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NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council
Subject: Regulation on Platforms-to-business relations

Delegations will find attached a Presidency discussion paper relating to the Platform-to-Business Regulation with a view to prepare the policy debate at the Competitiveness Council on 28 May 2018.

1. A transparent and predictable business environment to safeguard trust

When it comes to cross-border access to consumers markets, Online platforms offer unparalleled efficiencies and have become the “go-to interface” for successful companies: more than one million EU enterprises trade through online platforms to reach their customers, half of all travel bookings in Europe are made online, six out of ten European SMEs rely on social media to promote their products and services, and 66% of them claim that their position in search results has a significant impact on their sales.

Digital trade keeps growing fast and is increasingly intermediated by online platforms, which more and more act as gateways to markets, and are thus restructuring the digital economy. Online presence (on platforms) and visibility (also on search engines) are vital for the successful participation of European businesses in the EU economy.

Online platforms benefit from a virtuous growth cycle due to strong data-driven network effects of unprecedented magnitude, speed and scale: 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. Platforms have access to high quality, variety and volumes of data, including on users' profiles and preferences. This allows them to improve their goods and services by matching demand and supply of products/services (for online platforms) and search queries with results (for search engines) with unprecedented efficiencies.

The above characteristics can result in imbalanced bargaining power as business users increasingly depend on platforms and general search engines to reach their customers. The business strategies of online platforms are mainly focused on attracting and keeping consumers, whereas their business users typically need to be present on more than one platform within each market segment to optimize their turn-over. Besides that we are - as a result of network effect - in many sectors of economy confronted with a highly concentrated market concerning platforms.

The in-depth fact-finding exercise carried out by the European Commission during the past two years (including various studies, workshops and many complaints from businesses) has revealed a considerable number of harmful trading practices which limit the ability of many – often small – business users to reap the full benefits from online intermediation. This prevents them from focusing on their core tasks: to create growth and jobs by offering the widest possible range of products and services to European (and global) customers. Evidence – collected both at the EU and national level – suggests that almost one in two business users have already suffered from practices such as sudden and arbitrary changes in the platforms' terms and conditions, lack of clarity on the factors determining search results and rankings, being delisted by platforms without adequate justification, lack of clarity concerning the platform's data policies, or allegedly discriminatory behavior by those platforms that are vertically integrated and compete with their third-party sellers.

According to a Commission survey, one third of such problems remain unsolved, and another 29% can only be solved with difficulties, which illustrated the lack of effective redress in this area. It should be noted that, as a result of fear from potential retaliation from platforms, many problematic issues do not surface in the first place. With an estimated total user population of one million EU enterprises¹, hundreds of thousands of businesses are hence adversely affected one way or the other.

Neither competition nor consumer law effectively address those issues. Only a few of the largest platforms could potentially be found to hold a dominant position in competition law terms. Consumer law, by contrast, is limited to business-to-consumer transactions and does not generally address the unfair trading practices identified that are affecting other businesses. Nor do existing national laws on unfair trading practices specifically address the problems outlined above.

¹ Copenhagen Economics, 'Online Intermediaries Impact on the EU economy', EDiMA, October 2015

The market dynamics themselves are unlikely to change significantly as the number of businesses who would like to use online platforms to reach consumers is expected to grow much faster than the number of online platforms. As a result, the dependency-induced imbalance in bargaining power will only become more pronounced than today, and any self-regulatory initiatives are unlikely to effectively address the problems identified.

EU undertakings need a transparent and predictable business environment to be able to fully embrace the digital innovation and growth opportunities created by the online platform economy. It is therefore crucial to ensure transparency and predictability of the platforms' main trading practices. The proposal of the European Commission for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, adopted on 26/4/2018, aims to ensure a healthy platform ecosystem that benefits all – business users, online intermediaries, and European consumers – with a minimum degree of regulatory burden imposed on platforms (and exempting small platforms from the requirement to establish internal complaints-handling mechanisms). At the same time, both large and small platforms (and their users) are bound to benefit from a predictable, EU-wide regulatory framework.

2. A two-step approach to ensure proportionality

When regulating a fast growing sector with constantly developing business models, the issue of reaching the right balance and sequencing in the regulatory approach becomes very important both for the attainment of the direct policy objectives as well as for the growth potential of the economy. To this end, the European Council has already given guidance on the future regulatory framework by “underlining the necessity of increased transparency in platforms’ practices and uses”².

² European Council Conclusions, October 2017

Transparent business practices ("rules of the game") and improved redress mechanisms should help reduce the general level of friction observed today in platform-to-business relations. At the same time, the Commission proposal leaves platforms the freedom to determine the contractual rules applying to their marketplaces – recognising that this allows them to efficiently organise their large ecosystems of business users and consumers. The proposal thus safeguards the innovation potential of the online platform economy to the benefit of all actors, including the more than 7,000 online platforms established in the EU.

At the same time, a number of issues are understood to be of particular commercial importance to business users, and unilateral harmful trading practices cannot be excluded in this respect. This concerns for example the issues of competition by the platform on its own marketplace, of ranking, or of access to data. The detailed *ex ante* regulation of such practices would have implied altering the business models of online platforms and has been considered disproportionate by the European Commission – which weighed the existing evidence base against the potential negative effects of legislation that is not sufficiently technologically-neutral and innovation-proof.

The proposed transparency obligations already cover all of these "emerging" issues of key commercial importance for business users, and they are expected to have a disciplining effect on the platforms' behavior. Understanding the full nature and impact of the platforms' practices in these areas and assessing the impact of the transparency measures proposed will require further monitoring. The proposal's intervention logic is therefore based on a two-step approach: In a first step, enhanced transparency and redress obligations are meant to spur competition among platforms and to empower business users to take better informed decisions and to effectively resolve problems.

In a second step, the potential need for further-reaching targeted measures will be identified through an in-depth monitoring effort – i.e. the EU Observatory on the Online Platform Economy, which will be at the core of an attempt to combine the expertise of experts and policy makers across the Union. The independent expert group, which will be at the core of this Observatory, is expected to start its work before this summer. When working on the tasks assigned to it, it should liaise closely with existing centers of expertise and competence in the Member States.

This monitoring effort will contribute evidence to the review of the proposed Regulation three years after its adoption.

3. Questions

- Do you agree with the above analysis that there is a need to improve predictability and transparency for business users of online platforms in order to promote trust in the online platform economy?
 - Do you support a step-by-step approach for intervening in the fast evolving online platform economy focusing on transparency and redress, in which a swift agreement on the proposed first stage would be an important step for the EU?
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