

EDiMA feedback to the inception impact assessment on fairness in platform-to-business relations

EDiMA, the European trade association representing online platforms and other innovative tech companies, continues to be an active participant in the Commission's information-gathering exercises on P2B relations and appreciates the work on this issue.

Having noted the main issues identified by the European Commission as areas to be addressed by the inception impact assessment (i.e. terms and conditions, delisting, search ranking and advertising placements, transparency on data portability and access and better redress mechanisms), EDiMA would like to submit that there are three fundamental considerations that must be kept in mind throughout this process, namely: (i) the balance between B2B and B2C obligations, (ii) the legal obligations enforceable against online platforms and (iii) access to data: different reasons to collect it.

We would also like to react to the 3 options laid out in the inception impact assessment as possible avenues to follow as a next course of action, highlighting EDiMA's preference for Option I, i.e. EU soft law action to spur industry-led intervention.

I. The balance between B2B and B2C obligations must be safeguarded

Current discussions around the P2B initiative are focusing on the platform's stronger position over the business user or seller. It is however fundamental to properly understand the dynamics behind online platforms and their corresponding ecosystems. As multisided businesses, online platforms have a special role in balancing the interests of business users and individual users. As such, it is in the platform's best interest that they are positively perceived by the ecosystem as a whole. It is therefore not surprising that for many of the issues identified by the European Commission as potentially problematic, platforms have proactively put forward industry self-regulatory solutions which offer most effective and fast solutions. This means having clear T&C and policies on removals and delisting, as well as introducing effective internal redress procedures.

Platforms are also making every effort to increase transparency for consumers, which enables consumers to easily compare the products and services of competing suppliers. Increased transparency results in more competitive prices for consumers, which may not be in the interest in suppliers who prefer to keep prices at a higher level. The Commission should therefore be wary of regulatory solutions that would affect platforms' ability to deliver benefits to consumers.

It is important to underline the fact that online platforms are characterised by their scale, which enable business users to reach consumers worldwide without the overhead costs and risks linked to doing business in other markets. Scale is only feasible if the platform offers consistent rules across all of its business users. Any legislative initiatives must not have any adverse impact on the capacity of platforms to offer such scale, as any restriction will be detrimental to the business users that benefit from it.

II. Online platforms obligations

It is important to highlight that platforms are often forced to act against sellers that carry out illegal practices in order to defend their business models and ensure a high level of consumer protection on their services, which must be kept in mind throughout these discussions.



As an example of such a problematic result, a number of platforms recently engaged in a Memorandum of Understanding on a follow-the-money approach to online advertising and counterfeit goods, demonstrating a high level of goodwill in ongoing efforts to fight the spread of counterfeit items online and provide consumers with quality goods. In a situation in which a platform is made liable for removing a business' offer which contains an offer for counterfeit goods, how is the platform to balance its duties towards the business user, the consumer and its voluntary undertakings in the above-mentioned Memorandum of Understanding? Having to provide assurances to infringing business users will act as an impediment to the platform's ability to do right by the consumer and to do right by the law.

Another major issue to bear in mind is the legislative framework is the online platforms' obligation to comply with data protection legislation must also be taken into account in these discussions. For example, a list of the feedback provided by third party business users of online platforms revolved around accessibility to personal data which is actually not possible for the online platform to provide under the current Data Protection Directive, or the General Data Protection Regulation (GDPR) once it enters into force.

III. Access to Data: Data is collected for many different reasons

The Commission's intentions to target how platforms offer access to data to business users illustrates how a full understanding of how online platforms vary in functionality is inherent to the success of any foreseen proposal in the area of platform-business relations. Without understanding that each platform is fundamentally different and use data for many different purposes, a future EU-wide initiative runs the risk of restricting various and innovative business models in a rapidly evolving ecosystem.

The raw data collected by the platforms is often not valuable as it is collected but rather the aggregation of the data can lead to interesting conclusions and information. Naturally, the aggregation process is where major investments are made by the online platforms and thus the expertise built and the resources dedicated to this process is proprietary to the platform.

Reaction to the options for packages of specific measures to be explored by the European Commission

Option I: EU soft law action to spur industry- led intervention

EDiMA and its membership always strive at maintaining a strong relationship with their users; be they business partners or consumers. In that light we are fully committed to continue to work on finding pragmatic solutions to address areas of concern. Key factors in making this option a success are to focus on issues where there is evidence of substantial concern and to have a clear definition of the problems at hand taking into consideration the full legislative arena in which the platforms operate as well as the different business models of the platforms.

Option II: Targeted EU legislative instrument combined with industry-led action

Again with regards to the commitment from the industry to address well-defined substantive concerns remains as stated above. On the sub-options outlined in the inception impact assessment:

- *1st sub-option*: The "high level obligation for online platforms to ensure access of effective redress for their business users"- in principle EDiMA would agree that this could be a good way to create a baseline to address the issue but is concerned as to what this may entail - all

of our members currently do provide a form of redress to their business users yet we are concerned that trying to find a uniform approach to redress to cover all the different platforms might be extremely challenging bearing in mind the differences in business models and contractual relationships between the platforms and their business partners. Furthermore, on what basis would effectiveness be evaluated?

- *3rd sub-option*: On establishing a new dispute resolution mechanism to ensure effective redress and provide high-level principles on transparency and fairness to be codified by industry. EDiMA believes that again the variety of business models and the nature of the contractual agreements that the platforms have with their business partners vary so greatly that the scope of work of such a mechanism would a. require vast in-depth insight into the workings of all platforms b. would be very broad. A further consideration to be made is as to how this mechanism would fit in with the already-in-place judicial redress mechanisms when it comes to breach of contract.
- *4th sub-option*: The introduction of “a ban of specific problematic ‘P2B’ or ‘B2B’ commercial practices” EDiMA believes that the legal basis on which such a ban is assessed needs to be very carefully defined and needs to be substantiated with evidence that the practices included are wide-spread.

Option III: EU legislative instrument providing detailed principles

Whereas EDiMA always welcomes legal certainty on this matter a legislative instrument seems highly undesirable. The reasons being as follows:

- Such a legislative instrument will be based on current business models which means that by the time it goes to implementation phase it might no longer be relevant
- This approach would be far too prescriptive to be deemed future-proof legislation
- This approach would not address current concerns if they do exist on a broad scale