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General Secretariat

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**Brussels, 24 May 2018**

**WK 6210/2018 INIT**

**LIMITE**

**COMPET  
MI  
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TELECOM  
PI  
AUDIO  
JUSTCIV  
IA  
CODEC**

**WORKING PAPER**

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**WORKING DOCUMENT**

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From:	European Commission
To:	Working Party on Competitiveness and Growth (Internal Market)
Subject:	IA presentation

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# IA presentation

**23 May 2018 - CWP**

# Overview

*Part 1: Need for and Purpose of the initiative*

*Part 2: Options overview*

*Part 3: Preferred option – Impacts*

*Part 4: Monitoring – EU Observatory*

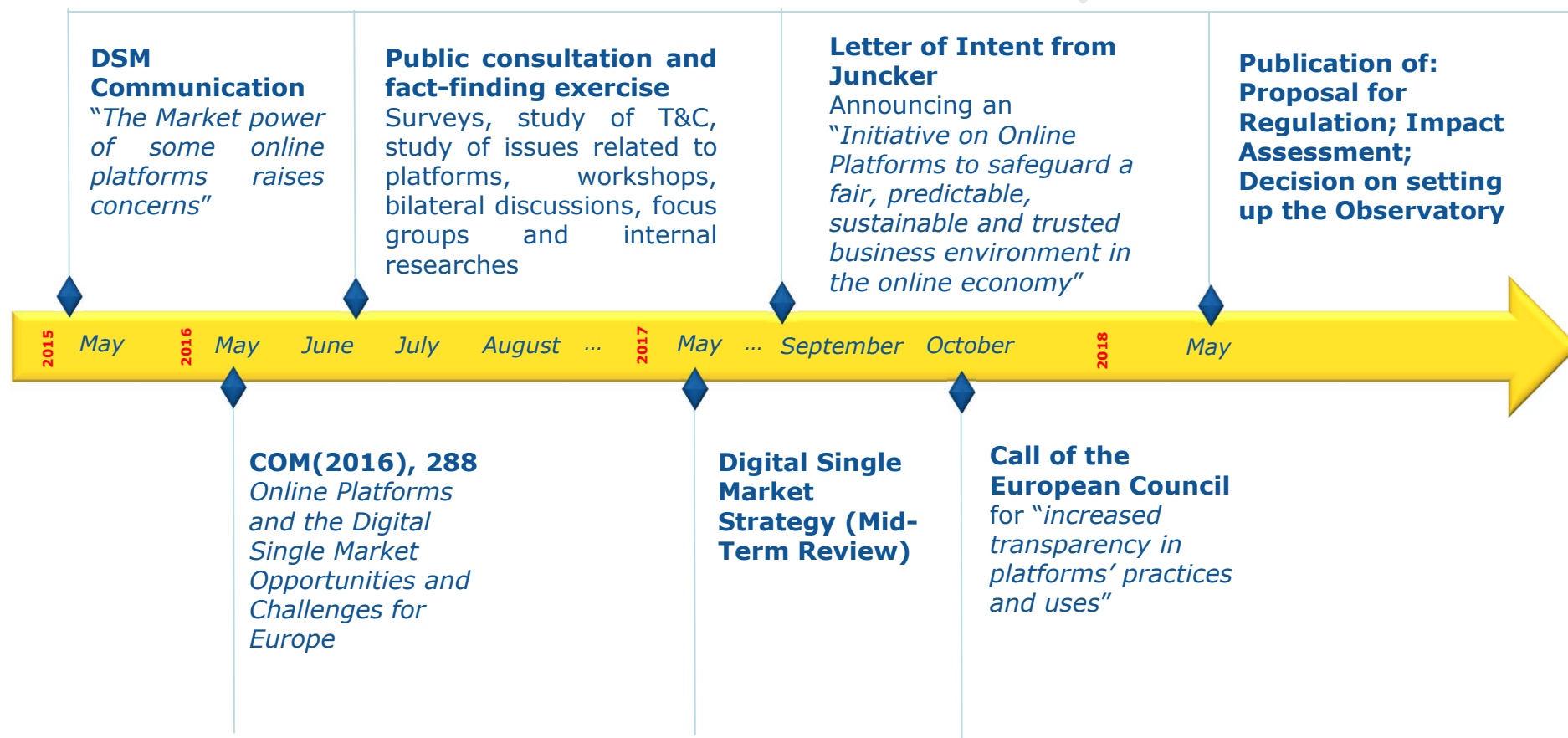
# PART 1

# Part 1

- A. Introduction: Process and Methodology**
- B. Problem statement**
- C. Objectives**
- D. EU right to act – added value**

# A. Introduction

# Process Timeline





## EU commits to investigate – DSM Strategy (2015)



EUROPEAN COMMISSION

Brussels, 6.5.2015

COM(2015) 192 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL,  
THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

A Digital Single Market Strategy for Europe

{SWD(2015) 100 final}

*The Commission will launch before the end of 2015 a comprehensive assessment of the role of platforms, including in the sharing economy, and of online intermediaries, which will cover issues such as (i) transparency e.g. in search results (involving paid for links and/or advertisement), (ii) platforms' usage of the information they collect, (iii) relations between platforms and suppliers, (iv) constraints on the ability of individuals and businesses to move from one platform to another and will analyse, (v) how best to tackle illegal content on the Internet.*





## ***Stakeholders consultation...***

- ✓ **Online platform consultation** from September 2015 until January 2016 -> more than 1036 replies
- ✓ **Bilateral meetings** (well over 70 meetings)
- ✓ **Targeted Workshops** with business users and platforms
- ✓ **Surveys** (Compound survey of 3549 business users of online platforms and 50 in-depth interviews )
- ✓ **Work with focus groups** representing business users, online platforms and regulators (designed and moderated by the JRC Policy Design Lab)





## ... together with other evidence ...

- ✓ **Eurobarometer** SME platform-use (4 904 interviewees)
- ✓ **Many studies commissioned by the EC** (e.g. Ernst & Young, Contractual Relationships between Online Platforms and their Professional Users; ECORYS, Business-to-Business relations in the online platform environment; VVA, Data in platform-to-business relations; GRAEF, Contractual terms and conditions of large e-commerce platforms)
- ✓ **External expertise**, consultation of experts in the field
- ✓ ***Dedicated survey on options among Member States***
- ✓ **Studies on platforms' terms & conditions**





## ... and economic literature

- ✓ **3 economic reports conducted by the JRC**
  - ✓ *JRC research online platforms*
  - ✓ *Quality discrimination in multi-sided markets*
  - ✓ *Platform to business relations in online ecosystem*
- ✓ **Other economic studies**
  - ✓ *Jean Tirole, Economics for the Common Good, 2017.*
  - ✓ *Oxera study (Google sponsored) on benefits of online platforms*
  - ✓ *Copenhagen 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"*
  - ✓ *Bruegel event on advantages of online platforms*
  - ✓ *White Book on online platforms prepared by the Federal Ministry of Economy and Energy in Germany*

# Methodological approach to estimates

## ➤ **Economic loss – consequence of the problem identified**

### **1. Direct loss in businesses' sales** realised on/through online platforms

- Figures on harmful practices applied to
- Turnover in different sectors

### **2. Dampening effect**

- Accounts for uncertainty due to lack of trust
- Assumption: 1%-5% further reduction of total sales by business users (conservative estimate)

### **3. JRC economic modelling as a check tool**

## ➤ **Impacts**

- Assumptions:
  - ✓ P2B regulation => 30% reduction of negative impact
  - ✓ Platforms apply 10% commission on sales they have intermediated

## ***Main considerations***

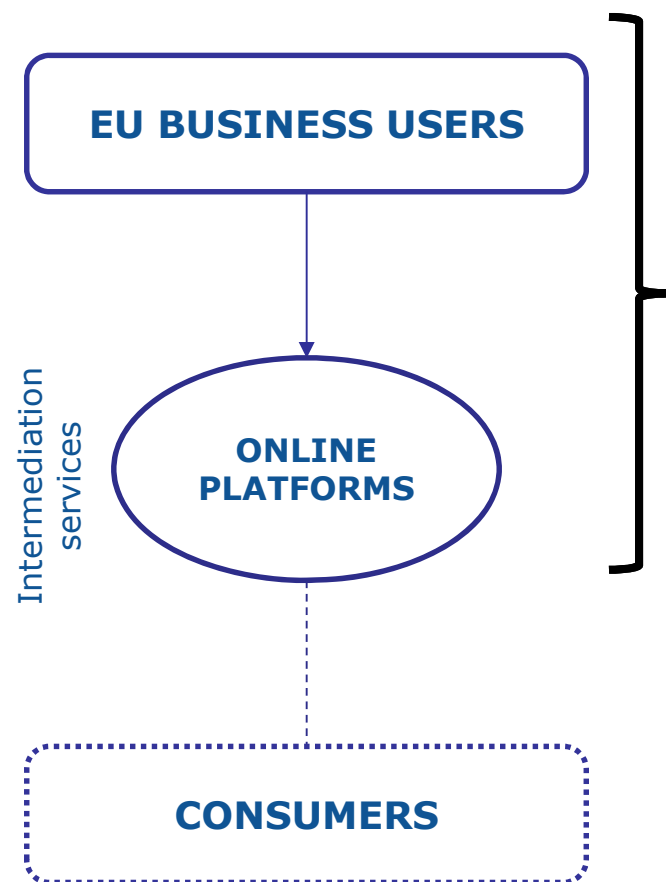
Make conservative assumptions to avoid overestimation of the :  
1/negative consequences of the problem, and/or 2/ positive impacts of the proposed regulation

## ***Main difficulties***

Getting a thorough and complete overview of the platform economy - fast evolving platform economy with complex value creation, requiring dynamic analysis and constant monitoring

Fear of retaliation and associated quantification difficulties

## *Scope of the IA*



### Definitional elements:

- a. Information society services
- b. B2P2C relationship
- c. Contractual relationships
- d. Initiating transactions
- e. Geographical scope: intermediation service in the EU irrespective of whether EU platform or not

## ***Included in the scope***

**Marketplaces on which a commercial transaction between a customer and a business user takes place**

*Characteristics: The transaction and payment take place on the platform*

*Common business model: The platform charges a commission*

### **E-COMMERCE**



**Booking.com**



**Etsy**



### **APP STORES**



## ***Included in the scope***

**Online platforms bringing together users with the aim to facilitate a commercial transaction**

*Characteristics:*

- *The transaction does not take place on the platform itself*
- *The actual payment takes place outside the platform*
- *The business user may be charged by the platform in different ways (e.g. commissions, charges per click, listing fees)*





## *Services and platforms not covered*

- **Peer-to-peer platforms** (e.g. WhatsApp, Skype, Facebook Messenger, BlablaCar, CouchSurfing)
  - no presence of business users
- Activities with **no contractual relationship** between the business user and the online platforms (e.g. Twitter, Snapchat, Facebook Profile)
- **Non-platform businesses** (e.g. Amazon Retail, Zalando Retail, Spotify, Netflix)
  - no intermediation – no “commercial relation”

## ***Services and platforms not covered***

- **Pure P2B platforms** (e.g. Salesforce, Microsoft Azure Market Place, Siemens AI Platform)
  - No consumers (i.e. private individuals under EU law)
- **Advertising activities** (e.g. Google Doubleclick, Bing Ads)
  - No contract with consumer
  - Not one and same services as those provided to consumers
- **Payment Platforms** (e.g. Amazon Pay, PayPal, Adyen)
  - No B2C commercial relations
  - Cannot be used to initiate transactions

## ***Services and platforms not covered***

- **Search engine optimization software**
  - No contract with consumers / invisible to consumer
- **Ad-blocking software**
  - No intermediation
- **Technology platforms connecting hardware and applications** (e.g. Windows, Linux, iOS)
  - Not directly connected with provisions of goods or services (no commercial relations)
  - No direct contract with both business user and consumer

## ***Search engines***

- \* *INCLUDED in the scope of the IA*
- \* *INCLUDED in the scope of the Regulation EXCLUSIVELY for issues relating to ranking of business users*

### ***WHY?***

Search engines are often the **source of the significant majority of Internet traffic for business users** and issues relating to the ranking of business users in the search services can be **exacerbated by a lack of clarity and predictability** around the functioning of ranking in the online general search engines.

***e.g.** Mobile software applications indexed by online general search engines. Business pages of restaurants on social media.*



## Compatibility of "*platform*" definition with definitions in relevant EU acts

***P2B definition of 'online intermediation services': Information society services within the meaning of Article 1 (1)(b) of Directive 2015/1535***

Legal instrument	P2B compatibility
NIS Directive (2016/1148)	' <i>online marketplace</i> ': definition identifies <b>one specific type</b> of online intermediation services, which is covered by the wider P2B definition. <b>Distinct purpose avoids conflict.</b>
Geoblocking Regulation	' <i>online interface</i> ': definition is not targeted at intermediation, but with <b>customers'</b> x-border access to information. <b>Obligations are complementary – no conflict.</b>
Regulation on content portability (2017/1128)	' <i>online content service</i> ': definition is not targeted at intermediation but at the resale of licensed audio-visual content (e.g. Netflix). <b>Online intermediation services are not covered.</b>

## Compatibility of "*platform*" definition with definitions in relevant EU acts

Legal instrument	P2B compatibility
Proposal for revised AVMSD Directive (2010/13/EU)	' <i>video-sharing platform service</i> ': definition narrowly targets video-sharing platforms where the provider does not have editorial responsibility. <b>Covers only one specific form of online platforms.</b>
Proposal for Directive copyright in DSM	' <i>video-on-demand platforms</i> ': <b>undefined concept</b> which narrowly targets video-on-demand platforms or user-generated content platforms.
Proposal for 'Digitax'	' <i>multi-sided digital interface</i> ': scope of definition is slightly broader. Purpose is to <b>identify taxable revenues</b> , not contractual imbalances in bargaining power. Online intermediation services will be included for tax purposes. <b>Definitions are aligned – no conflict.</b>
Proposal for revised Consumer Rights Directive (CRD)	'online market place' and 'online interface': definitions identify <b>one specific type</b> of online intermediation services where the <b>contract is concluded online</b> . The purpose is to protect consumers, not businesses – <b>no conflict.</b>

## Compatibility of "*platform*" definition with definitions in relevant EU acts

Legal instrument	P2B compatibility
Draft crowdfunding Regulation	Crowdfunding definitions identify a specific type of C2P2B platform (peers investing in a trader's idea). <b>Different purpose and outside of P2B definition – no conflict.</b>
Draft enforcement Regulation/Goods package	Recital 13 uses 'intermediary services' in the sense of the P2B definition (no definition). <b>No potential for conflict.</b>
Draft proposal for a Regulation on cross-border access to electronic evidence in criminal matters	' <i>Service provider</i> ': definition targets a broad range of 'intermediaries' (including marketplaces and social media). However, obligations relate to the relationship between intermediaries and public authorities rather than businesses. <b>No potential for conflict.</b>

## **B. Problem definition**



# Online platforms offer **unparalleled opportunities** and their **potential shall be maintained**

## **Innovation and growth in the digital economy**

22% of the 2016 e-commerce value generated by EU third party sellers on online platforms;  
1 million EU businesses already selling goods and services via online platforms

## **Cross-border market opportunities**

more than 50% of SMEs selling through online marketplaces sell cross-border

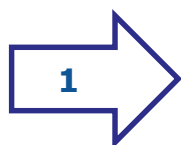
## **Enhanced consumer welfare**

increased choice of competitive goods and services online

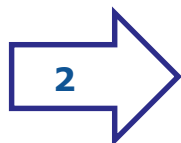


## Core problem:

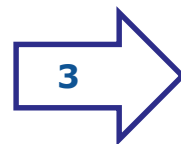
unexploited potential of online platform economy by European undertakings – platforms and business users



Potentially harmful trading practices

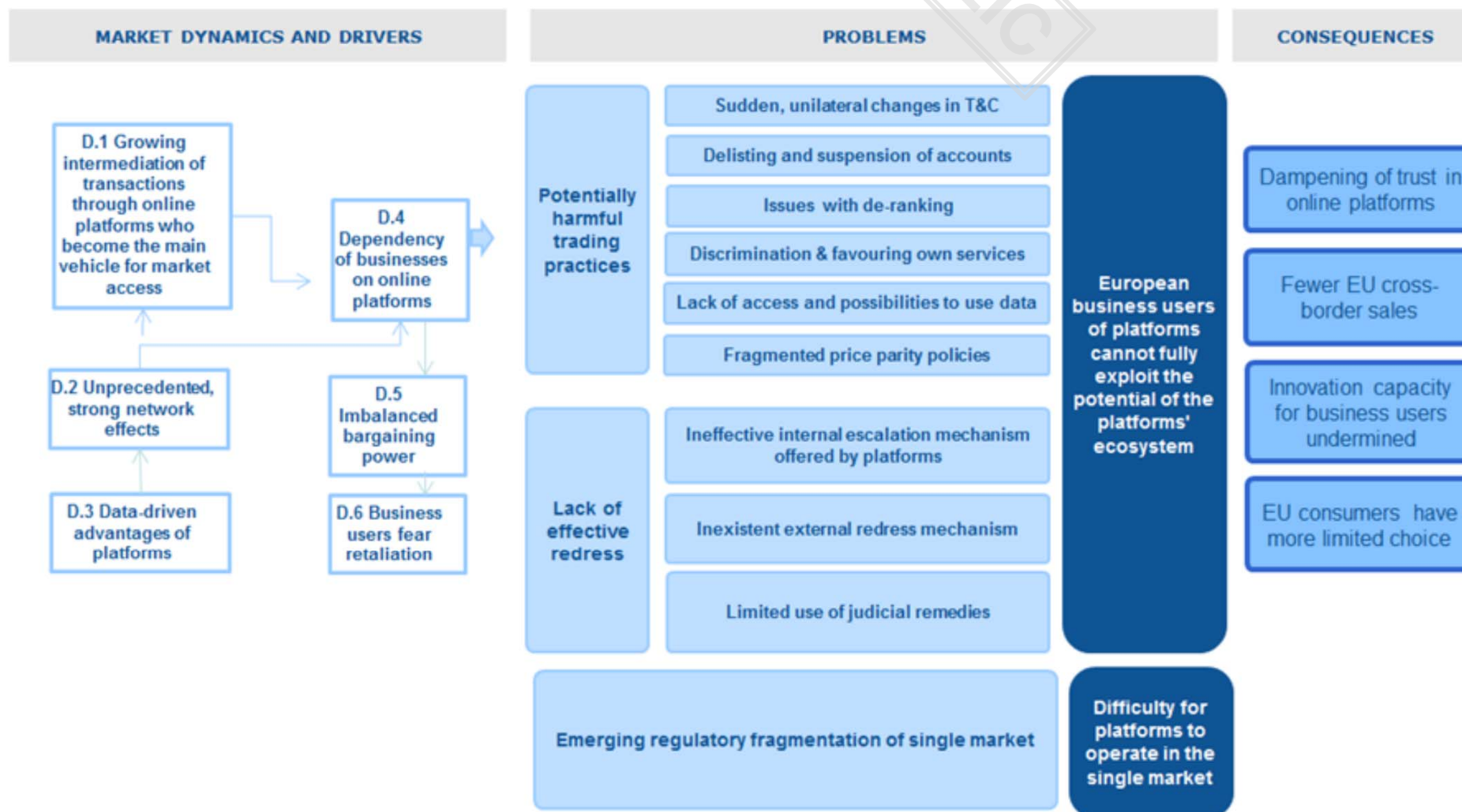


Lack of effective redress



Emerging regulatory fragmentation of single market





# 1. Potentially harmful trading practices

## 1.1 Sudden, unilaterally changes in T&C

- Standard T&C applied by platforms (given the large number of individual business users)
- Over 1 million EU business users, 200,000 enterprises would consider terms and conditions unfair
- Lack of clarity of the T&C, even for legal experts
- 19% of problems encountered by business users are connected to T&C
- T&C related issues have caused between 20% and 95% losses in business users' turnover

# 1. Potentially harmful trading practices

## 1.2 Delisting and suspension of accounts

- Increased dependency of business users on online platforms as “gatekeepers” to markets and consumers
- Strong impact on business users (especially SMEs) in case of delisting/suspension
- Frequent absence of a clear statement of reasons when delisting/suspending
- 11% of issues reported by business users are linked to the suspension of their account and 15% to delisting
- Very significant impacts in case of delay in reinstatement following unjustified delisting of account/goods (anecdotal evidence: loss in turn-over up to 10% for several weeks or months)

# 1. Potentially harmful trading practices

Fair ranking is essential for businesses' online visibility

## 1.3 Issues related to ranking (i)

- Lack of meaningful accountability and predictability for business users
- Business users heavily impacted by their position on online platforms' pages
- 12% of respondent businesses who have encountered problems in their business relationship with online platforms (and 15% of the "heavy users") claimed these were due to biases in the search related practices
- Paid-for ranking: uncertainty on the service delivered.

**IMPORTANCE OF ONLINE SEARCH ENGINES AS INDIRECT SOURCE OF INTERNET TRAFFIC**

# 1. Potentially harmful trading practices

## 1.3 Issues related to ranking (ii)

### ONLINE SEARCH ENGINES

- Online search engines continue to be an **important indirect source of Internet traffic** for business users on platforms (e.g. restaurants on social media or hotels on OTAs are all equally indexed by online search engines)
- They originate the **vast majority of Internet traffic for smaller, standalone websites** (e.g. for e-commerce sector, Internet traffic in the eight largest EU MS generated by online search engines accounted for >50% of the total desktop Internet traffic received by these websites)

# 1. Potentially harmful trading practices

## 1.4 Issues related to data access and use

- Limited access to data have negative effects on businesses' ability to grow
- Increased dependency on platforms as gateway to consumers
- No consistent views as to the level of satisfaction with data access policies
- Variety of data types accessible by businesses not consistent across platforms
- Vast majority of platforms do not give business users the opportunity to ask for consumers' consent to obtain and process their data
- 33% of heavy business users link their problems with platforms to unclear data policies



# 1. Potentially harmful trading practices

## 1.5 Discrimination and favouring own services

- Often dual role of online platforms: both selling own products/services and providing the online market place
- Differentiated treatment to own products/services generally not made transparent: one of three most experienced trading practice
- Additional fees charged to third party business users but not to online platforms' own services
- 11% of surveyed business experience limitations on payment possibilities

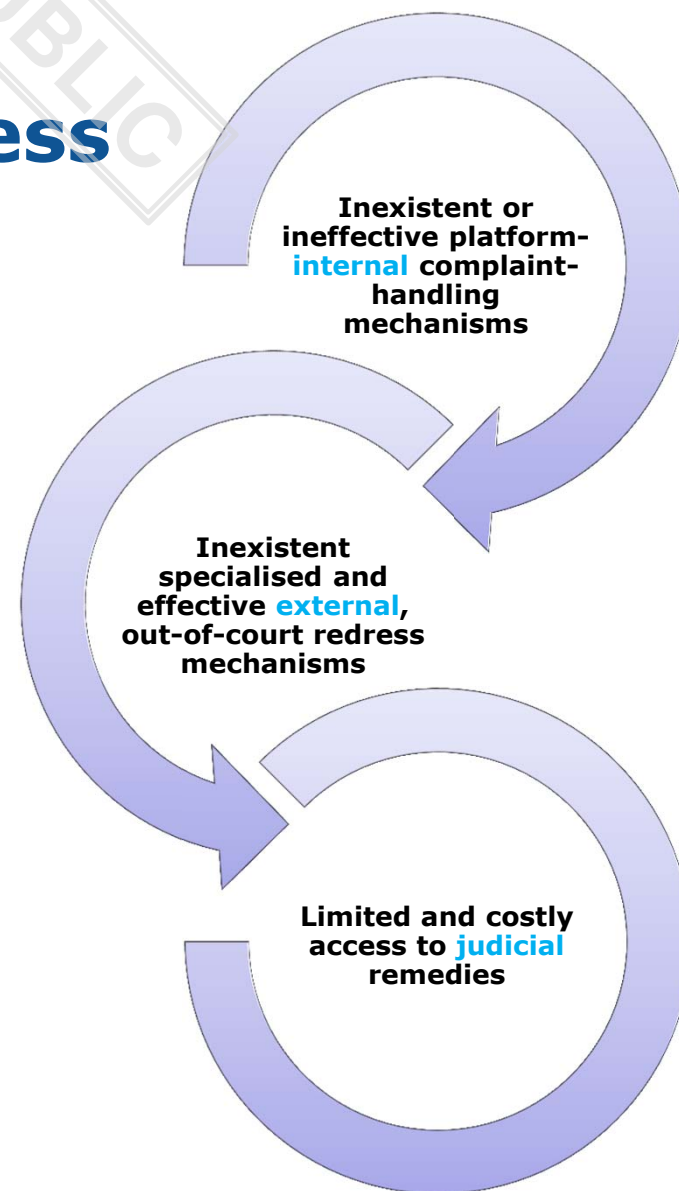
# 1. Potentially harmful trading practices

## 1.6 Most-favoured nation (MFN) clauses

- Practices limiting businesses' availability to offer better conditions outside the platform
- Ongoing monitoring in the hospitality sector as baseline for Impact Assessment
- MFN clauses in OTAs investigated by many national competition authorities (e.g. Germany, France, Italy)
- MFN clauses in the online hotel booking regulated by national laws (e.g. Loi Macron)

## 2. Lack of effective redress

- **Perceived ineffective nature** of existing redress mechanisms
- **32%** of all problems in the P2B relations **remain unsolved**
- **29%** can be solved **with difficulties**
- **32%** of EU businesses selling online **disagreed** that a reliable dispute resolution system is available



## 2. Lack of effective redress

### **Other important factors that limit the effectiveness of judicial redress:**

- Fear of damaging the business relationship
- Fear of retaliation induced by dependency limits the effectiveness of existing redresses
- Often exclusive choice of law and forum clauses imposed by online platforms
- Lack of knowledge of judicial redress possibilities due to small size of companies
- Disproportionate costs of international redresses especially for SMEs
- Judicial redress being too lengthy

## 2. Lack of effective redress

REGULATORY GAP - lack of EU or MS B2B **rules** combined with lack of **effective** platform-internal, external and judicial **redress** (lack of speed, anonymity, high cost)

- **EU level:** Existing rules do not sufficiently address the observed practices
  - Competition law: High threshold - Article 102 TFEU only prohibits abusive behaviour of dominant companies; very lengthy proceedings (Google search: 6.5 years)
  - Consumer & market law: No overlap with most practices identified – limited effectiveness of UCPD rules on misleading actions for labelling of paid-for search results
- **MS level:** B2B unfairness legislation exists in most MSs but difficult to implement or to apply P2B
- **MS level:** Emerging regulatory fragmentation on platform-specific laws

### 3. Fragmentation

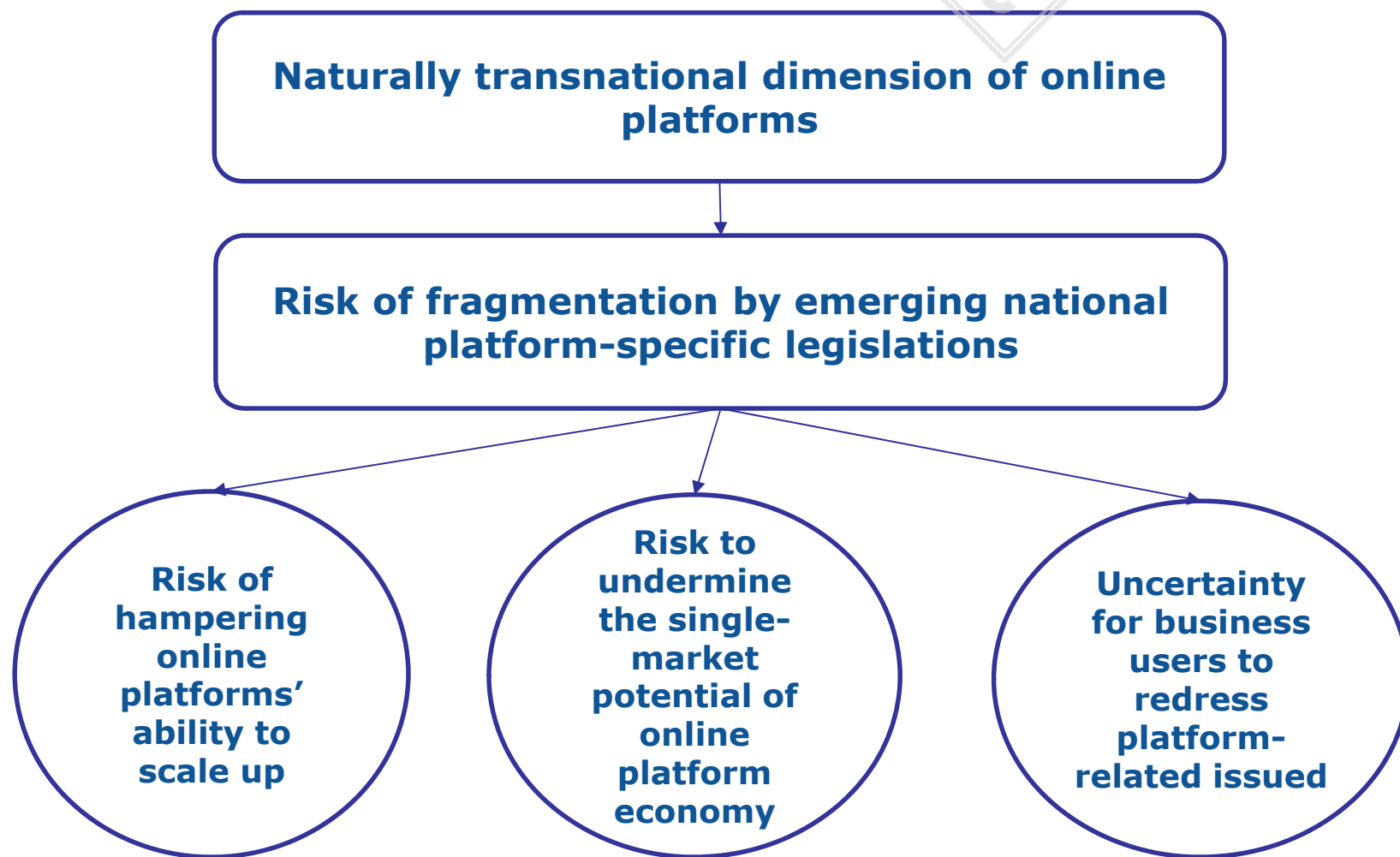
**DEPENDENT BUSINESSES BEING SUBJECT TO A RANGE OF  
HARMFUL TRADING PRACTICES**



**GENERAL PRESSURE ON NATIONAL LEGISLATORS AND AUTHORITIES TO  
REGULATE:**

- **AT, FR and IT:** P2B-specific prohibition to narrow MFN clauses for OTAs
- **FR:** Broad platform definition, information requirements, P2C relationships
- **IT:** 2 Proposals that aim to regulate platform-relevant aspects
- **DE:** White Paper on Digital platforms
- Increasing regulatory activities in the area of **collaborative economy**

### 3. Fragmentation



## **Online/Offline distinction (i)**

**Online intermediation is fundamentally different from offline retailing (supermarket) and intermediation (shopping mall)**

- Online has unlimited shelf size and is first example where businesses directly market to consumers through the intermediary's platform, subject to the intermediary control
- Platforms benefit from virtuous growth due to strong data-driven direct and indirect network effects of unprecedented magnitude, speed and scale
- Apps exist entirely by virtue of online platforms (OTAs already account for over 50% of all hotel bookings)



## **Online/Offline distinction (ii)**

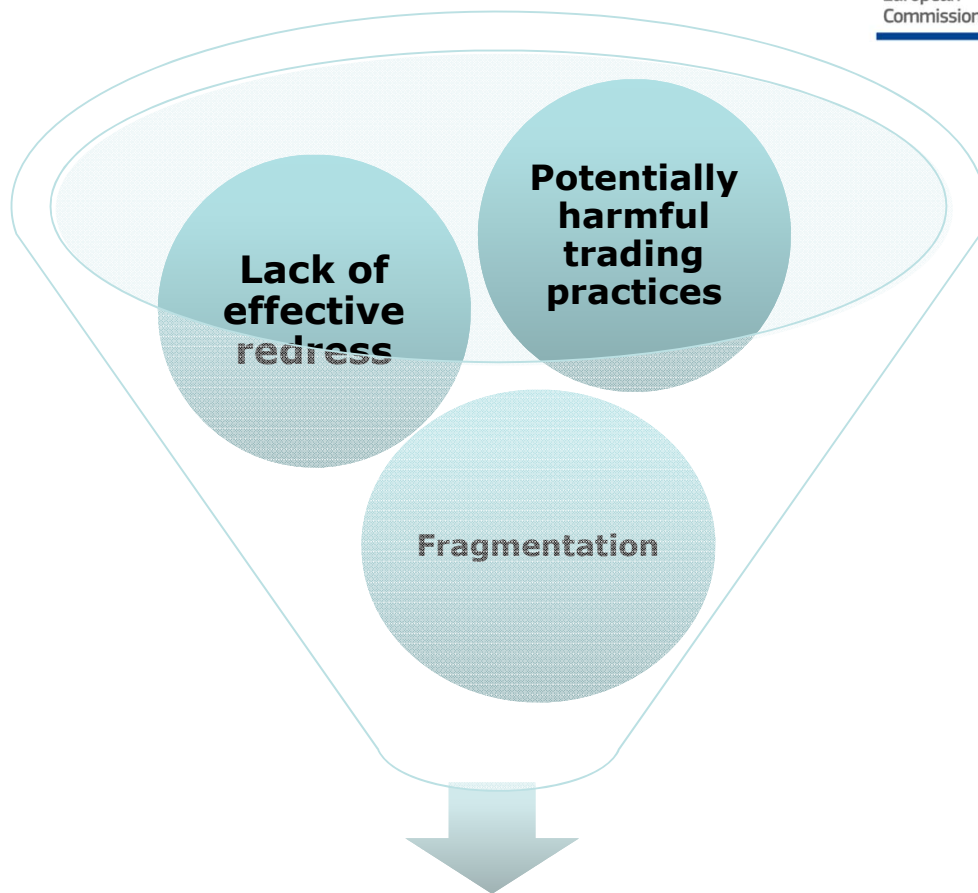
### **Issues specific to online intermediation**

- Technical issues (automated decision-making)
- Effects of paid-for placement not opaque (all supplier can visit the supermarket and verify)
- Ineffective access to justice in online intermediation- context (choice of law and forum clauses in cross-border context – barriers to justice)

## **Online/Offline distinction (iii)**

### **Existing EU instruments do not solve online intermediation-specific issues**

- Existing initiatives targeting harmful trading practices offline are designated to tackle practices relevant to the sector or context in which they arise (e.g. Supply Chain Initiative)
- Consumer law inefficient to address issues related to platforms in the context of DSM
- Issues not anti-competitive per se as they involve business users rather than competitors and platforms not necessarily within the thresholds provided by Competition law



**NEGATIVE IMPACT ON:**

- (i) TRUST**
- (ii) GROWTH OF ONLINE INTERMEDIATION**
- (iii) PLATFORMS' REVENUES**

The number of enterprises affected can be estimated to reach around **1 million merchants in the EU**

**46% of the business users encounter problems** in their relation with platforms (75% for business users realising more than half of their turnover on platforms)

The **unrealised potential of platform economy** due to unfair practices can be estimated between € 3.97 and € 15.85 billion per year

Almost **1/3 of issues remain unsolved** while 29% are solved with difficulties

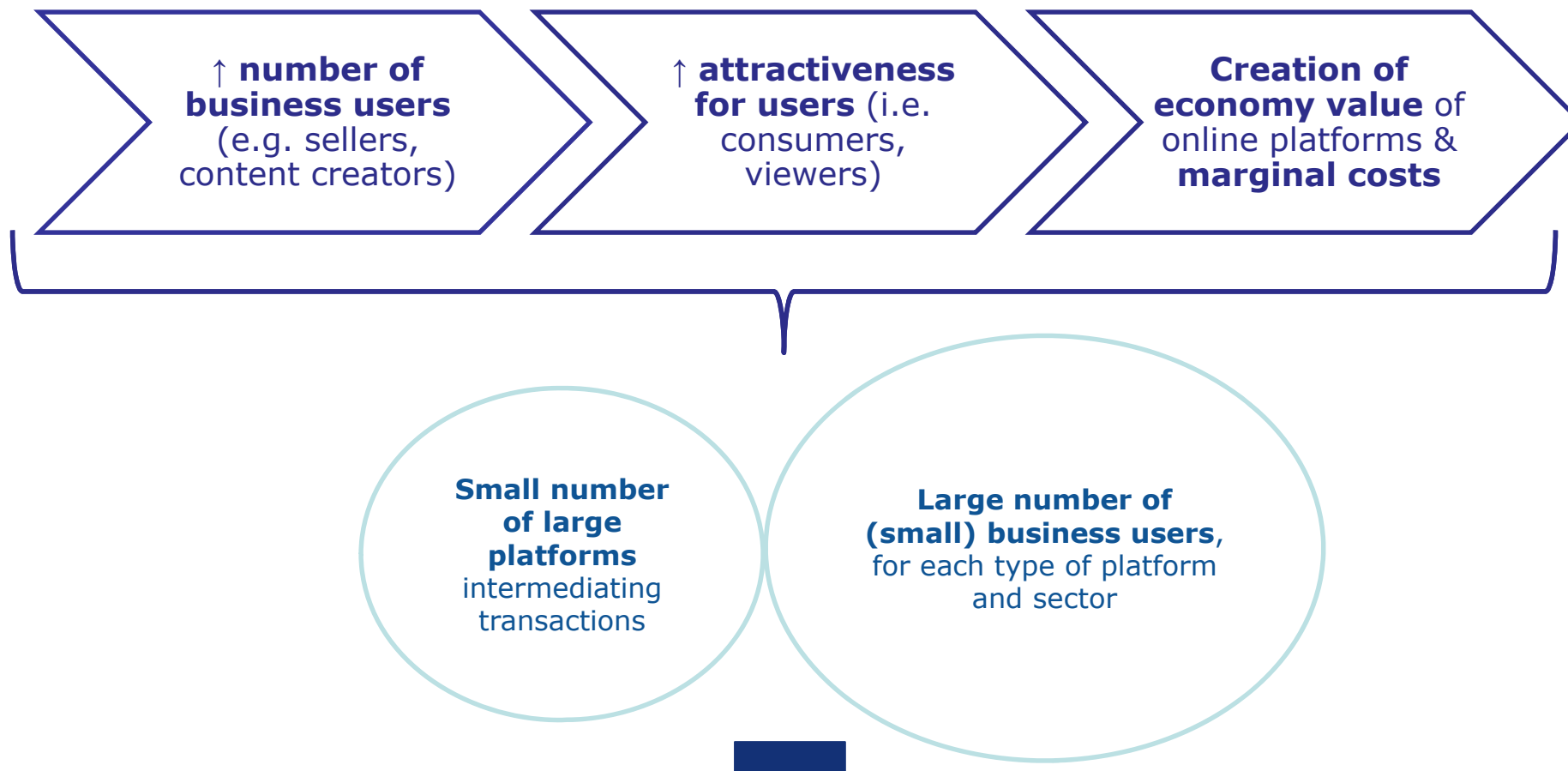
# Market dynamics and drivers

- 1) Online platforms as main vehicle for market access*
- 2) Unprecedented, strong network effects*
- 3) Data-driven advantages of platforms*
- 4) Imbalanced bargaining power and dependency of businesses on online platforms*
- 5) Business users' fear of retaliation*

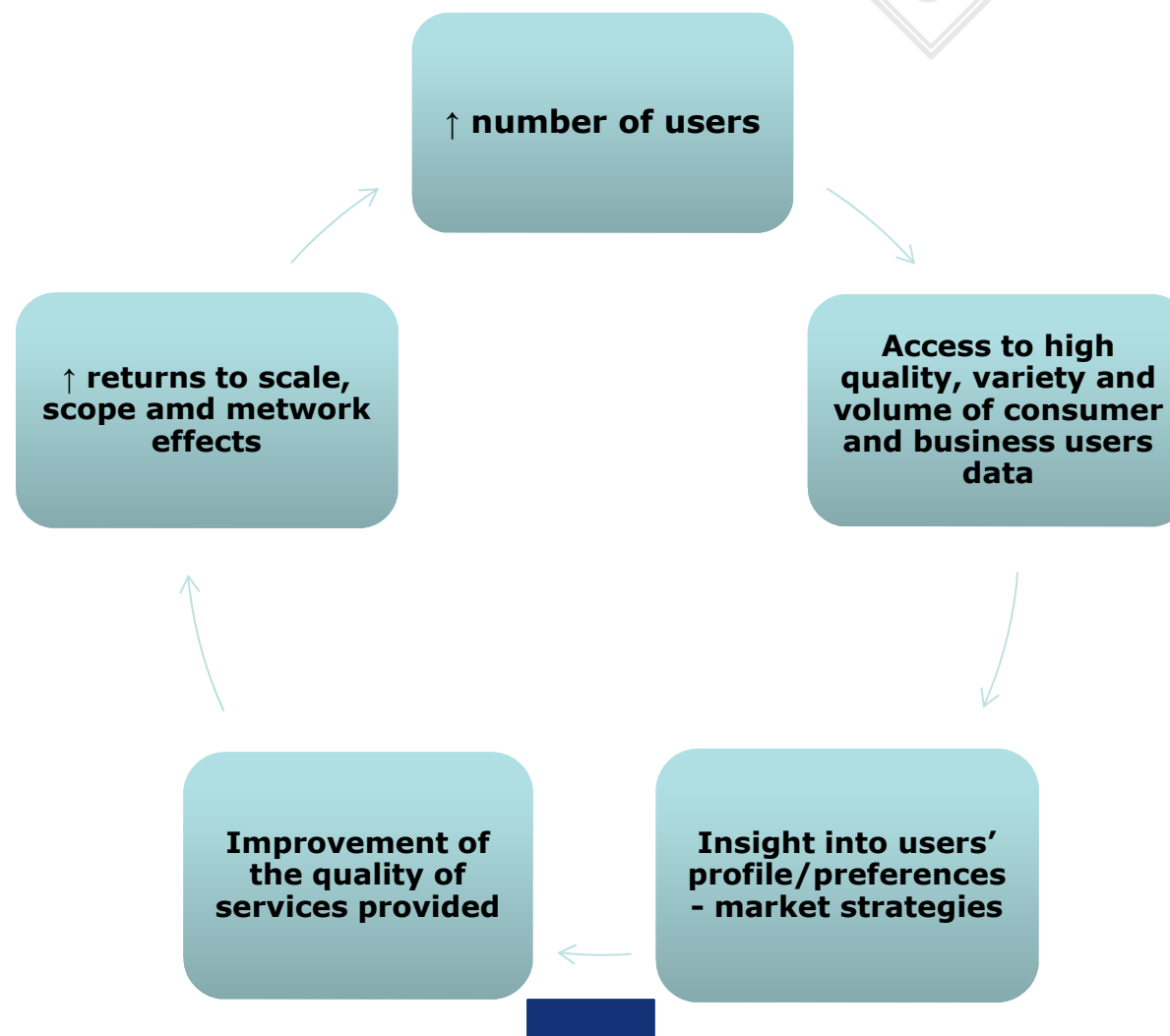
## 1) Online platforms as main vehicle for market access

- 85%** EU households that had access to Internet from Home in 2015 (against 55% in 2007)
- >50%** increase in the sales on online-only retailers in the EU between 2011 and 2016
- >50%** of the online sales are generated by sales over platforms
- 60%** of private consumption of goods and services related to the digital economy go via online intermediaries
- 61%** of European SMEs rely on social media to promote their goods and services (2015)
- 71%** of online bookings for independant hotels are made through online platforms
- 49%** of all travel bookings in Europe were made online

## 2) Unprecedented magnitude, scale and speed of network effect



### 3) Data-driven advantages of platforms



## 4) Imbalanced bargaining power and dependency

**Growing intermediation (1)**

+

**Strong network effect (2)**

+

**Data-driven advantage (3)**

=

**Increased dependency** of  
business users on platforms as  
quasi **“gatekeepers”** to  
market and consumers

Tendency towards **market concentration**: the bigger a platform is the stronger the network effect will be, which will then lead to **increased bargaining power**

Online platforms **do not have incentives to protect the business users**, but rather to afford optimal quality to consumers and to maximise profits

Most businesses need to be **present on more than one platform** within each segment to reach consumers

Fact-finding confirmed that businesses in general **cannot negotiate platforms' terms and conditions**, which are frequently to be imbalanced



## 5) Fear of retaliation

Given the unprecedented scale of the asymmetry in bargaining power, well-known **fear of commercial retaliation** is exacerbated:

- **Fear in dependency relations well documented:** Late Payments Directive evaluation report, food supply chain, competition law – anonymous complaints
- **Hesitation of businesses to participate in EC fact-finding** (some requiring study contractor to sign NDA, others refusing to come forward)
- **Fear to damage commercial relationship**, and 10% of surveyed businesses did not even take any steps when faced by problems
- Dependency-induced fear of commercial retaliation means online platforms themselves do not observe scale of friction in P2B relations: **platforms report not to be aware of any real issues remaining unresolved**

# CONSEQUENCES

*1 million EU businesses selling goods and services via online platforms:*

- *460,000 enterprises encounter problems*
- *200,000 enterprises consider terms and conditions unfair*
- *More than 500,000 encounter issues related to search and ranking*
- *1/3 of issues unsolved*

# Consequences

## A) Direct loss in sales through platforms

- **T&C change:** no timely adjustment of business model, significant reduction in sales ranging from 20% to 95%
- **Delisting/Suspension:** significant loss of turnover (Orxata); one business user had to lay off 20 employees
- **Search and ranking:** reported 80% loss in revenue after a change in Google's app store algorithm
- **Lack of access** to and portability of to certain type of data (personal and/or non-personal)
- **Favouring of own or third party products or services:** example Apple Appstore, up to 30% commission

**Reduction of sales caused through platforms for EU business users caused by the practices at stake: between € 1.27 and €2.35 billion per year**

# Consequences

## B) Further dampening effect through lack of trust

**P2B harmful trading  
practices**



**Economic under-utilisation  
of the potential of the online  
platform economy**

**60%** of sellers on biggest e-commerce marketplace fear being banned

**25%** of app developers view the app stores as their greatest threat

**19%** of Internet users in the EU do not trust that the search results provided them the most relevant results to their query

Estimate of **€ 2.7 to € 13.5 billion of turnover not realized** on online platforms

*Impact due to  
uncertainty*

- » **EC estimates:** reduction in turnover realised on platforms by business users of **€ 3.97 to € 15.85 billion per year**; consistent with
- » **JRC estimates:** impact in EU economy amounting between **€ 2 to € 19.5 billion per year.**

# Consequences

## C) Fewer EU cross-border sales

**Online marketplaces  
facilitate cross-  
border sales  
especially by  
smallest retailers**

- ✓ 50% of SMEs selling through online marketplaces sell cross-border
- ✓ Reduction of trade costs for SMEs (especially those linked to differences of languages and regulatory framework)
- ✓ Ensure global presence and reach previously reserved to large retailers



Difficult and expensive to replicate in-house the services (e.g. multi-lingual customers' support, international shipping, regulatory compliance) supplied by platforms at a significantly lower cost.

If business users are **reluctant** to enter into or expand business relationships with platforms

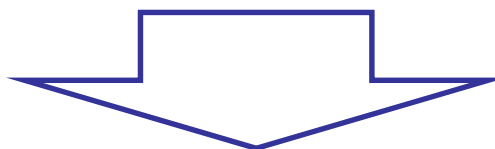
—————→ **limited growth of  
cross-border sales**

# Consequences

## D) EU consumers have more limited choice

**Online platforms have dramatically contributed to increases in consumer access to goods and services**

- ✓ Around **60%** of private consumption and **30%** of public consumption of goods and services related to the Internet economy go via online platforms
- ✓ Value of goods and services purchased by private households and public sector via online intermediaries amounting to **€ 270 billion** in 2014 (2.5% of final consumption)



**Loss of sales** by business users on platforms

IF

**Limited presence** of business users on platforms (fear of retaliation or lack of trust)



**Reduced choice** of competitive products/services



## How would the problem evolve without intervention?

### **Platforms' "gatekeepers" potential would increasingly develop**

- Role of online intermediaries would strengthen facilitated by growth of digital trade and increasing use of cloud computing
  - 40% of retail online sales will be conducted through intermediaries by 2020
  - B2C e-comm revenue has more than doubled between 2012 and 2017
  - Overall growth rate for online intermédiaires is 10% per year since 2012
- Big platforms would continue expanding (due to intrinsic incentives to grow)
- Start-up platforms would have difficulties to enter the market/ compete for business users

### **Business users**

- no access to effective dispute resolution and/or redress
- persistent fear of retaliation -> difficulty to scope and address issues
- risk of aggravated unfair trading practices in terms of scale and scope

### **Platform economy - underexploited potential**

- Lack of trust in the platform economy – suboptimal use of online intermediaries
- Ineffective functioning of the single market due to increased legal fragmentation (because of increased national attempts to address potentially amplified P2B issues)

## C. Objectives



# Part 1: Objectives

## GENERAL OBJECTIVES

**Establish a fair,  
trusting and  
innovation-driven  
ecosystem around  
online platforms in  
the EU**



**Release the full  
potential of the  
online  
platforms'  
economy**



**Contribute to  
the  
functioning of  
the Digital  
Single Market**

## SPECIFIC OBJECTIVES

**Fair, transparent  
and predictable  
treatment of  
business users by  
online platforms**

**Effective, agile  
redress for  
businesses**

**Predictable and innovation-  
friendly legal environment for  
online platforms within the  
EU, without unnecessary legal  
burden**

# Objectives

**To ensure a fair and innovation friendly online platform economy.**

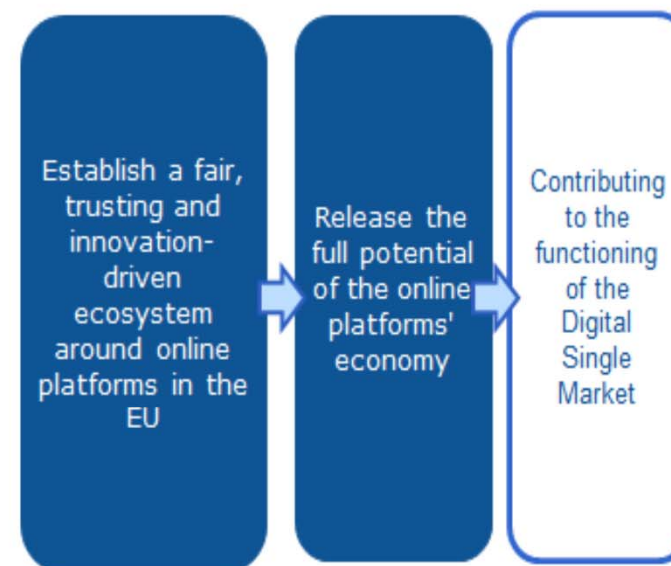
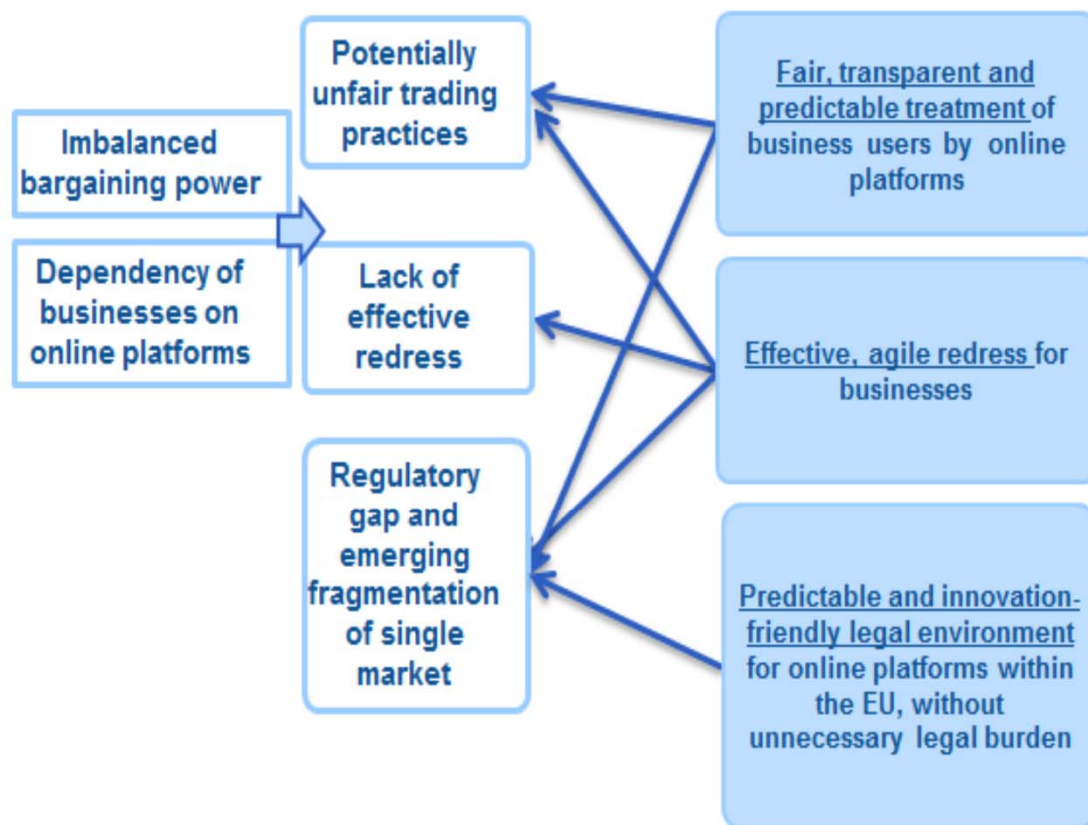
- Optimise innovation and growth potential of online platform ecosystems
- Ensure a predictable and trusted business environment
- Limit direct negative effects and abuse of dependency
- **Reduce legal fragmentation** of the Digital Single Market
- Facilitate development of new online platforms (reducing barriers to entry and ensuring a level playing field)

# How do objectives link to the problems?

## DRIVERS AND PROBLEMS

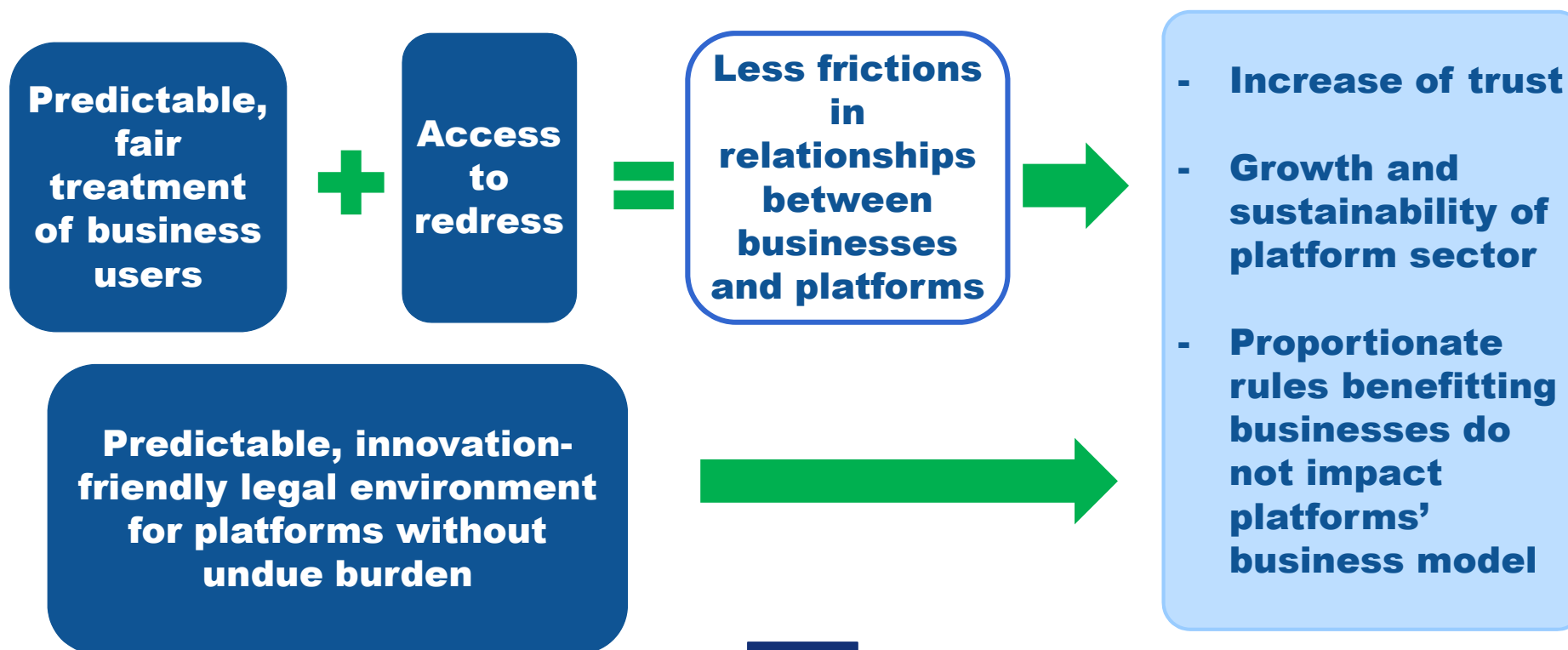
## SPECIFIC OBJECTIVES

## GENERAL OBJECTIVES



# Relations between objectives

- The three specific objectives complement each other





## Consistency with EU Policies

**Fair, predictable and trusted legal environment for business users and online platforms limiting harmful practices and preventing further fragmentation of the digital single market is in line with and complements:**

- *Digital Single Market Strategy*
- *EU consumer protection policies and rules*
- *Rules on alternative dispute resolution*
- *EU competition rules*
- *Access to and use of data will have to be GDPR compliant*



## **D. EU right to act**

# EU Right to act I

## ***Legal basis: Article 114 TFEU***

- *Inherent cross-border nature of online platforms: platforms represent most effective means to provide goods and services across borders*
- *Traditional single market approach consists in removing existing national fragmentation*
- *Increasing dependency and harmful trading practices with no redress possibilities under national legislation lead MS to regulate the online platform economy environment*
- *P2B initiative aims at preventing « (re-)fragmentation » of the Single Market*

## EU Right to act II

### ***Subsidiarity: Objectives cannot be reached by MS alone***

*Only EU action can prevent harm to businesses in the cross-border platform environment and safeguard the Single Market potential for online platforms.*

- *Ineffective redress mechanisms, including national rules*
- *Increasing dependency of businesses on online platforms to reach consumers in cross-border markets*
- *Problems are specific to the online platform economy*
- *On-line intermediation has no off-line equivalent (e.g. paid-for placement practices in supermarkets are not opaque, whereas ranking in an online environment is)*
- *Unparalleled size of markets increases negative effects*



## EU Right to act III

***Added value: EU action will ensure that business users can fully exploit the potential of the Digital Single Market***

- *Same P2B protection in all MS*
- *Prevention of further legal fragmentation of the Single Market*
- *Easier scaling-up for platform start-ups through lower compliance costs and more legal certainty*
- *Incentives for new platforms to develop*

## PART 2

## Part 2: Options

### *Overview*

- **Logic behind the choice of options:**
  - overall construction.
  - two-step approach.
- **Baseline scenario.**
- **Discarded options.**
- **Retained options.**
- **Preferred option.**
- **Testing of options on stakeholders.**

## Part 2: Options

### *Choosing options*

### **What was the logic behind the choice of options?**

- Link to the specific problems identified.
- Assessment of effectiveness, cost efficiency & coherence.
- Retention of the elements combined into policy options.
- Assessment of suitable legislative and non-legislative tools.
- Assessment of existing legislative instruments.

## Part 2: Options

### *Choosing options*

## Two step approach

**Step 1: Improve transparency & bilateral conflict resolution.**

**Step 2: Monitoring exercise at EU level.**

## Part 2: Options

# Baseline scenario

### No EU Action

*How would the problem evolve in the absence of intervention?*

- Platforms' 'gatekeepers' potential would increasingly develop.
- Business users' problems remain unresolved.
- Platform economy - underexploited potential.
- Consumers – risk of more limited choice and/or price increase.

## Part 2: Options

# EU Action - 'Content' options

*Consideration of the types of measures to address:*

### - ***Potentially harmful practices:***

- Sudden unilateral changes to terms and conditions.
- Delisting/suspension.
- Ranking.
- Data.
- Discrimination.
- MFN clauses.

### - ***Inefficient redress***

- Ineffective internal escalation procedures.
- Non-existent external redress mechanisms.
- Limited access to judicial remedies.

### - ***Future monitoring.***

## Part 2: Options

# Discarded options

*What were the discarded options?*

- See Annex 10, Table 3.

*Reasons to discard:*

- Disproportionate high costs for Member States.
- Not future proof.
- Too intrusive to platforms' business models.



## Part 2: Options

# Retained options

1.

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 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. *(Discarded)*.

2.

Delisting/Suspension

- Transparency: Platforms to state clear reasons for suspending or delisting business' accounts or services/products. Except for overriding reasons of public security.
- Regulating the reasons for delisting/suspension: Establishing a list of permitted or forbidden reasons for delisting/suspension of accounts *(Discarded)*.

## Part 2: Options

# Retained options

3

### 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: Platforms would explain in their terms and conditions the high-level criteria for natural and paid for ranking mechanisms, with safeguards to protect trade secrets.
- Paid for ranking transparency in relation to general conditions and expected effects of: Platforms would make transparent the general conditions and expected effects of paid for ranking for businesses that contracted 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. (*Discarded*)

## Part 2: Options

# Retained options

4.

Data

- Monitoring of development of data-related issues: EU Observatory set up to monitor the evolution and emergency of issues related to data access and use by both platforms and their business users.
- Supporting measures would encourage industry sharing, access and use of non-personal data: Part of a wider Commission initiative on the data economy encouraging fair policies on non-personal data sharing, which shall inform 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.
- Obligations on data access (for business users) imposed on platforms: Platforms obliged to share certain categories of data. (*Discarded*).
- Ban on contractual clauses that prevent business users from retrieving and/or using specific types of data outside the platform (*Discarded*).
- Possibility for business users to ask for customer's consent to obtain and process email addresses.

## Part 2: Options

# Retained options

5.

Discrimination

- Transparency on differential treatment: Platforms to publish general policy guidelines setting out any differential treatment they apply as regards entities controlled by them compared to (third party) business users.
- Transparency on conditions for use of principal and auxiliary services: For advertising and billing purposes, platforms to clearly separate auxiliary services and conditions for their use from the principal online intermediation service.
- General non-discrimination clause: Platforms banned from favouring certain businesses active on their market places, including platform-owned businesses or bundled auxiliary services (e.g. payment, advertising) – in terms of transparency, access or any other conditions (*Discarded*).

6.

MFN Clauses

- Transparency: Platforms required to explicitly justify the use of MFN clauses in their terms and conditions. .
- Ban of MFN clauses: Banning outright or in specific forms MFN clauses (whether on price, availability or quality). (*Discarded*).

# Part 2: Options

## Retained options

### Lack of effective redress

1.

Ineffective  
internal  
escalation  
procedures

- Requirement for an effective internal escalation mechanism: Platforms to provide an internal complaint handling system, which should comply with certain effectiveness principles – speed, accessibility, accountability.

2.

Inexistent  
external  
redress  
mechanisms

- Industry-led alternative dispute resolution: Call on industry to create and fund and EU wide external ADR mechanism to provide quick, independent and confidential outcomes. Requirements to comply with quality requirements to ensure effectiveness (e.g. independence, fairness).
- Platforms to list existing EU mediators or industry led ADR in their terms and conditions, coupled with an obligation to act in good faith in proceedings.
- National competent authorities to be designed by Member States, to be used for dispute resolution: Obligations to ensure effective enforcement at Member State level, involving the designation of competent authorities (*Discarded*).



## Part 2: Options

### Retained options

### Lack of effective redress

3.

Limited access  
to judicial  
remedies

- Improved access to injunction proceedings: To ensure more expeditious and effective cessation infringements of P2B rules (*Discarded*).
- Ban of exclusive choice of law/forum clauses in favour of extra-EU law/jurisdiction (*Discarded*).
- Provisions to improve business users' access to court:
  - Harmonised EU rules specific to P2B relations, so enforcement not impaired by differences in national legislation due to the cross-border nature of online intermediation.
  - Rights for associations representing businesses to seek redress on behalf of business users, which assists with providing anonymity given businesses' fear of retaliation.
  - Possibility to enforce mandatory EU rules on P2B to optimize the likelihood that any court in the Member States would declare themselves competent to deal with cases.

## Part 2: Options

### Retained options

### EU level monitoring, coordination & enforcement

EU level  
monitoring,  
coordination &  
enforcement

- Setting up an EU Observatory of the Digital Platform Economy: The Observatory would monitor the online platform economy and be able to publish opinions and recommendations. An internet portal launched in parallel could enable business users to anonymously register specific problems they have encountered when dealing with platforms.
- Review clause: To (i) set a time frame for additional measure to improve redress for business users in case of non-compliance or lack of effectiveness, and (ii) assess the effectiveness of industry action.
- EU level ombudsman: to deal with referrals from national mediators and to assess recurring transversal and cross-border issues (*Discarded*).
- Creation of a fully-fledged EU agency to enforce proposed P2B principles (*Discarded*).

## Part 2: Options

### Option 1: Non-legislative approach/pure self-regulation.

#### Transparency Measures

- Industry invited to develop principles and best practices on changes to T&Cs and delisting/suspension.
- Encouragement of industry to improve transparency on data policies, differential treatment and auxiliary services.
- Structured dialogues with industry, aiming to address emerging issues in paid for ranking, encouraging voluntary standards, private audits.

#### Redress

- Call on industry to:
  - Improve internal complaint handling systems;
  - Set up an external independent redress mechanism at EU level to provide businesses users with an additional venue for redress.

#### Monitoring

- Set up of EU Observatory.
- Tasks to include monitoring the evolution and emergence of issues related to data access and use by platforms and business users, including sharing of non-personal and personal data.



## Part 2: Options

### Option 2a: Limited scope of legal transparency principles, maximum focus on voluntary industry action

#### Transparency Measures

- Builds on calls on industry in Option 1 – to voluntarily explore practical solutions to improve predictability regarding ranking, differentiation, data, MFN clauses, advertising.
- Transparency from platforms on limited issues:
  - Improve clarity & availability of T&Cs.
  - Give reasonable notice before introducing changes to T&Cs.
  - List the objective grounds for suspension/delisting.
  - Statement of reasons for any decision to suspend/delist.

#### Redress

- Legal obligation for platforms to provide an internal complaints handling system.
- Legal obligation to list a mediator or make reference to organisations provided mediation set up by industry, together with a legal obligation to act in good faith.
- Right for business associations to seek action in court for injunctive relief.
- Call on industry to:
  - set up organisations to provide industry-specific mediators at EU level to provide business users with ADR; and
  - explore further recommendations on internal complaint handling systems through Codes of Conduct.

#### Monitoring

- Set up of EU Observatory.
- Tasks to include the same tasks as Option 1 as well as monitoring the evolution and emergence of issues related to:
  - preferential treatment of platforms' own products and services.
  - use of MFN clauses and testing of the reasons provided for justification for their use.
- EU Observatory to act as a repository for public reports on the effectiveness of internal complaints handling systems and refusal to participate in mediation attempts.
- Medium term review clause.

## Part 2: Options

### Option 2b: Co-regulation with horizontal application of legal transparency principles to all trading practices.

#### Transparency Measures

- *Builds on calls on industry in Option 1 – to voluntarily explore practical solutions to improve predictability regarding ranking, differentiation, data, MFN clauses, advertising.*
- *Transparency from platforms on all potentially harmful practices to cover:*
  - *Improve clarity & availability of T&Cs.*
  - *Give reasonable notice before introducing changes to T&Cs.*
  - *List the objective grounds for suspension/delisting.*
  - *Statement of reasons for any decision to suspend/delist.*
- **Transparency on ranking, discrimination, data and MFNs.**

#### Redress

##### •As option 2a.

- *Legal obligation for platforms to provide an internal complaints handling system.*
- *Legal obligation to list a mediator or make reference to organisations provided mediation set up by industry, together with a legal obligation to act in good faith.*
- *Right for business associations to seek action in court for injunctive relief.*
- *Call on industry to:*
  - *set up organisations to provide industry-specific mediators at EU level to provide business users with ADR; and*
  - *explore further recommendations on internal complaint handling systems through Codes of Conduct.*

#### Monitoring

##### •As Option 2a.

- *Set up of EU Observatory.*
- *Tasks to include the same tasks as Option 1 as well as monitoring the evolution and emergence of issues related to:*
  - *preferential treatment of platforms' own products and services.*
  - *use of MFN clauses and testing of the reasons provided for justification for their use.*
- *EU Observatory to act as a repository for public reports on the effectiveness of internal complaints handling systems and refusal to participate in mediation attempts.*
- *Medium term review clause.*

# Part 2: Options

## Option 2c: Co-regulation with horizontal application of legal transparency principles to all trading practices, scope extension to online general search.

### Transparency Measures

- Builds on calls on industry in Option 1 – to voluntarily explore practical solutions to improve predictability regarding ranking, differentiation, data, MFN clauses, advertising **and in relation to ranking on general search engines.**
- Transparency from platforms on all potentially harmful practices to cover:
  - Improve clarity & availability of T&Cs.
  - Give reasonable notice before introducing changes to T&Cs.
  - List the objective grounds for suspension/delisting.
  - Statement of reasons for any decision to suspend/delist.
  - Transparency on ranking, discrimination, data and MFNs.
- **Transparency from general search engines on ranking.**

### Redress

- **As options 2a and 2b.**
- Legal obligation for platforms to provide an internal complaints handling system.
- Legal obligation to list a mediator or make reference to organisations provided mediation set up by industry, together with a legal obligation to act in good faith.
- Right for business associations to seek action in court for injunctive relief **including those associations representing businesses with website indexed on online general search engines.**
- Call on industry to:
  - set up organisations to provide industry-specific mediators at EU level to provide business users with ADR; and
  - explore further recommendations on internal complaint handling systems through Codes of Conduct.

### Monitoring

- **As Options 2a and 2b.**
- Set up of EU Observatory.
- Tasks to include the same tasks as Option 1 as well as monitoring the evolution and emergence of issues related to:
  - preferential treatment of platforms' own products and services.
  - use of MFN clauses and testing of the reasons provided for justification for their use.
- EU Observatory to act as a repository for public reports on the effectiveness of internal complaints handling systems and refusal to participate in mediation attempts.
- Medium term review clause.

## Part 2: Options

### Option 2d: Co-regulation with horizontal application of legal transparency principles to all trading practices, scope extension to online general search and targeted legal obligation on email addresses.

#### Transparency Measures

- Builds on calls on industry in Option 1 – to voluntarily explore practical solutions to improve predictability regarding ranking, differentiation, data, MFN clauses, advertising and in relation to ranking on general search engines.
- Transparency from platforms on all potentially harmful practices to cover:
  - Improve clarity & availability of T&Cs.
  - Give reasonable notice before introducing changes to T&Cs.
  - List the objective grounds for suspension/delisting.
  - Statement of reasons for any decision to suspend/delist.
  - Transparency on ranking, discrimination, data and MFNs.
- Transparency from general search engines on ranking.
- **Legal obligation for platforms to give business users the opportunity to ask for, in line with the GDPR, customer's consent to obtain email addresses after completion of a transaction.**

#### Redress

- **As options 2a, 2b and 2c.**
- Legal obligation for platforms to provide an internal complaints handling system.
- Legal obligation to list a mediator or make reference to organisations provided mediation set up by industry, together with a legal obligation to act in good faith.
- Right for business associations to seek action in court for injunctive relief.
- Call on industry to:
  - set up organisations to provide industry-specific mediators at EU level to provide business users with ADR; and
  - explore further recommendations on internal complaint handling systems through Codes of Conduct.

#### Monitoring

- **As Options 2a, 2b and 2c.**
- Set up of EU Observatory.
- Tasks to include the same tasks as Option 1 as well as monitoring the evolution and emergence of issues related to:
  - preferential treatment of platforms' own products and services.
  - use of MFN clauses and testing of the reasons provided for justification for their use.
- EU Observatory to act as a repository for public reports on the effectiveness of internal complaints handling systems and refusal to participate in mediation attempts.
- Medium term review clause.

# Part 2: Options

## Option 3: Mandatory, binding rules for all aspects

### Transparency Measures

- Transparency from platforms on all potentially harmful practices to cover:
  - Improve clarity & availability of T&Cs.
  - Give reasonable notice before introducing changes to T&Cs.
  - List the objective grounds for suspension/delisting.
  - Statement of reasons for any decision to suspend/delist.
  - Transparency on ranking and discrimination
- All legal and technical details set out at EU level.
- Legal obligation for platforms:
  - to extend data access rights to business users for specific categories of data (including the opportunity to ask for customer's consent to obtain email addresses after completion of a transaction in line with the GDPR).
  - Ban on contractual clauses that prevent business users from retrieving and/or using specific types of data outside the platform.
- Prohibition of MFN clauses.

### Redress

- Legal obligation for platforms to provide an internal complaints handling system, including all legal or technical details that were left to industry.
- Obligation on Member States to ensure effective enforcement and efficient dispute resolution by designating competent authorities, capable of imposing sanctions.

### Monitoring

- As option 2.
- Set up of EU Observatory.
  - Tasks to include the same tasks as Option 1 as well as monitoring the evolution and emergence of issues related to:
    - preferential treatment of platforms' own products and services.
    - use of MFN clauses and testing of the reasons provided for justification for their use.
  - EU Observatory to act as a repository for public reports on the effectiveness of internal complaints handling systems and refusal to participate in mediation attempts.
- Medium term review clause.

# Part 2: Options

## Option 4: Extension of existing rules

### Transparency Measures

- Include platform specific practices in:
  - the annex of the Unfair Contractual Practices Directive (UCPD).
  - the grey list in the annex of the Unfair contract Terms Directive (UCTD).
  - the blacklist of the Misleading and Comparative Advertising Directive (MCAD).

### Redress

- Extend the scope of the UCPD and UCTD to cover B2B relationships in P2B.
- Extend the content of the MCAD to also cover existing contractual relationships and broaden the scope to particularly address P2B relations.

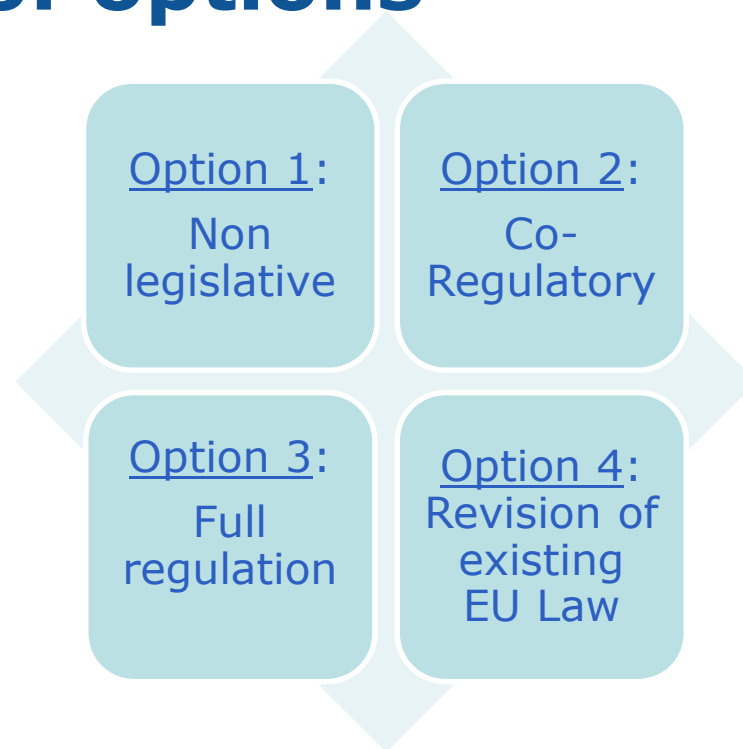
### Monitoring

- Extend available monitoring mechanisms under Consumer Law to businesses.



## Part 2: Options

# Legislative or non-legislative character of options



## Part 2: Options

### Preferred option

***Preferred Option = Option 2 (Co-regulation)***

**Reasons to discard options 1,3 and 4 - ineffective and disproportionate.**

- **Option 1: Self-regulation unlikely to be effective.**
- **Option 3: Full regulation - quick to be outdated & ill-suited.**
- **Option 4: Extension of EU rules – ineffective.**

**Conclusion: Self-standing instrument – most efficient & proportionate.**



## Part 2: Options

# Preferred option - Advantages

**Co-regulation - strikes a balance between a predictable legal framework and flexibility for industry sensitive to the speed of innovation.**

**Self-standing rules that can be immediately relied upon by businesses.**

**Good balance between general rules and detailed or technical rules, filled in by industry.**

**Future-proof – technical rules capable of modification with first-hand experience of industry itself.**

**Co-responsibility.**



## **Part 2: Options**

# **Testing of Options**

**Focus Group with Business Users – 7  
September 2017.**

**Report from the Joint Research  
Centre.**



# PART 3

## Part 3. Impacts of the preferred option

### ➤ Overview of the preferred option

- A two-step co-regulatory approach based on three pillars
- What rights for business users? What obligations for platforms?

### ➤ Impacts - cost-benefit analysis

- Impact on business users, platforms - focus on SMEs – thresholds
- Impact on consumers, national authorities
- Impact on growth, innovation, competitiveness, competition, social impact, etc.

### ➤ Rationale behind the choice of the preferred option

- Coherence
- Proportionality
- Efficiency
- Effectiveness

# Overview of the preferred option

## ➤ ***Two-step approach***

### ➤ *Co-regulation*

- *Legal obligations*
- *Scope for self-regulation*

### ➤ *Monitoring*

- *to enhance self-regulatory effort*
- *to inform regulation's review*

## ➤ ***Three pillars***

- *Enhanced transparency of P2B trading practices*
- *Improved internal, external and judicial redress*
- *EU Observatory*

## Enhanced transparency: What rights and obligations?

### *High-level legal obligations with...*

- **Online intermediation services providers** are required to be transparent on:
  - **T&C** – T&C will have to be drafted in a clear and unambiguous language. Business users will be informed of any changes to the T&C. Platforms will have to respect a notice period, unless the business concerned explicitly agrees on a shorter period.
  - **Delisting** – what are the reasons for delisting business users' goods/services or for suspending/terminating their accounts; T&C will include the possible reasons why a professional user can be delisted or suspended.
  - **Ranking** – what are the main parameters determining how goods and services are ranked
  - **Data** - what data generated through their services can be accessed, by whom and under what conditions
  - **Preferential treatment** - how platforms treat their own goods or services compared to those offered by their professional users
  - **MFN clauses** – how and why platforms use contract clauses demanding the most favourable range or price of goods and services offered by their professional users
- **Online search engines** are required to be transparent on the main ranking parameters used in search results – transparency obligation limited to ranking

### *...a scope for self-regulation*

*Possibility for industry codes of conducts to spell out legal and technical specificities of implementation*

## Part 3: Impacts

### Improved redress possibilities - What rights and obligations?

- **effective internal complaint handling**  
(except business users of small enterprises with  $< 50$  staff and  $\leq \text{€ } 10$  million turnover)
  - legal obligation to set such mechanism & to report annually on its effectiveness
  - further specification possible through industry codes of conduct
- **out-of-court dispute settlement** through accessible external mediators
  - legal obligation for platforms to list mediators in their T&C and act in good faith towards business users' attempts for mediation
  - encouragement for platforms to set up platform-specific independent mediators – compliant with effectiveness principles
- **injunctive relief** - representative organisations or associations will be able to defend businesses in courts against possible infringements of the proposed rules by online platforms or search engines (limited to ranking)
- **reinforced by the legal transparency obligations**, e.g.
  - reasons for delisting will be spelled in T&C
  - businesses would be provided with an actionable statement of reasons



## Part 3: Impacts

### Business users - Improved judicial redress

#### Increased chance for enforcement in EU courts

- Binding character of the transparency and redress measures  
(notwithstanding the exclusive choice of law & forum clauses in P2B contracts, frequently designating non-EU courts)
- Granting representative organisations the right to seek action in Court
  - representative organisations will be able to defend businesses in courts against possible infringements of the proposed legally binding rules by online platforms or search engines
  - limited to the ranking issue only for actions against search engines
  - CJUE case law: actions by such bodies are not subject to private contracts provisions - more likely to be brought before the Court of the MS where the alleged harm would occur
  - helps addressing fear of retaliation – individual businesses' anonymity preserved
  - injunctive relief only - no compensatory relief





## Part 3: Impacts

### Business users - What benefits for SMEs?

- *greater visibility both on online intermediation platforms and search engines (ranking provisions) => possible expansion of customer-base with direct impact on turn-over*
- *reduced legal interpretation costs (clearer T&C)*
- *greater capacity to adapt their commercial strategy to changes in T&C or even change platform (pre-notice period)*
- *easier and objective decisions whether to participate in auctions (in the case of paid-for ranking results)*
- *savings stemming from spared costs for reinstating blocked accounts/products (delisting provisions)*
- *enhanced redress possibilities – particularly burdensome for SMEs*
- *enhanced legal certainty and predictability (throughout all measures)*
- *greater ease of doing business*
- *opportunity of doing business with a given platform (preferential treatment and MFNs provisions)*

## Part 3: Impacts

### Business users - Risk of cost pass on SMEs?

- *Business users contribute to indirect network effects which are core to platforms' business models*
- *Non-compliant platforms/ platforms passing on the limited regulatory costs to business users would be less competitive vis-à-vis other platforms – rank less well in terms of quality of the business service offered*
- *Anonymity allowed by the legal standing given to representative bodies*
- *Monitoring measures and threat of further intervention (the two-step approach)*
- *Expected impact on direct sales realised on platforms: EUR 0.381 billion - EUR 0.705 billion (increased turn over)*

## Part 3: Impacts Platforms

- *costs*
- *benefits*
- *focus on SMEs/start-ups*
- *threshold-related assessment*

## **Part 3: Impacts**

### **Platforms – Costs overview**

**What costs would stem from the obligations?**

- **Legal obligations regarding the 6 harmful trading practices identified**
- **Internal redress mechanism and related reporting obligation**
- **External redress**
- **Injunctive relief**

## Part 3: Impacts

### Platforms – Costs overview

#### Costs related to the legal transparency obligations addressing the harmful trading practices identified

##### ➤ **One-off costs**

- adapting 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

##### ➤ **Limited run costs**

- modifying and communicating changes to their terms and conditions
- likely to be equivalent to those that online platforms currently face –since changes are not expected to occur more frequently
- Counterbalanced by the fact that 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 (delisting, ranking, etc.

## Part 3: Impacts

### Platforms – Costs overview

#### ➤ Internal redress mechanism

- Platforms already having 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).
- Platforms not having such platforms in place will face set-up and running costs. The cost of such mechanisms varies considerably according to the size of the platform.
  - 0.4% to 1% of the cost base – increase for smaller platforms (assuming the cost of one additional employee for a company with 50 - 250 employees)
  - 0.03% of turnover – increase for larger ones costs may be offset over time as a result of increased or more efficient platform-use (estimation 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)

## Part 3: Impacts

### Platforms – Costs overview

- These costs may not always be completely offset BUT platforms may in many cases develop intelligent solutions to lower costs – e.g. using the same or similar technologies and operational structures for customer support to also provide for internal redress for businesses.
- In most cases the costs would be more limited since:
  - the majority of platforms have a form of dispute settlement in place;
  - platforms are also likely to have a commercial incentive to follow the example of larger players => the actual additional cost is likely to be lower and likely to be on top of sunk costs for investments already made.
  - small platforms are exempted from this obligation.

## Part 3: Impacts

### Platforms – Costs overview

#### Reporting obligation - limited costs since

- related to the internal redress mechanism to monitor its effectiveness
- designed to cover a limited number of elements - total number of complaints received, the subject matter of the complaints, the time period needed to process the complaints and the decision taken
- data collection and reporting can be largely automated
- many platforms collect this type of information already for quality management purposes => limited costs for transmitting the data on a regular basis



## Part 3: Impacts

### Platforms – Costs overview

#### External redress

- **One off costs to change T&C to identify mediators with whom platforms are willing to engage**  
(stemming from the obligation to list mediators in T&C)
- **'external mediation mechanism' related costs**
  - would depend on the set-up chosen by industry – difficult to predict - but cost spread across multiple platforms
  - voluntary call on platforms – could be entirely avoided
  - market may respond - reducing the necessity for platforms to act.

## Part 3: Impacts

### Platforms – Costs overview

#### Legal standing costs

- On the one hand, additional legal costs may arise for online platforms if they have to defend against cases brought under the enforcement provision of the rules.
- At the same time, the regulatory assumption is that compliance with the mostly one-off transparency obligations will be high, especially in light of the proposed monitoring efforts, and the technical legal grey zones would be small, and therefore limited costs arising from litigation would be incurred.
- Safeguards against frivolous litigation include limiting the nature of cases that can be brought to injunctive relief (and not compensatory), and requiring that associations are non-profit in character.

## Search engines - costs

Search engines: limited costs both for

- *bigger search engines – with SEO (search engine optimisation) guidelines already in place - could be re-purposed for business users*
- *smaller ones - able to draw on existing best practices*

## Part 3: Impacts Platforms – Benefits

- ✓ P2B initiative => high quality standard requirements for P2B services  
=> increased quality of business services offered by platforms =>  
**P2B requirements can be used as a competitive asset by platforms**
- ✓ Benefit from more clarity and regulatory predictability as to the EU requirements  
they need to comply with – **preserved scale-up opportunities**
- ✓ Positive impact on the sector's **growth due to increased trust**



- ✓ **Additional commissions** due to turnover realised on or through platforms
  - EUR 38 million - EUR 70.5 million (increased turn-over)
  - EUR 119 million - EUR 476 million (turn-over + reversed dampening effect)



- ✓ **Increased ability to invest in R&D**



# Focus on small platforms

- Light touch approach – limited costs
- Exemption from the most burdensome measure – 47% of EU platforms exempted
- The rest of the regulatory measures would provide smaller platforms with a competitive asset – compliance with these requirements would give the opportunity to put in place high quality of service offered to their business users – more businesses would be attracted
- Important for them to expand their customer base, i.e. to attract customers on both side of the platform to reach a critical mass and benefit from strong indirect network effects

# Part 3: Impacts

## Platforms - Thresholds

- **Should some enterprises be exempted from the proposed regulation?**
- **If yes, are exemptions needed with regard to (a) the entire regulation or (b) specific measures, (c) which measures ?**
- **If exemption thresholds are needed, how should they be set?**
- **What proxies can be used to determine the threshold(s), and to verify compliance with such thresholds?**



## Part 3: Impacts

# Platforms - Thresholds

- (A) A threshold exempting some categories of online platforms from the most burdensome measure(s)
- (B) A horizontal threshold exempting some categories of platforms (micro- or small-) from the entire regulation
- (C) A dual threshold combining (A) and (B)
- (D) No threshold – the proposed measure applies horizontally to all platforms

## Part 3: Impacts

# Platforms - Thresholds

### **(A) A threshold exempting some online platforms from the most burdensome measure(s)**

- Exempt some platforms from the internal redress mechanism – all other measures would apply
- Which platforms – micro- or small- enterprise ? No clear cut.
- Exempting small enterprises (< 50 employees) allows:
  - ✓ Supporting scaling-up of emerging and start-up platforms
  - ✓ 47% of all EU platforms (3380) would be exempted
  - ✓ providing a competitive edge to small platforms through the application of the other regulatory measures
  - ✓ prevents the risk of imposing disproportionate burden



## Part 3: Impacts Platforms - Thresholds

### ➤ What proxy to use for setting the threshold?

- staff headcount and turnover – EU SME definition
- number of website visits/month
  - ✓ seasonal impact on statistics
  - ✓ fast growth versus no growth periods
  - => Uncertainty for businesses whether they fall under the regulation
- number of registered users
  - ✓ platforms with large user bases may not have sufficient margin to absorb costs
  - ✓ disincentivise platforms from increasing their user base

Number of neither websites visits or registered users is publicly reported.

## Part 3: Impacts

# Platforms - Thresholds

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

➤ **micro-enterprises' exemption (1772)**

- 90% of micro-enterprises are in the seed phase & may not be able to absorb the costs of the internal redress obligation;
- It can't be generally assumed that the dependency-relationship is not valid
- Light touch approach measures

➤ **small-enterprises' exemption**

- Almost half of the platforms (47%) would be exempted from the entire regulation
- Leaves important scope for unfair P2B practices - further legal fragmentation
- Unjustified given light touch measures and the important gateway function that small platforms may have

**A targeted (rather than horizontal) threshold seems to be more appropriate.**

# Part 3: Impacts

## Platforms - Thresholds

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

- *Exempting the 1772 micro-enterprises or the 3298 enterprises from the entire regulation risks putting the threshold at an incorrect level*
- Instagram example shows that even smaller platforms can develop relative market power
- Inappropriate to exclude micro- or small platforms from the light-touch measures which could also serve as a competitive asset

### **(D): No threshold**

- the proposed measure applies horizontally to all platforms
- option D does not appear appropriate - need to account for the more burdensome nature of the internal redress mechanism

## Part 3: Impacts Consumers

### ***Risk of cost pass on consumers?***

- Consumers are at the core of platforms' business model – high quality products/services at a minimal or 0 price
- light measure non-intrusive in business models

### ***Expected impact***

- Larger cross-border choice due to increased competition/ maintaining current level of quality and choice
- More impartial and pro-competitive outcome in ranking results of platforms and search engines
- Supporting the current trend of consumer trust

## Part 3: Impacts

### National Public Authorities

#### ➤ Mediation-related obligation

- List national mediators in T&C and engage in good faith with them => more P2B cases might be brought to mediators (private activity)
- No requirement for MS to adapt their mediators-certification schemes

#### ➤ National Courts

- Burden on national court systems is expected to be limited
- Layered design of redress : internal redress, mediation, injunctive relief
- Incentives for out-of-court dispute handling – legal standing for business associations
- Legal standing is at the same time limited: not possible for representative organisations to instigate court cases on substantive issues related to individual business users

#### ➤ EU Observatory

- € 1,000,000 – EU Commission budget
- no budgetary implications for national authorities

## Part 3: Impacts

- **Digital Single Market**
  - Growth
  - Legal fragmentation
- **Innovation and Competitiveness**
- **Competition**
- **Social impact and employment**

## **Part 3: Impacts**

# **Digital Single Market**

**Two-fold impact:**

- **Growth of the platform economy**
- **Legal fragmentation**

## Part 3: Impacts

# Digital Single Market – Platform economy growth

### ➤ Importance of the platform economy for DSM

- value of e-commerce in the EU was estimated to more than 500 billion EUR in 2016
- This represents a 13.5% increase from 2015
- 22% of the 2016 e-commerce value is estimated to have been generated by EU third party sellers on online platforms
- Majority of consumers (~71%) seem to prefer platforms for their purchases

### ➤ Impact of the initiative

- reduced impact of the harmful P2B practices (assumption 30%) =>
- dampening effect of mistrust and unrealised potential could both be reduced (30%)
- expected positive impact
  - ✓ € 381 million - € 705 million per year in terms of increased turn-over, and
  - ✓ € 810 million - € 4.05 billion per year of reversed dampening effect
  - ✓ figures likely to be higher in the future due to growing platform-intermediated trade





## Part 3: Impacts

# Digital Single Market - Legal fragmentation

- ✓ 'regulation' as a legal instrument to ensure harmonisation in areas covered by the P2B initiative
- ✓ no general harmonisation of national B2B legislations
- ✓ sets more clarity and regulatory predictability for platforms as to the EU requirements they need to comply with
- ✓ sets a common regulatory and monitoring framework for Member States to preserve the existent cross-border dynamics of the platform economy
- ✓ shows the specificities of the platform economy thus underlining the risk of artificial fragmentation of the natural cross-border platform economy
- ✓ sets high-level EU framework for increased transparency & redress - to reduce the need for intervention at national level - enhanced external scrutiny of online platforms' trading practices should incentivise these firms to pro-actively improve the situation for business users
- ✓ creates EU Observatory to build shared understanding of issues thus paving the way towards more regulatory consistency across the EU when intervention at national level is deemed necessary

## Part 3: Impacts

### **Employment, social, environmental impact**

- **4,7 million jobs preserved (conservative estimate)**
- **89% of all sellers on e-commerce market places are self-employed with turnover < € 5,000**
- **no direct environmental impact**
  - Innovation-driven efficiency gains due to less resource-extensive production processes (as a result from digitally-driven economic growth)
  - E-commerce sector only implies physical delivery

## Part 3: Impacts Innovation

### **Platforms** - innovation drivers and enablers

- established platforms innovate to compete with emerging platforms
- start-ups innovate to be able to enter the market & gain market shares
- greater investment opportunities in R&D due to higher revenues as a result of the expected growth of the platform economy

### **Business users** – important innovators

- e-commerce sellers provide feedback on logistical, software and commercial problems and innovative ways to address those
- app developers provide constant richness of content to platforms
- could fully seize innovation opportunities offered by platforms through the enhanced use of platforms' software "building blocks"
- would better embrace digital transformation - due to their greater presence on platforms (as a result of increased trust)

Increased innovation capacities on both sides – platforms and business users.

## Part 3: Impacts

# Competitiveness

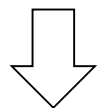
- **Innovation capacity** – positive impact (as shown on previous slide)
- **International competitiveness**
  - ✓ Platforms – can use the increased quality of their online platforms' business services (high quality standard legal requirements) as a competitive asset
  - ✓ Business users – can offer high(er) quality EU products and services – due to increased technological and innovation capacity
- **Price-competitiveness**
  - ✓ Platforms – prices are not expected to be impacted
    - ✓ regulatory costs would be limited due to the growth of the platform economy
    - ✓ minimal costs for smaller platforms thanks to the 'internal mechanism' exemption
  - ✓ Businesses – neutral effect - no costs are expected to be passed from to business users as a result of platforms' regulatory costs

## Part 3: Impacts Competition

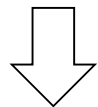
Increased trust

Business users

*Increased incentives  
to use online platforms*



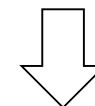
*More businesses  
present on platforms*



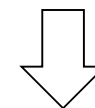
*Increased  
intra-platform competition*

Platforms

*Growth platform economy*



*More start-ups attracted by the  
platforms' business model*



*Increased  
inter-platform competition*

## Part 3: Impacts

# Rationale behind the choice of the preferred option

- **Effectiveness**
- **Efficiency**
- **Coherence**
- **Proportionality**

## Part 3: Impacts

### Rationale behind the choice of the preferred option

#### Effectiveness

Transparency, redress & monitoring



contributing to a more fair, transparent and  
predictable treatment of business users  
(specific objective 1)

Improved internal, external and judicial redress  
& call on industry for voluntary actions



effective and agile redress for businesses, adaptable  
to the evolving market  
(specific objective 2)

no intrusion in business  
models



Preserved innovation capacity

EU rules  
Observatory – shared understanding of issues  
Framework for more consistent EU approaches



preserved scale-up ability

threshold for costly  
measures



proportionate burden



Preserving a predictable and innovation-friendly legal environment for online platforms within the EU, without  
placing undue administrative burden on platforms  
(specific objective 3)

## Part 3: Impacts

### Rationale behind the choice of the preferred option

## Efficiency – what costs for what benefits?

### BENEFITS

#### Business users:

- Increased opportunities to embrace digital innovation, transformation and to access new markets
- more transparent & predictable business environment
- Improved internal, external and judicial redress
- A step towards more fairness – transparency would allow greater overview of discriminatory behaviour
- Better informed search optimisation strategies
- Pro-competition effects: search engines - comparison sites; business users - vertically integrated platforms

Consumers: preserved or increased choice;  
more impartial search results more easily identifiable

#### Online platforms & search engines:

- increased trust ⇔ growth of the sector,
- preserved scaling-up opportunities
- quality of business service - greater scope for differentiation for start-up and new entrants

Public authorities: Observatory to inform policy making

### COSTS

#### Online platforms:

- one-off costs to adjust their terms and conditions, including legal and communication costs
- limited (comparable to baseline) running costs when T&C change
- limited compliance costs for smaller platforms - exemption from the internal complaint mechanism

#### Search engines: limited costs both for

- bigger search engines – with SEO (search engine optimisation) guidelines already in place - could be re-purposed for business users
- smaller ones - able to draw on existing best practices

No expected cost pass on SMEs or consumers

Limited costs for national authorities





## Part 3: Impacts

### Rationale behind the choice of the preferred option **Proportionality**

#### **Improved environment for business users - a proportionate co-regulatory approach for platforms**

- ✓ Platforms remain free to set their general policies & have the opportunity to shape voluntary commitments by way of industry codes of conduct within a principles-based framework
- ✓ two-step approach tailored to platforms' fast changing technological and economic environment
- ✓ exemption from the most burdensome obligation for smaller platforms - preserved start-up and scale-up capacity
- ✓ targeted issue-specific intervention with respect to online search engines
  - ✓ Limited to ranking transparency & legal standing for representative organisations
  - ✓ Proportionate measure not requiring algorithms' disclosure to prevent gaming

## Part 3: Impacts

### Rationale behind the choice of the preferred option Coherence

- ✓ **Consumer law**
- ✓ **Fundamental rights**
- ✓ **Competition law**
- ✓ **Trade Secrets Directive**
- ✓ **ODR- ADR- regulation**
- ✓ **"Online platform" definition consistent with other related EU definitions**
- ✓ **DSM strategy, GDPR, Copyright, Illegal content**



# **Expected benefits - overview**

**Growing & better functioning online economy**

FOR

**Strengthened Digital Single Market**



# Expected benefits

## Quantitative overview

### Growing & better functioning online economy

- €381 million - 705 million/year increase in turn-over realised on or through online platforms
- €38 million - 70.5 million in **additional platform commissions**
  - 119 million - EUR 476 million ( if we consider the reversed dampening effect)
- €0.81 million - € 4.05 billion of **reversed dampening effect** resulting from a lack of trust of business users
- 4.7 million **jobs preserved**
- 89% of sellers on e-commerce market places are self-employed persons achieving a turn-over of less than €50,000 – **beneficial social impact**
- **Cost savings** through the increased use of **mediation** (€7.500 per dispute)



# Expected benefits

## Qualitative overview

### Strengthened Digital Single Market

- **Increased innovation opportunities for all actors in the online platform ecosystems through enhanced transparency and higher trust**
- **High level framework for common P2B rules based on transparency, dispute resolution and monitoring**
- **Greater regulatory predictability for the online economy**
- **Reinforced scale-up, innovation and operation capacities for platforms and general online search engines within the EU**
- **Close monitoring, anticipation and solving of issues in the online economy through a dedicated EU Observatory**



# PART 4

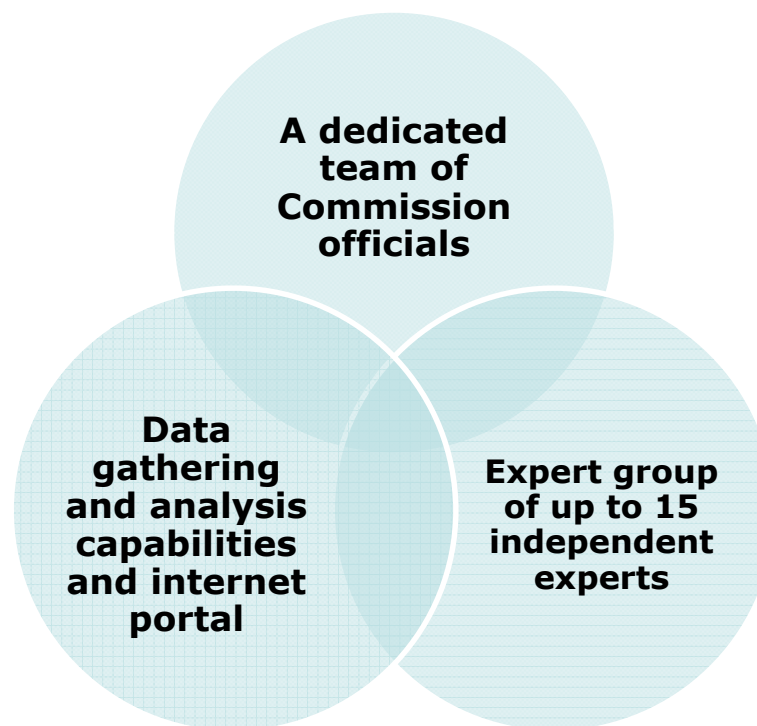
## **Part 4**

# **Monitoring and evaluation**

1. Monitoring of the evolution of the online platform economy - emerging challenges and opportunities for the EU

2. The specific monitoring of impacts related to the regulatory intervention

# 1. The EU Observatory on the Online Platform Economy - structure





## EU Observatory – budget

The Commission will bear the costs of the EU Observatory:

- reimbursement of travel and accommodation expenses of experts
- costs of setting up and running of an internet portal
- study supporting the work of the Observatory (data gathering and analysis + running of the portal)- €1,000,000 Euro

# Monitoring of the evolution of the online platform economy

**The EU Observatory will:**

- **Look into the emerging challenges and opportunities for the EU in the online platform economy, through data/evidence gathering and analysis of trading practices**
- **Gather impacts from regulatory approaches and non-regulatory measures in the MSs**
- **Liaise with relevant expert bodies at EU and national level**

# **Observatory – analysis of issues of particular importance that may arise in the online platform economy**

## **In particular:**

- (i) issues related to algorithmic decision-making and ranking in connection with the provision of online intermediation services and online search engines, including the question of transparency;
- (ii) access to, and use of, different categories of personal data and other data, in compliance with data protection rules, provided or generated in the context of the provision and use of online intermediation services and online search engines;
- (iii) issues related to remuneration for material displayed online, in particular in relation to search results;



## **Observatory – analysis of issues of particular importance that may arise in the online platform economy**

(iv) transparency and accountability in business-to-business commercial relations in online advertising;

(v) differentiated treatment which providers of online intermediation services might give to goods and services offered by themselves or by the undertakings which they control;

(vi) restrictions to offer different conditions when using other distribution channels which providers of online intermediation services might impose on business users;

(vii) possible impacts of these potentially harmful practices on consumers;

## 2. Monitoring – evaluation indicators

INDICATORS		OPERATIONAL OBJECTIVES	SPECIFIC OBJECTIVES
EFFECTIVENESS	OUTPUT		
<p>In-depth analysis supported by the EU observatory:</p> <p>1. Effectiveness monitoring and interpretation</p> <p>2. Detection of emerging issues</p>	<p>Share of platforms including such clear clauses in their terms of service.</p> <p><b>Target:</b> 100% within two years (out of estimate 5000 platforms in scope of the intervention)</p> <p><b>Baseline:</b> general clarity assessment as not fit for purpose for 54% of T&amp;C in a sample-based assessment (EY, forthcoming);</p> <p><b>Data collection strategy:</b> Monitoring inclusion of such clauses in T&amp;C, and clarity ratings.</p>	<p><b>Platforms transparently inform their business users about:</b></p> <ul style="list-style-type: none"> <li>Changes in terms and conditions within reasonable notice period</li> <li>Statement of reasons for delisting and clarity of terms and conditions in this regard</li> <li>General criteria for ranking offers</li> <li>Clear information regarding platforms' competing services</li> <li>Clarity of conditions for data access and use</li> <li>Conditions including best price or product selection for the market place</li> <li>Listing of EU mediation bodies that adhere to the European Code of Conduct of Mediators</li> </ul>	<p>Predictable, fair treatment of business users by online platforms</p>
	<p>Share of business users reporting further frictions with platforms</p> <p><b>Monitoring indicator:</b> no target set, as this could lead to misleading incentives for reporting. Yearly monitoring</p> <p><b>Baseline:</b> overall 46% (Ecorys, 2017)</p> <p><b>Data collection strategy:</b> Monitoring through survey and reporting via the online presence of the EU Observatory.</p>		
	<p>Monitoring and qualitative assessment of accompanying voluntary measures.</p>	<p><b>Online platforms set up effective and accessible internal redress mechanisms</b></p>	<p>Effective, agile redress for businesses, adaptable to the evolving market</p>
	<p>Average number of complaints received by platforms from their business users (per platform, per type of issue).</p> <p>Average and median time to process the complaints</p> <p><b>Monitoring indicators:</b> no pre-set target, as this could lead to misleading incentives for reporting. Yearly monitoring</p> <p><b>Baseline:</b> N.A;</p> <p><b>Data collection strategy:</b> Based on platforms' mandatory yearly reports</p>		
	<p>Number of cases reported to the EU Observatory where platforms allegedly did not act in good faith when a case was brought to a EU mediator.</p> <p><b>Monitoring indicator:</b> no pre-set target, as this could lead to misleading incentives for reporting. Monitoring twice a year.</p> <p><b>Baseline:</b> N.A;</p> <p><b>Data collection strategy:</b> Based on reporting through the online presence of the EU Observatory</p>	<p><b>Business users can access easily EU mediation bodies</b></p>	<p>Predictable legal environment for online platforms within the EU, without unnecessary legal burden</p>
	<p>Legal enforcement</p> <p>Monitoring of case law.</p>	<p><b>Possibility for associations and representative bodies to seek action in court</b></p>	

# Monitoring and Evaluation – Operational Objectives

- **Platforms transparently inform their business users about:**
  - Changes in terms and conditions within the notice period
  - Statement of reasons for delisting
  - General criteria for ranking
  - Clear info regarding platforms' competing services
  - Clarity of conditions for data access and use
  - Clear grounds for restricting the business users ability to offer different conditions to consumers
- **Online platforms set-up effective and accessible internal redress mechanisms**
- **Business users can access easily mediation bodies**
- **Possibility of associations and representative bodies to seek action in court**

# Monitoring indicators

**Share of platforms including clear clauses in T&C**  
**Share of businesses reporting further problems**

Monitoring and qualitative assessment of voluntary measures

Legal enforcement  
Monitoring of case law

# Stakeholders' Views

<b>Business users</b>	<p><b>Overall supportive of intervention and in favour of:</b></p> <ul style="list-style-type: none"><li>• stronger, co-regulatory intervention</li><li>• effective redress option (complaint handling, contact point)</li><li>• greater transparency of platforms' ranking practices</li><li>• Prohibition of MFN clauses</li><li>• Transparency of delisting processes</li><li>• Access to and portability of customer data</li></ul>
<b>Online platforms/ Search engines</b>	<p><b>Pro:</b></p> <ul style="list-style-type: none"><li>• certain transparency obligations (e.g. to give reasons for delisting or taking down offers – <i>in line with legal obligations to remove illegal content</i>)</li><li>• (<i>not too rigid</i>) notice periods for changes to T&amp;C</li><li>• transparency of main ranking parameters but risk of gaming and algorithm manipulation (search engines already provide guidance on ranking optimisation)</li><li>• monitoring as long as trade secrets are respected</li></ul> <p><b>Contra:</b></p> <ul style="list-style-type: none"><li>• No added value of <b>external</b> dispute resolution (own internal procedures are deemed sufficient)</li></ul>



# Stakeholders' Views

<b>National authorities</b>	<p><b>Pro:</b></p> <ul style="list-style-type: none"><li>• addressing issues related to T&amp;C (transparency, simplification, changes etc.). Obligations proportionate to the platform size).</li><li>• justification for delisting (aligned with illegal content procedures).</li><li>• transparency of general ranking criteria. improved redress options (but some concerns about administrative burden of internal complaint handling).</li><li>• monitoring</li><li>• best practices.</li></ul> <p><b>Diverging views about:</b></p> <ul style="list-style-type: none"><li>• notice periods, according to national experience, from "<i>no need to regulate</i>" to "<i>mandatory terms</i>".</li><li>• caution on access to data, non-discrimination and MFNs – need for further reflection</li></ul>
<b>Consumers</b>	<p><b>Overall supportive.</b> Expectation to further benefit from better choice and lower prices.</p>