings involving non-EU platforms in which exclusive choice of forum or law could be set aside would be very rare. Such cases would moreover be limited to injunctive claims alleging a breach of the general legal transparency and redress obligations contained in the proposed co-regulatory options.

12.2.4. Impact on business users

Compliance costs linked to the co-regulatory options will not have a short term effect on the fees and commissions applied by online platforms. Compliance costs linked to establishing transparent terms and conditions are, as explained in the previous sections, limited. Certain platforms might decide to use the opportunity created by the implementation of a legislative initiative to increase the fees applied to business users, who may in turn pass these on to consumers. If these increases were to be substantial, the effects described above would be limited by a dampening effect on sales. However, it is unlikely that platforms will significantly increase their levels of fees or commissions, as the compliance costs of the co-regulatory options are limited. In addition, platforms will be incentivised to compete for business users due to harmonised legal transparency obligations facilitating the emergence of new platforms. It would therefore be in their interest to keep fees and commissions at a competitive level, thus reducing the risk that costs would be passed on to consumers.

In the event that platforms choose to transfer the additional costs incurred onto the sellers, the additional burden on the business user is foreseen to be highly limited. Using the estimates under 6.2.1, should platforms transfer the entirety of the one-off cost of setting up an internal redress mechanism towards its existing business users, the additional cost increase for each seller is foreseen to be minute[203].

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[201] According to the Dealroom database.

[202] See section **Error! Reference source not found.**

[203] Based on the actual example of a EUR 1.75 million one-off cost for a platform company achieving a EUR 6 billion annual turnover, with 45.500 active sellers.

Beyond the increased sales through platforms, the creation of an effective redress mechanism will be particularly positive for business users.[204] In combination with the greater clarity provided by the transparency measures on the reasons for differences with platforms, business users will have a greater chance of quickly and effectively solving disputes with online platforms. This may mean that more business users find grounds under which they can take problematic cases to court, using for instance collective interest litigation. Nonetheless, it will be in the interest of both business users and platforms to make greater use of the possibilities offered by mediation, which both co-regulatory options make more readily available. Mediation has been shown to be a more flexible and cost-effective solution. A European Parliament study on the cost of (non-)mediation has shown that an average cost to litigate in the EU is more than € 10,000, while the average cost to mediate is approx. € 2,500. Therefore when mediation is successful, it could save € 7,500 per dispute[205].

As regards potential retaliatory actions from platforms towards the businesses active on them, neither of the options retained is estimated likely to trigger them. The **fear of retaliation** expressed in parts of the stakeholder consultation process concerned measures taken by certain platforms against individual businesses, or groups of businesses, as payback for specific actions. The co-regulatory options retained do not, however, single out particular businesses or specific actions that might single out a particular business to a platform. They rather increase clarity on the grounds for suspension or termination on the use of a platform, how ranking operates including mechanisms that allow business users to influence their prominence etc. and give more time to react to changes in terms and conditions or understand why a decision has been taken to delist or suspend them. Furthermore, the specific measures put forward in the proposal (redress mechanisms, observatory, etc.) contain safeguards against businesses being endangered for making use of the new functions: the external redress possibilities must fit the criteria of anonymity and independence, the internal redress mechanisms would be open for use to all the businesses on a platform, therefore making it hard for the platform to reasonably single out and punish against one single business, etc. In addition, a platform choosing not to adopt the new features designed to enhance trust and increase the quality of the experience for a business would find itself at a disadvantage compared to other platforms that choose to attract businesses by improving the quality of the seller's experience, and therefore, risk losing its market share among sellers.

None of the options will create significant costs for ***SME business users***. On the contrary, SME users of platforms stand to gain from measures that will provide them with greater ease of doing business and enhanced legal certainty. This includes in particular the measures on transparency and minimum notice periods for changes to terms and conditions, transparency on the reasons for suspension or delisting, and transparency on the criteria for paid ranking results. These measures would lead to savings for smaller business users, as they would be spared the costs linked to reinstating accounts or products that have been blocked. In the case of paid-for ranking results, the increased transparency around the auctions oftentimes used to

[204] The study Ernst & Young, "Contractual Relationships between Online Platforms and Their Professional Users – SMART 2017/0041" (forthcoming)], chapter 4.3.2.2 also concludes on a strongly positive effect of the transparency benchmark on business users due to reduction of their direct costs resulting from non-transparent T&C; this beneficial effect being more pronounced for small firms.

[205] Note of the European Parliament, Quantifying the cost of not using mediation – a data analysis.

award increased visibility would be beneficial to smaller business users, as they could either choose not to participate where the resulting ranking is unlikely to be satisfactory, thus saving them the cost of participation, or choose to participate, and gain increased exposure. This was confirmed in the replies to the Commission's consultation of SMEs through the Small Business Act Follow-up Group.[206]

Businesses' turnover is in addition directly impacted by the visibility they get on online general search engines. A transparency obligation on ranking in general search, such as foreseen under **policy option 2c,** would allow more predictability for business users. Given the regular and high rate of algorithms changes done by online general search engines, such obligation would help businesses to develop better informed search optimisation strategies. This would be particularly beneficial for enterprises with little or no online presence.

Such obligation could possibly lead to a better distributional outcome if a few new businesses manage to get higher in the search results through getting more insight in the ranking policies of online general search engines. This appears however to be a strong assumption given the light nature inherent to the proposed transparency obligation and the limits of a ranking system – not all enterprises can rank high irrespective of the impartiality of search results and the businesses' search optimising strategies. A transparency obligation is however important for enterprises with their own websites and which may directly compete with the respective online general search engine's services. As the *Google shopping* antitrust case shows, users are not necessarily made aware that the results of a specialised search service such as Google's comparison shopping service are displayed and positioned in its general search results pages using different underlying mechanisms than those used to rank generic search results. A transparency obligation set in EU law would strengthen businesses' ability to use such a provision in court proceedings. It would also be a helpful complement to enforcement tools under competition law since it would allow greater insight in possible discriminatory behaviours.

The benefits of options 2b, 2c and 2d (at least in terms of immediate effects) for smaller business users would be significant, as the majority of companies active in the sectors concerned are small or micro-enterprises. 83% of SMEs in the accommodation sector are micro-enterprises employing fewer than 10 people[207] and for retail the rate stands at 95%[208]. Similar rates or higher can be expected for app developers.

Policy option 2a would also already bring important benefits for business users as compared to the baseline. Its value-added would however be more limited if compared to the other co-regulatory options retained, as it would leave the majority of the most frequently observed high-impact issues fully to voluntary industry efforts.

Policy option 2c would significantly extend the scope of the legal transparency obligation on ranking to encompass both business users' online presence on platforms, as well as any standalone websites featured in online general search engines – including those hosted by

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206 Based on a response to the questionnaire circulated through the Small Business Act Group on 11 August 2017 and discussions at the Small Business Act stakeholders meeting on 27 September 2017.

207 Eurostat, data set sbs_sc_sca_r2.

208 'Retail & wholesale: Key sectors for the European economy. Understanding the role of retailing and wholesaling within the European Union,' Oxford Institute of Retail Management (OXIRM), Saïd Business School, University of Oxford, 2014.

business users. As explained in section 2.1.1.3, the legal transparency obligation on ranking would thereby additionally cover 20%-30% of total Internet traffic received by online platforms and respectively >50% and >70% of Internet traffic received by retailers' and hotels' own websites.

Finally, policy option 2d would be particularly beneficial for SMEs since it would allow them to expand their customer base and render their direct marketing more efficient. It is difficult though to predict whether these immediate benefits would be maintained in the longer term. If the burden to provide their consent for sharing emails is judged as too heavy by consumers, they could reduce the purchases made through online intermediation thus essentially circumventing the platform, which could impact the platform ecosystem and create possible disincentives for platform innovation. The question is then whether the increase in sales made through their own websites or offline would outweigh potential negative effects which option 2d may entail for platform economy's dynamics such as reduced market and innovation opportunities created by a healthy platform ecosystem.

12.3. Impact on public authorities

National authorities will not be directly impacted by any of the co-regulatory options. Over time, the obligation on platforms to list national mediators in their terms and conditions and to engage with them in good faith might lead to more P2B cases being brought before such mediators. Mediation is however a private activity which will not impact public authorities. Member States will moreover not be required to adapt their existing certification schemes for mediators; those that already have such schemes in place will simply provide this existing service also for any new mediators that may enter the specialised area of P2B relations.

Any possible burden on national court systems is also expected to remain limited as a result of the layered design of the legal redress provisions. All co-regulatory options rely on out-of-court, alternative dispute settlement mechanisms to solve substantive issues arising between business users and online platforms. The legal provision granting standing to business associations is a tool to encourage online platforms to actually engage in these out-of-court mechanisms to effectively resolve disputes without having to resort to national courts. In Member States, the mere threat of possible collective interest litigation is a sufficient deterrent to encourage industry compliance with obligations.[209] It will not be possible for these associations, as representatives of the business users, to rely on the foreseen legal instrument to instigate court cases concerning substantive issues relevant to individual business users. Rather such cases shall be limited to the prevention or termination of non-compliance with the obligations in the foreseen legal instrument, which will be limited to those that do not make the necessary adaptations.

[209] See comment from the Finnish Competition and Consumer Authority in the Analysis of the state of collective redress in the European Union in the context of the implementation of the Recommendation of the Commission on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (request for services JUST/2016/JCOO/FW/CIVI/0099, Lot1/2016/06) prepared by the British Institute of International and Comparative Law (BIICL), in a research consortium with Civic Consulting and Risk & Policy Analysts (RPA), and supported by the Office for Economic Policy and Regional Development (EPRD), (forthcoming).

The **European Commission** will be responsible for creating and supporting an **EU Observatory**. The costs will include in addition an online interface for business users, which will inform the work of the **EU Observatory** by measuring statistics on areas of potential friction in P2B relations. Other relevant costs to be borne by the European Commission would include the development of the portal and its operation. Setting up such a portal would be linked to one-off costs for the European Commission reaching up to €1,000,000.

The running costs of the portal would include costs for hosting the platform, maintenance, translations and a possible helpdesk manned by a dedicated support team. A first estimate based on the running costs of the Your Europe portal of the running costs of the web-based system would be €1.5 million/year, staffing costs included[210]. However, the Your Europe portal handles 17 million requests per year. The number of requests handled by the online portal foreseen as part of the present initiative is likely to be lower, thus limiting its running costs, and its functionalities would be more basic, as the portal should only collect input from business users and offer them relevant information at a general level. If fewer than a million complaints are submitted to the platform every year (i.e. less than a tenth of those handled by the Your Europe portal), the running costs of the platform which the European Commission would cover, could therefore be estimated to around 10% of those of the Your Europe platform, i.e. € 150,000 per year. This estimate indeed seems reasonable given that this Internet portal is merely meant to produce statistics on the number of issues raised, as well as on their topics. Otherwise, it will provide only general information to business users. As it will also be made explicit that no follow-up will be given to individual complaints, the cost of even a large number of complaints is expected to have only a limited impact on the running costs of the portal.

12.4. Impact on innovation, competitiveness, competition

12.4.1. Innovation

As stated in Section 2.3.5, online platforms are important drivers and enablers of ***innovation***[211], thus contributing to digital transformation of the economy and enhancing businesses' ***competitiveness***. Business users, in turn, are important innovators, using the innovation-enabling software "building blocks" and market access provided to them by online platforms. The millions of sellers active on e-commerce market places for example provide constant feedback to online platform operators on logistical, software and commercial problems encountered and on possible innovative ways to address them. App developers provide a constantly improving richness of content that no single platform could have imagined or engineered.[212] Research indeed confirms this key role played by communities, networks and user involvement in software innovation.[213] All co-regulatory options that aim

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[211] Platforms are a magnet for innovation. For example, new apps are constantly being developed and made available in app stores. In March 2017, there were 2.8 million apps available in Google Play, 2.2 million in the Apple App Store, 669,000 in the Windows Store and 600,000 in the Amazon Appstore. Statista: Number of apps available in leading app stores as of March 2017.

[212] Based on 1.5 million apps listed in the App Store, it is estimated that in order to re-create the same creative richness, it would have required Apple itself 519 000 years' worth of work, see: https://www.slideshare.net/faberNovel/gafanomics-season-2-4-superpowers-to-outperform-in-the-network-economy/42-42The_more_apps_available_the.

[213] Jeremy Rose and Brent Furneaux, "Innovation Drivers and Outputs for Software Firms: Literature Review and Concept Development," *Advances in Software Engineering*, vol. 2016, Article ID 5126069.

at releasing the full potential of the online platform economy can thus positively impact innovation both on the side of the platforms and of the business users.

Regulatory action on P2B relations could hamper the innovation capacity of online platform ecosystems only if it were too interventionist, as it would divert resources from innovation activities to regulatory compliance activities. The measures to be proposed are however proportionate and do not interfere with platforms' business models. The coherence with innovation is indeed also a specific criterion against which each content option has been checked (see table in Annex 10). Conversely, the impact in terms of innovation on the side of business users can be similarly expected to be positive, as business users trading via platforms can benefit from a more predictable and contestable business environment, and focus even more on product and service improvements and innovation.

The proportionate nature of the measures proposed under any of the policy options 2a, 2b and 2c should accordingly prevent any negative impact on innovation. At the same time, all of these policy options aim to help prevent further fragmentation of the Digital Single Market, and to enhance transparency around a selected number of high-impact trading practices. Given the relatively wide scope of the legal transparency obligation under policy options 2b and 2c, these options may help improve the functioning of markets and facilitate the scaling-up possibilities for new online platforms. This should help prevent that, going forward, a limited number of exceedingly large, established providers of online platforms limit their own investment in innovation, as well as the capacity to innovate of their business users – through the latter's significant innovation-dependency on the platforms' software building blocks.

Different from 2a, 2b and 2c, policy option 2d may have a negative impact on innovation, as data lies at the centre of platforms' business models. The measure concerning the release of certain types of personal data under option 2d may interfere with platforms' ability to develop new data-driven services and products. Platforms, in particular start-up or smaller platforms are also dependent on building their customer base to scale up. As platforms facilitate the contacts with customers by intermediation, subsequent direct contacts with the business users after the first intermediation bypassing the platforms are clearly detrimental to their business models. Such an obligation may require adjustments of platforms' business strategies and could constrain their capacity to innovate. In addition, direct contacts with clients that have already used a platform are in many cases possible, e.g. for hotel owners that have a direct contact with the customers, regardless of the manner in which the room was reserved. As a result, option 2d, while facilitating enterprises' scaling-up possibilities, could constrain platforms' innovation capacity.

On the contrary, policy options 2a, 2b and 2ce are all expected to lead to further growth of turnover for platforms and businesses as compared to the baseline, and hence of market players' capacity to invest in innovation. This could be expected especially in the long term, when increased business users' trust and the resulting network effects would materialise in the form of greater turnover from commission payments (see Section 6.2.2). Voluntary action on data sharing similarly can accelerate data-driven innovation in the online economy. While increased turnover does not necessarily translate into investments in innovation, the platform economy is innovation-driven and online platforms invest massively in R&D[214]. It is hence

[214] Average per year from 2013 to 2017: Facebook: 904.84 million USD, Alphabet 2.721 billion USD, Amazon: 2.811 billion USD, and strongly increasing over the years. Retrieved from Ycharts.com.

legitimate to expect an increase in platforms' innovation expenses in case of economic growth.

12.4.2. Competitiveness

In terms of competitiveness, EU-based online platforms will not be undermined by the proposed measures, irrespective of the policy option chosen.

Option 2a is expected to contribute to the growth of sales and will therefore create revenues for innovation which is an important competitiveness parameter. However, the relatively more limited scope of the legal transparency obligations can undermine some of the trust-building effect of the intervention foreseen under policy options 2b, 2c and 2d, and thereby limit the positive impact on innovation.

Notwithstanding their broader scope, policy options 2b and 2c are light-touch and do not imply significant costs for online platforms. Also, since all platforms intermediating between EU-based business users and consumers will have to comply with the measure, any risk of European platforms being undercut by platforms not complying with the proposed measure is minimal. Rather than driving operators of online platforms out of Europe, the proposed measure is estimated to increase trust and lead to an increase in the number of businesses present on online platforms.

The platform ecosystem is also expected to become more **competitive** as a result of this initiative aiming at greater predictability for the platform ecosystem. Policy options 2a, 2b and 2c will, although to a different extent, have a positive or neutral impact on the three components of competitiveness, as defined in the Better Regulation toolbox:

- Price-competitiveness: it will generate some regulatory costs but these are expected to be limited, and mitigated through the threshold(s) exemptions. They are thus not expected to impact prices, especially given that costs would be offset by the growth of the platform economy.
- Innovation capacity: in all three scenarios 2a, 2b and 2c, platforms will be incentivised as compared to the baseline scenario to innovate in order to compete with small emerging platforms, and to develop better quality services and products. Option 2a would already imply innovation opportunities but they take longer to materialise given the limited scope of legal transparency. Option 2b would imply greater value added for business users and hence potentially higher innovation opportunities. Option 2c would theoretically extend those benefits to online general search engines. It is however uncertain to what extent greater insight in ranking policy would lead to increased online revenues for business users, and hence in possible R&D investments. The positive impact on online general search engines would therefore also have to be estimated as limited, notwithstanding the large scale for improving user trust.[215] It accordingly appears difficult to assess the value added of option 2c as compared to option 2b (for Section 7). It is therefore policy options 2b and 2c that are expected to contribute to the greatest extent to the growth of the platform economy, and therefore with more revenues to invest in R&D&I. Due to the increased trust and presence on

[215] As mentioned in section 2.1.1.3, 19% of EU Internet users does not trust that the results presented to them are the most relevant to their query.

platforms, business users would seize innovation opportunities offered by platforms and better embrace digital transformation.

- International competitiveness: platforms would be incentivised to increase the level of quality of service offered to business users. The increase in quality of the products and services of online platforms will be an asset when competing with non-EU companies. This is also true for businesses active on online platforms; they would become more competitive as a result of developing innovative products and services. They would also have increased incentives to compete with foreign companies due to the market access and business opportunities offered by a better functioning platform economy.

The impact of option 2d on competitiveness is more difficult to predict, and is therefore accompanied by greater uncertainty than policy options 2a, 2b and 2c. This option would indeed equally create incentives for platforms and businesses to increase their effort to offer improved services as a result from the introduced quality standards. However, the innovation capacity of platforms may be limited in option 2d by the measure contained in this option to release data concerning email addresses. Their ability to compete could be constrained by the possible decrease in revenues which may result from the reduced use of data, which is at the basis of online platforms' competitive advantage. The immediate impact of option 2d on business users would be increased revenues due to improved customer base. However, if option 2d affects negatively platforms, it could not be excluded that their reduced ability to innovate and compete is passed on business users in the longer term.

12.4.3. Competition

The co-regulatory options retained would set a standard for higher quality of service thus creating the opportunity for start-up platforms to compete on the basis of the better business environment they would offer to professional users. Both options would thus likely create the right regulatory environment for ***increased competition*** as compared to the baseline scenario on both sides of the market - among platforms and among businesses present on these platforms. Increased competition could be expected to lead to higher quality products/services provided to business- and end-users.

Under option 2a, the mandatory transparency provides additional competitive parameters for start-up platform companies. Even small increases in user trust will equally support the growth of existing platforms as well as the emergence of start-up platforms. Increased transparency though non-binding for some of the issues would possibly give the right signal to more businesses to use online intermediation; this could in return lead to more competition.

In option 2b, the increased trust resulting from the resolution of disputes with online platforms will expand the business user base of existing platforms. This will feed into the existing network effects laid out in the problem statement. The resulting renewed dynamism of the platform economy would *a priori* allow the emergence of new, small platforms. Legally binding transparency rules on all six issues identified and appropriate redress tools could also be expected to contribute to more competition among business users.

Option 2c would extend these above effects to online general search engines and the business users who use them as a gateway to customers. This option may be expected to have an indirect positive effect through enhanced transparency as a complementary tool to competition law.

The positive effect on online platforms will be more limited in option 2d, where the risk of free-riding by business users is greater; the number of business users active on platforms may not increase as much, if platforms are faced with the need to redesign their business strategies. On the other hand, option 2d could lead to increased competition since the access to emails would possibly allow some enterprises to increase their business thus creating new competition dynamics. This could not however be predicted with certainty because of the interaction with the consumer side of the market, and namely the "transaction point" discussed under section 6.6 below, i.e. if the consumers perceive the 'email' sharing request made to them as too burdensome, there may not be a positive effect on business users' turnover generated through online intermediation.

12.5. Employment and social impact

The overall impact of the co-regulatory options on social welfare including in particular employment is likely to be **positive**. As described above the measures aiming to full potential of the online platform economy will lead to an increase in turnover for both business users and platforms. The increase of business users' turnover may be expected to lead to increased employment opportunities. This expectation would probably be less valid for online platforms despite the fact that they will see their revenues from commissions increasing (as a result of the increase in sales over platforms). Given that platforms are innovation-driven, it would be difficult to predict whether they would use increased revenues to create additional jobs instead of investing in research and development.

However, even if the initiative would not lead to the creation of new jobs either by business users or platforms, it would be reasonable to assume that it would contribute to maintaining the current number of jobs offered by the 1 million EU businesses active on online platforms. By offering better opportunities to businesses to grow through improved relationships with online platforms, the policy options 2a, 2b, 2c would preserve the 4.7 million[216] jobs already created by business users of platforms. The effect of Option 2d is more uncertain. Option 2d could on the one hand be expected to have a greater positive impact on job creation by business users since it would expand their client base thus possibly leading to an increase in their turnover. On the other hand, this option would be more intrusive in platforms' business strategies and ultimately limit online market access and business opportunities for professional users. This could possibly have a negative impact on jobs both for platforms and their business users.

In addition, while the primary impacts of the initiative are of an economic nature, some beneficial social impact in particular for self-employed individuals is conceivable. A large part of sellers on e-commerce market places are self-employed individuals, with 89% of all sellers achieving a turnover of less than € 50,000.[217] In addition, both options will cover collaborative economy platforms to the extent these host professional users. Whether a user of a platform is considered professional or not depends on national rules in the EU. However, the proposed obligations would lead to greater transparency, predictability, and certainty for all

[216] We consider an average number of employees of 4.7 irrespective of the economic sector concerned. This is a conservative assumption since this figure corresponds to the lowest one of the three sectors for which data is available: i.e. computer programming (i.e. app developers). The corresponding figures are 5.2 for retail and 8.4 for accommodation (source: Eurostat, datasets sbs_na_dt_r2 for retail and sbs_na_1a_se_r2 for accommodation).

[217] COM SWD(2017), 154 final, Commission Staff Working Document accompanying the Final report on the E-commerce Sector Inquiry (COM(2017), 229 final), paragraph 449, 10 May 2017.

users.[218] Overall, although difficult to quantify, it is therefore reasonable to assume that the proposed options will provide more predictability also to the benefit of a large number of particularly vulnerable economic actors. The net benefit of the initiative – improved businesses' access to innovation and business opportunities created by inline platforms, increased competition leading to lower prices, higher quality and broader choice for consumers of goods and services offered on online platforms - should outweigh the costs.

12.6. Impact on consumers

Online platforms being two-sided markets with business users on one side of the market and consumers on the other, it would be legitimate to ask the question whether the proposed intervention on the business users' side would not impact the consumer side of the market. Given that platforms would incur some regulatory costs on the business users-side as a result of the initiative, they may attempt to recoup costs on the consumers-side through e.g. higher prices or decreased quality.

This risk is particularly high for option 2d, in which online platforms may be partially deprived of one of their key assets, i.e. consumer data. As the exact share of consumers who would agree to this measure is difficult to estimate, it is equally difficult to determine whether platforms would pass on possible losses from this measure to consumers. Therefore, the mandate of the dedicated EU Observatory (see Section 5.2) should include the task of monitoring, inter alia, to what extent platforms share both non-personal and personal data, e.g. e-mail addresses, with business users and to what extent business users request access to such data.

In option 2b however, the risks of platforms passing on costs to consumers are far more limited due to i. the specificities of platforms' business model and ii. the proportionate nature of the option. Consumers are at the core of platforms' business strategy. They benefit from very competitively priced high-quality products and services. Platforms would not put in question their successful business models without a valid reason to do so. Option 2 would not impact platforms' business strategies, in line with the third specific objective according to which no undue burden should be put on them. It is proportionate as it is light-touch, targeted and its co-regulatory nature gives sufficient flexibility to industry.

The expected increase in the number of platforms and businesses active on these platforms would likely lead to increased choice for consumers on online platforms and increased competition among business users for these consumers, thus better prices and quality. At the same time, if the present initiative contributes indeed to increasing the number of successful online platforms, this would also translate into increased search costs for consumers who would spend more time choosing the product and/or service they need. Arguably, the increased number of platforms could result in the appearance of more specialised platforms. This could in turn lead to higher quality products being offered on the market, thus counterbalancing the disadvantage of higher search costs. Finally, even if the growth of the number of business users on platforms is limited, the businesses which are currently present on platforms are still more likely to continue using platforms, thus contributing to maintaining a level of quality and choice for consumers similar to the current one.

[218] A large number of platforms active in the collaborative economy are however "hybrids", in that they enable peer-to-peer as well as business-to-consumer transactions.

When analysing impacts on consumers under option 2c, it is important to underline the value added that online general search engines have brought for them – in one-click consumers have access to a huge variety of information, businesses, goods and services. While the ranking transparency obligation does not target "consumer users" (i.e. searchers), a transparency obligation would indirectly contribute to safeguarding and possibly strengthening this positive effect. By prioritising tools like OneBox over organic links online general search engines are not necessarily delivering the most relevant search results on top of the page. A transparency obligation would incentivise search engine operators to be more cautious and transparent in those instances where there a conflict of interest could exist between their own services and competitors' services. This would possibly contribute to a more impartial and pro-competitive outcome for consumers. Given that popularity is an important factor for getting visibility, webpages ranked objectively higher have greater chance of being linked back by a higher number of visitors, which in the longer term could materialise through results of even higher relevance getting better ranking.

Business-oriented fair practices would also complement consumer protection rules, thus enhancing end-users trust in the platform economy, giving them confidence in buying online thus benefitting from larger cross-border offer. This could support the existing trend of growing consumer trust in e-commerce. More than one in two Europeans now buy online (55% of consumers in 2016[219]). Since 2014, consumers' levels of trust have increased by 12 percentage points for purchases from retailers located in the same country (72.4% of consumers are confident buying online in their own country) and by 21 percentage points for purchases from other EU Member States (57.8%). In conclusion, the co-regulatory options' expected impact of widening consumer choice and its expected indirect positive effect on consumer trust mean that it will contribute to the further increase of consumer trust in online markets in the coming years. Therefore, should one of the co-regulatory options be implemented in four years' time, and given the positive trend in consumer trust in online shopping in recent years, it can be reasonably expected that more than 75% of consumers will be confident buying online in their own country and over 60% cross-border by 2020.

Option 2d implies some burden on end-users who would be obliged under this option to provide their consent for their email addresses to be shared with platforms' business users. If this translates in less purchases being done on online platforms this could lead to less businesses being present on online platform (especially given the risk of free-riding). This would in turn negatively affect indirect network effects and lead in the long term to reduced consumer choice on online platforms. The latter could however be compensated by an increased choice of products/services offered offline and/or on business own websites.

12.7. Environmental impact

The co-regulatory options aims at addressing the issues business users have in their relationship with several types of online platforms: e-commerce marketplaces, app stores, online travel agencies, and social media. Transactions on these online platforms, except for the e-commerce marketplaces, do not imply physical delivery, and should therefore have no direct environmental impact of these sectors. In addition, the initiative aims at contributing to releasing the full potential of the digital economy in the EU. A well-functioning digital economy contributes to the development of more innovative technologies and efficient

[219] Consumer Conditions Scoreboard – Consumers at Home in the Single Market. 2017 Edition.

production processes. Digitally-driven economic growth is less resource-extensive due mainly to efficiency gains stemming from innovation. While no clear-cut quantified assessment of the environmental impacts associated with the present initiative is available, it is nonetheless not expected to have a significant detrimental impact on the environment. This is valid for all options retained.

12.8. Impact on fundamental rights

All co-regulatory options fully comply with the Charter of Fundamental Rights ("CFR"), in particular with Articles 8, 16 and 47 CFR. The rationale behind this initiative is to establish a more balanced commercial relationship, while ensuring that platforms maintain full discretion over their business concepts. All retained options are designed in a way that the right to conduct a business, pursuant to Article 16 CFR, is preserved fairly on both sides at a similar level. Important to note in this regard is that one of the problem drivers is a dependency-induced imbalance in bargaining power which can unduly restrict the contractual freedom of business users. In such cases, there is, arguably, a failure of the market to maintain the freedom to contract and therefore a lack of respect for Article 16 CFR. The legal transparency obligations foreseen under options 2a, 2b, 2c and 2d therefore apply strictly to situations where general terms and conditions are unilaterally imposed by online platforms on their business users.

Different from policy option 2a, the policy options 2b, 2c and 2d include legal transparency obligations on technically more complex and fast-changing issues such as ranking. As described in section 6.2.1, these options therefore imply a relatively more pronounced risk of legal uncertainty for online platforms, which should however be alleviated by the co-regulatory design that uses technologically-neutral legal principles to be implemented by industry. All of the above options would therefore appropriately balance the fundamental rights concerned, by improving respect for business users' freedom to contract while safeguarding online platforms' right to legal certainty.

In relation to providers of online general search engines, policy option 2c addresses a single trading practice that is capable of yielding significant dependency-induced harm, even outside a formal contractual relationship. The relevant legal transparency obligation on ranking in online general search will moreover allow the relevant providers to build on existing examples of transparency provided to their users. The narrow scope and limited cost of policy option 2c thereby respects the right of providers of online general search engines to conduct their business. It should at the same time improve the predictability for business users whose websites depend for a large share of Internet traffic on online general search engines, in light of potential unilateral ranking practices that can negatively impact their freedom to conduct a business.

The co-regulatory options also comply with the right of access to justice laid down in Article 47 CFR. The various policy options will namely establish mandatory EU rules enforceable by business representative organisations. This will ensure that existing barriers to accessing justice for business users of online platforms, which take the form of an important fear of retaliation combined with the need to litigate across borders – frequently outside the EU, are lowered. The legal obligations for online platform providers to establish an effective internal complaint-handling mechanism and to engage in good faith in mediation should at the same time limit the need for lengthy and costly court proceedings – while leaving both online platforms and business users entirely free to actually instigate such court proceedings at any time. The objective of creating an efficient redress facilitating EU business users' access to redress also does not interfere with platforms' contractual freedom to determine relevant

courts and legal regimes for contractual issues. All co-regulatory policy options will therefore serve to reinforce the respect for Article 47 CFR.

Compliance with Article 8 CFR is ensured by the fact that all the respective options have been envisaged only provided that they conform to the provisions of the General Data Protection Regulation (2016/679/EU). Thereby, the high degree of data protection for European citizens as stipulated under Article 8 CFR is safeguarded. As regards GDPR, option 2d adds a legal obligation for platforms to give business users the opportunity to ask for customers' consent to obtain and process their e-mail addresses after the completion of a transaction and the payment of the commission to the respective platform. In its implementation, this measure will be carried out in full compliance with the GDPR – including the provisions regarding taking up the roles of data controller and data processor by the platforms. At the same time, different from policy options 2b and 2c, the data sharing obligation foreseen under this option involves a risk that business users circumvent the platform, thereby disrupting the latter's business model. This data sharing obligation therefore risks negatively impacting the right of online platforms to conduct their business, by failing to achieve an appropriate balance between this right of platform and the corresponding right of business users.

12.9. Summary

All co-regulatory options have features that could impact the functioning of the online platform economy, for instance by increasing regulatory costs which potentially could be passed on to consumers, or limit access to online platforms. Such unintended impacts have been analysed and are expected to be limited by the additional growth and competition which will result from the increased legal certainty and possibilities for redress created by the instrument proposed. Nonetheless, certain features of option 2d create significant risks for the platforms business model. The impacts of the four options are summarised below.

Table 5: Summary of impacts of retained options

Type of impact	Option 2a	Option 2b	Option 2c	Option 2d
Internal market fragmentation	Neutral to positive: legal transparency and redress measures will increase legal certainty. However, with various high-impact trading practices being left to self-regulation (ranking, data, discrimination, MFNs), this options may not prevent direct harm to businesses. The effect of EU monitoring / pushing	Positive: reduced need to intervene at national level to resolve them. The new rules together with the EU observatory will help allow building a common EU understanding of what issues are, thus also allowing for more consistent regulatory approaches when such are deemed necessary at national level.	As in option 2b: transparency and redress measures will increase legal certainty, and monitoring tools will help limit further fragmentation.	As in previous options 2b and 2c: transparency and redress measures will increase legal certainty, and monitoring tools will help limit further fragmentation.

	reputational levers will also be less pronounced in the absence of legal transparency obligations on all high-impact trading practices. The risk of fragmentation thus remains large since national authorities would continue intervening to solve existing imbalances.			
Growth	Neutral to positive: increase in trust in the platform environment will support growth in sales, while limited legal obligations represent minimal compliance costs. Leaving high-profile issues such as ranking, data, discrimination and MFNs to self-regulation can however undermine some of the trust-building effect of the legal measures on terms & conditions, delisting and redress, following increasing awareness and concern among businesses.	Positive: increase in trust in the platform environment will support growth in sales realised on online platforms. This impact, positive both for platforms and business users would contribute to mitigating possible impact of compliance costs. The expected growth of the platform economy in conjunction with foreseen growth of online activities could be expected to contribute to digital growth within the internal market.	Positive impacts as in Option 2b, extended also to the online general search environment.	Uncertain: risk of free-riding by business users limits positive impact on sales realised on online platforms. While growth in the online intermediation could be suboptimal, it could possibly be compensated to some extent by growth in online sales on business users' own websites.
Platforms	Minimal costs: The legal transparency	Limited costs: the impacts of 2a are also valid here. The	Limited costs: the extension of the ranking	Negative to neutral: While thresholds may help small platforms

	obligations on terms and conditions and delisting imply only limited costs for platforms while allowing them to benefit from increased trust. Smaller platforms are exempted from the most burdensome internal redress mechanism obligation. The two-step approach will ensure that thresholds are adapted if needed to respond to the evolution of the fast-changing platform economy. Threshold for small platforms will support emergence of new players.	extension of the legally binding nature of the requirements to all areas of issues would create some additional one-off and running costs as compared to 2a. These costs remain limited to ensure the effectiveness of the obligations and exempt small platforms from disproportionate burden (possibility for thresholds to be reviewed in a second step). The limited regulatory costs are expected to be outweighed by the increased growth opportunities for platforms (more sales would also translate in increased commissions for platforms) created by positive indirect network effects. Small platforms can benefit from appropriate thresholds to grow. A clear and predictable regulatory environment would also support emergence of new players.	transparency requirement and parts of redress would create some limited costs for online general search engines. The additional trust for search engines which would result from the initiative is expected to counterbalance the limited costs.	to develop new business models, this option may impact platforms' business strategies. It does imply relatively high costs for platforms without creating benefits to compensate for costs.
Business users	Positive: proposed measure, while not binding for all issues, would offer a higher quality experience for business users.	Positive: Business users would benefit from greater predictability. Clarity of platforms' policies and improved access to redress would allow businesses to better grasp the innovation and business opportunities offered by online intermediaries. Business users' sales	Positive: In addition to benefits identified under option 2a, businesses would be able to develop better informed search optimisation strategies. This would be particularly beneficial for SMEs and	Positive to neutral: In addition to benefits under option 2c, option 2d would allow business users to expand their customer base. Potentially negative effects are however not to be excluded in the longer term if platforms' environment dynamics change as a result of option 2d's

		would grow as a result from their increased trust in the platform economy and stemming strengthened network effects.	enterprises with no or emerging online presence.	impact on platforms' business strategies.
Public administrations	Limited costs: legal obligations require mostly one-off implementation and are easy to monitor. Moreover, instead of relying on public enforcement that would have to be financed by national or EU administrations, the co-regulatory design of this policy option foresees private litigation by representative associations and therefore implies no additional costs. Finally, the Commission will bear the costs of EU Observatory and portal.	As Option 2a.	As Option 2a.	As option 2a.
Employment and Social impact	Neutral to positive: growth of the platform economy will contribute to maintaining the 4.7 million jobs created by business users of platforms.	Positive: as in option 2b but the maintaining effect on employment could be expected to be stronger due to the additional incentives provided by the legal character of transparency measures for all six issues. Expected positive social impact.	Positive: As option 2b, option 2c could be expected to lead to increased employment opportunities for businesses dependent on online platforms and on general search engines. Should the positive effect be more limited than expected, option 2c would contribute to maintaining	Uncertain: impact would depend on whether the immediate effect of possible increase in number of jobs by business users would outweigh possible job cuts. The latter would be due to potential decrease in business opportunities in the platform economy as a result of option 2d – related obligations.

			existing jobs.	
Innovation	Neutral to positive: any action injecting trust would increase sales, thus creating revenues for innovation. However, as with the foreseen impact on growth, the limited scope of the legal transparency obligations can undermine some of the trust-building effect of the intervention and thereby limit the positive impact on innovation.	Positive: growth of sales will create revenues for innovation both for platforms and business users.	Positive: Better insight in ranking policies could help business users grasp innovation opportunities offered online.	Negative: may interfere with platforms' ability to develop new data-driven services and products. This could in turn reduce innovation opportunities offered to business users.
Competitiveness	Neutral to positive: costs will be particularly limited and price-competitiveness therefore unaffected; innovation could increase and support international competitiveness.	Positive: competitiveness would be reinforced through the enhanced incentives for platforms to compete on the basis of greater transparency and increased quality of service. Positive impact on trust and presumably growth of the sector would support international competitiveness through increased innovation opportunities for business users and platforms. Start-up and small platforms could use increased transparency and redress standards (incentivised through the measure) to build a competitive advantage.	Positive: As in option 2b. In addition, if greater insight in SEO leads businesses to access new markets and embrace innovation (cf. above) this could translate in strengthened positive impact on competitiveness.	Negative to neutral: limited impact on price-competitiveness but negative impact on innovation and international competitiveness.

Competition	Positive: the mandatory transparency provides additional competitive parameters for start-up platform companies. Even small increases in user trust will equally support the growth of existing platforms as well as the emergence of startup platforms.	Positive: expansion of user base will support emergence of new, small platforms.	Positive: Increased pro-competitive effect among platforms through enhanced transparency. Potential indirect effect: competition among business users could potentially increase due to greater insight in ranking policies.	Negative to neutral: as for option 2c but the business model of platforms may be impacted by sharing of data, which makes the effect uncertain on inter-platform competition. Uncertainty is also true for business- and end- users – the potential positive effect expected could be counteracted by consumers concluding fewer transactions because of the increased burden to prior respond to email sharing requests.
Consumers	Neutral to positive: linked to growth, the limited scope of the legal transparency obligations can undermine some of the trust-building effect of the intervention and thereby limit the positive impact on consumer choice.	Positive: improved P2B relations will allow maintaining and possibly increasing consumers' choice in terms of quality goods and services offered at a competitive price. Legal transparency obligation on ranking combined with EU monitoring may in addition have particularly important indirect positive effect for consumers that will be able to make more informed purchasing decisions.	Positive indirect effect: could contribute to a more impartial, pro-competitive outcome in the form of higher relevance results being more easily identifiable.	Uncertain: sharing of data is a direct burden for consumers. If considered too heavy by them, the email-related obligation may result in reduced purchase on online platforms. This could negatively affect indirect network effects and lead in the long term to reduced consumer choice.
Environment	Neutral	Neutral	Neutral	Neutral
Fundamental rights	The legal transparency and redress measures will help safeguard the freedom to contract (to conduct a business), by	Legal measures on technically complex issues such as ranking imply some risk of legal uncertainty for online platforms, which should however be alleviated by the co-	The targeted legal transparency obligation on ranking in online general search strengthens the positive impact of policy options	Article 8 CFR is safeguarded, as compliance with GDPR would be ensured. The data sharing obligation however risks negatively affecting online platforms'

	improving the situation for businesses without affecting online platforms' freedom to determine their business concepts implemented in general terms and conditions. These measures will also improve the right of access to justice for business users, by addressing importing barriers to accessing cross-border justice.	regulatory design that uses technologically neutral legal principles to be implemented by industry. These measures combined with the legal redress measures at the same time ensure the appropriate respect for business users' freedom to contract as well as for their right of access to justice.	2a and 2b on business users' right to conduct their business, while leaving the corresponding right of providers of online general search engines unaffected.	freedom to conduct a business.