



The Digital Services Package

KEY MESSAGES

- The eCommerce Directive has greatly contributed to the growth of Europe's economy, yet the online landscape in which it was adopted has greatly changed. Shaping a framework that takes this into consideration must protect both consumers and the competitiveness of business users. The value of the online ecosystem lies in its ability to operate quickly at scale.
- Clarity on which types of digital services and definitions of what goods/content are to be covered are required. The framework should be upgraded to apply to 3rd country services that are not established in the EU but offering services within it.
- Clear, fast and harmonised mechanisms are needed to support the removal of illegal goods and content online. Further novel measures should be considered to incentivise platforms into maintaining diligent processes of active engagement.
- A clear notion of what is an illegal good/content is needed. This cannot be a "one-size-fits-all" definition and should instead be tailored based on specific, existing EU and national legislation. The notion of legal but "harmful" content should not be defined or legislated for at the risk of breaching fundamental rights.
- Platforms achieving a so called "gatekeeper" position are not necessarily abusing that position. However it can take place through carrying out activities that impede effective competition. Contestability of these platforms by others through truly open markets should be the goal.
- Clarity as to which platforms are considered "gatekeepers" as well as the criteria as to how these characteristics should be measured are required. Appropriate and practicable thresholds would avoid overregulation on smaller platforms that serve only niche markets.
- Any new ex-ante mechanism should have a solid due process and governance model to avoid legal uncertainty and arbitrary decisions in order to keep the spirit of the existing competition framework.
- Consumer welfare must remain the ultimate goal. As markets are rapidly evolving with the state of technology any new mechanism should remain future-proof and technology neutral.
- The Commission should continue to map the situation and policy responses across Member States to develop a repository of practices to better understand the commonalities and differences of platform workers across the single market and then carry out tripartite discussions on this topic.



THE DIGITAL SERVICES PACKAGE: ILLEGAL GOODS/CONTENT, “GATEKEEPER” PLATFORMS AND PLATFORM WORKERS

CONTEXT

The eCommerce Directive has successfully promoted online commerce and the development of the platform economy in Europe. It has also offered new opportunities for businesses, particularly SMEs, to participate in the wider global economy. In turn, this has fostered knock-on effects for growth, innovation and the development of services for other economic sectors. The Directive has therefore greatly contributed to Europe's economic activity. We have defended the internal market provisions of this Directive (see BusinessEurope's separate paper [here](#)) and believe that the country-of-origin principle within the eCommerce Directive should not be opened as it represents a cornerstone of the Single Market. Key Single Market provisions of the directive should be preserved.

However, we recognise that the context in which the eCommerce Directive was adopted is different to the current state of play. The sheer size, importance and influence of the online economy has meant that rogue actors have utilised platforms in order to distribute illegal goods and content online. It is therefore useful to revisit this framework, align it with EU case law and ensure the online sale of fake, counterfeit or dangerous goods and content is tackled effectively, particularly when (extraterritorial) enforcement of product safety laws against non-compliant products entering the EU market have been difficult to address.

Some platforms have also emerged with stronger market positions in the digital economy. While dominant players are permitted, the monitoring of markets must ensure effective competition, consumer welfare, the creation of innovation and ensure that no barriers for market entry exist within the markets in which they operate. It is also important to tackle problems related to interoperability and portability for business users (see BusinessEurope's [paper](#) on the data strategy on this regard).

The update of the safe harbour regime for digital services providers should take other legislative measures impacting this initiative into account to avoid risk of overlapping or conflicting provisions (eg. the Copyright Directive, Platform to Business Regulation, Goods Package, Audio-visual Media Services Directive, VAT Reforms and the ongoing discussion surrounding the Terrorist Online Content Regulation). Any revision of the eCommerce Directive should ensure broad harmonisation, maximum certainty for businesses, a level playing field for all and effective enforcement, including those companies outside the EU offering their services in the single market.

We also understand that the Commission is taking the opportunity to consult on issues related to platform workers' rights as self-employed people providing services for the platform economy. It is important to approach the topic of platform work from a broad perspective eg. not only related to social affairs. Furthermore, it is important to realise that the issues currently under discussion are not specific to platforms – they relate to self-employed persons more generally. As already made clear in the agreement on the directive on transparent and predictable working conditions, it is for Member States and



social partners to decide how to define different types of work and categories of workers. This should be done in a way which ensures legal clarity, takes account of new forms of work and is future-proof. It should also be in line with competition policy rules, and their interpretation by the European Court of Justice¹.

As a key societal stakeholder, BusinessEurope outlines its reaction to the Commission's consultation on the Digital Services Package in relation to tackling illegal content online, gatekeeper platforms and platform workers, below:

1. TACKLING ILLEGAL GOODS/CONTENT ONLINE:

The policy maker must take consideration of both: protection of European consumers and competitiveness for business users; while keeping innovative services that citizens expect and fostering opportunities for new business models to develop. The value of the online ecosystem lies in its ability to operate quickly and at scale. Measures should be effective, practicable and proportionate so as to not detriment their benefit to consumers, businesses and society alike.

Scope:

As the DSA intends to update the eCommerce Directive and target this framework towards removing various types of illegal goods & content online, it is crucial that clear definitions and categories exist as to what is being covered so that respective responsibilities are understood. It should also be clear as to what is meant by a platform (intermediary) covered under these new rules. It should have clear definitions to determine what "content", "services" and "product" we refer to in this instance. We need legal clarity but also avoidance of unnecessary burdens for sectors not intended to be included (e.g. logistics, transport).

We also call on the Commission to recognise the diversity of platforms (clearly differentiating between those who play an active or a passive role with respect to the information they distribute, share or host) spell out the services or activities not intended to be in scope of the proposed measures. A one-size-fits-all approach that would apply similar rules to all online services, regardless of their business model, societal impact or risk profile in the dissemination of illegal content, would damage the broader data economy.

Further to this, we agree that the framework should be upgraded to apply to 3rd country services that are not established in the EU but offering services within it. These services should be obliged to have a digital representative, particularly as the most popular platforms used by EU consumers are not based in the EU. Geographical location bears little significance when these goods and services can be accessed by EU citizens online at distance.

Notice and take-down:

¹ C-692/19 concerning the status of platform workers in the UK working for Yodel delivery network, the ECJ ruled that it is for national courts to make decisions about workers' employment status and that in this case, the worker had been correctly classified as self-employed



The ability to bring actions against platforms must be a key factor in ensuring the sustainability of the digital economy. However, notice and takedown procedures, the main tool for removing illegal content, remain fragmented across the EU. This means that procedures can differ from one intermediary to another, including: the speed of the responsiveness, the information required from the intermediary, the information to be provided throughout the takedown process (eg. acknowledgment of receipt of the notice, confirmation of takedown, information about the measures taken). The role of the DSA should therefore reinforce the cascade of responsibilities in fighting illegal content, stressing that clear, fast and harmonised mechanisms are defined for the removal of illegal content. It would be appropriate to harmonise notice and takedown procedures as the primary instrument in the removal of illegal content in the EU by indicating criteria for notices of illegal content. The clearer the conditions for illegal content, the better and faster the response from platforms.

The awareness of illegal content should trigger a straightforward obligation to remove or block access to such content after obtaining this knowledge. The update of the existing eCommerce Directive should therefore preserve liability for platforms that have actual specific knowledge of the illegal content (eg. through receiving a notice) but then failed to act (eg. by not removing or blocking access to specific illegal content). While failure to keep the content down indefinitely should not lead to immediate liability for the intermediary if the previous notice was reasonably followed, “best efforts to prevent their future upload” in accordance with “high industry standards” as per Article 17(4)(c) of the Copyright Directive could be a useful principle for platforms to follow to prevent the re-upload of illegal content. Liability should only feature however if “best efforts” cannot be demonstrated or another notice was issued on the basis of the re-upload and then not followed.

We therefore agree that novel measures for services to tackle illegal content should also be considered in the revision of this framework. This approach should incentivise platforms to ensure processes of active engagement to keep illegal goods and content from their services. As a result, we support the strengthening of existing overarching EU coordination groups (eg. Member State eCommerce coordination group) to support national authorities in collecting evidence to check and proportionately penalise those that do not have necessary processes in place to be in a position to obtain “actual knowledge” themselves to remove illegal goods/content or effectively enforce the terms & conditions of their services.

What is deemed satisfactory should be based on a broad diligence assessment of the platform (eg. processes adopted, dedicated employees, combination of cases). It will be important to take into account the ultimate goal: the creation of a healthy digital environment in which illegal contents or goods are removed promptly. Regular and proportionate transparency reporting on the removal of illegal goods/content could aid businesses to demonstrate adherence to this general responsibility. Provisions should also seek to consider how they could impact smaller businesses, considering their limited resources to proactively take action in comparison to larger companies; a proportionate approach should be taken. If certain processes are found to be sub-optimal, constructive regulatory engagement with the intermediary should take place to improve the situation before penalties are given.

Some platforms are often involved in the actual transaction itself (eg. stocking, transportation) where it is difficult to distinguish the platform from the business user.



However, a commercial relationship does already exist to organise those services. We therefore support a “Know Your Business Customer” responsibility to be established to incentivise platforms to further use this necessary information to identify their customers in order to create a safer online business environment. Again, these new provisions should take the limited resources of smaller businesses into account.

However, provisions should be proportionate and only apply to active platforms. There should only be liability for passive mere conduit, caching and hosting services where positive knowledge arises due to an intermediary being notified or where they have taken active measures and become aware but then failed to act sufficiently. Otherwise, there should be no liability for passive services. The distinction between service categories in Article 14 of the eCommerce Directive should be upheld and complemented by additional criteria aimed at clarifying the passive nature of these services. For example, keyword advertising for trademarks cannot easily be classified as a host provider as current terms have fallen behind the times linguistically. In particular, this criteria should take into account the actual risk presented by, whether the service provider has any control over the content being published or possesses the technical capabilities to access users’ specific content that is otherwise not public. In some cases, a business user maybe obliged to maintain full control of the content and services they operate.

This should be coordinated with existing laws to ensure coherence (e.g. the Copyright Directive, the revised Audiovisual Media Services Directive and the proposal for a Regulation on Terrorist Content Online). The flexibility of this approach would allow provisions to evolve over time and enable a differentiated approach through guidance based on the nature of the applicable service or content.

Providing platforms with more responsibility to remove illegal content can only take place with clarity on which content is actually deemed “illegal” and which services it needs to be removed from. Only then can they exercise further responsibility to meaningfully remove that content.

Illegal content:

The spread of illegal online activity continues to cause societal harm. We support the principle of: “what is illegal offline must also be illegal online”. What could help business is a clear notion of what illegal content is in a harmonised manner. This cannot be a “one-size-fits-all” definition however and should instead be tailored based on specific EU and national legislation.

Online platforms have made some steps to reduce illegal content that is online, the scale and pace of technological change has also permitted growth of illegal goods and content online. Online platforms have however invested in technologies, processes and people to protect consumers and businesses alike. They have developed tools to monitor activities to detect certain types of illegal content. However, it is important to realise that these types of aids are still a long way off replicating human judgement which itself is not infallible either.

Consumer flagging can play an important role and some online platforms already offer this possibility to promote a positive user experience. While community standards are important, it is ultimately up to authorities to decide what is actually illegal. Courts should also continue to play an essential role in both interpreting and shaping the legal



framework and decisions on which platforms rely and resolving disputes that arise. Clarity on what content is deemed to be illegal would help all actors and bring the crucial legal certainty needed.

In order to meaningfully prevent, remove and disable access to illegal content online, platforms should be required to adopt clear terms and conditions that express that the sale or promotion of illegal goods and content is prohibited and will give rise to sanctions. Online platforms should know the identities of their business users too (see more on the “Know Your Business Customer” responsibility above). In the context of transparency, we also suggest that the injured party should be provided with the infringer’s contact details in order to enable the seamless enforcement of legal claims.

Transparency is also important for business users who have placed the content online that is subsequently deemed illegal either by an authority or an online intermediary. Information as to why the content was deemed illegal and as a result taken down should be clearly and rapidly conveyed to the business user. The procedure envisaged in the platform-to-business Regulation could offer an efficient procedure of notice to draw upon.

Lawful but harmful content:

The notion of legal but “harmful” content should not be defined or legislated under the DSA. This would tip the balance of protecting consumers and businesses from harm and instead breach fundamental rights such as: human dignity, freedom of expression, freedom of association, freedom to do business and potentially breach privacy. Instead, the focus should be on describing a clearer definition of what illegal content is in order to solve these greater societal damages. This would also give clearer responsibilities for those involved in its removal. Otherwise, widening these responsibilities also to “harmful” content would not only take the benefit of these efforts away but inadvertently restrict the rights of EU citizens and potentially 3rd country citizens when applied ex-territorially.

While it could be difficult to legally define “harmful” (but not illegal) content, we recognise the potential issue of fragmentation at national level if Member States move to adopt multiple different initiatives on similar subjects in this area. Self- and co-regulatory initiatives at the EU level, including the EU Code of Practice on Disinformation have been a first step. Other initiatives such as the European democracy action plan have the opportunity to deal further with the issue of harmful content online.

2. EX-ANTE REGULATION FOR “GATEKEEPER” PLATFORMS:

Online platforms have become a vital part of the digital economy. Many consumers and businesses users benefit from the various services they offer. By bringing together large number of different users and offering enabling technology, platforms have been able to develop the digital economy and lower the costs of doing business at scale. They have incentives to maintain user trust on both sides to ensure engagement.

In some cases, such platforms are achieving a so called “gatekeeper” position. While some platforms are considered to be in this so called “gatekeeper” position, it does not automatically mean they are systematically abusing such position. Abuse of a “gatekeeper” position can take place through carrying out activities that impede effective



competition through creating market failures or lock-in effects. Lock-in effects can generate difficulties for business users who want to change the platform they are utilising or have no alternative.

The aim of the Commission should be to ensure contestability of digital markets by other players. Markets should also be open and contestable to new entrants in all aspects. We should also understand how certain contractual terms or practices imposed by so called “gatekeeper” platforms may impact fair competition within a specific market.

However, it is unclear which platforms the Commission considers to be a “gatekeeper” as well as the criteria as to how these characteristics should be measured. Appropriate and practicable thresholds for the scope of application could be useful, in order to avoid that other smaller platforms serving only niche markets are regulated in an unbalanced manner at the same time (eg. specific industrial platforms that have different market realities to the wider platform economy due to their high degree of specialisation and more closed nature). Scalability and the network effects derived from the intermediary should be the focus.

In this regard, thorough and efficient application of existing competition rules, that aim at demand markets to be open to new entrants, is of paramount importance. The principle of undistorted competition within markets provides the freedom for any market players to develop and expand their businesses and the emergence of new products and services. Competition rules are designed to safeguard this principle by sanctioning non-competitive actions from inside and outside of markets, eg. abusive market behaviour of dominant global market players and by ensuring the absence of interventions of public authorities in functioning markets. In particular, the ex-post control mechanism for the abuse of a dominant position, as laid down in Article 102 of the Treaty on the functioning of the European Union (TFEU), allows for undistorted competition within markets while also tackling abusive behaviour in general through benchmarks set by the case-by-case decisions. The ex-post design of the control mechanism ensures that authorities do not intervene in functioning market process unless a non-competitive disruption of these processes or market failure has been proven.

However, there is some concern that some of the markets on which these global platforms are active have tipped in response to the rapid emergence of the digital economy. Moreover, there is a concern not only that customers and competitors may be exploited but that new players may struggle to enter these markets and neighbouring markets which in turn could be hampering the emergence of new products and services which could otherwise benefit European consumers. There is a concern that the behaviour of powerful global online platforms could be exacerbating the current situation through the use of certain contractual terms or practices. Against this background, we welcome the opportunity to contribute to the debate on the basis of these concerns as well as on how to address these alleged challenges through an ex-ante regulation of “gatekeeper” platforms.

Any new rules or mechanisms should have solid evidence, due process and governance in this regard to avoid legal uncertainty and arbitrary decisions in order to keep the spirit of the existing framework. The relationship of a possible ex-ante regulation for gatekeeper platforms with the proposals being consulted on in parallel for a potentially New Competition Tool and existing regulation needs to be clarified. Clear criteria defining



what a “gatekeeper” intermediary is should also be required so that predictability is supported and the growth of an intermediary is not deterred due to uncertainty. It should be clear that the potential ex-ante regulation will only apply to platforms acting as “gatekeeper”.

Consumers welfare must remain the ultimate goal. As markets are rapidly evolving with the state of technology any new mechanism should remain future-proof and technology neutral. End-users should be provided with an improved freedom of choice by preventing operator selection of the content and services available on their devices. This can be achieved through avoiding commercial and technological barriers that limit the effect of competition and innovation in the market.

The Commission needs to acknowledge that, although there is no one-size-fits-all approach, general evidence based ex-ante rules for gatekeeping platforms in the online world may be useful. At the same time, the Commission needs to also consider that network effects are not the same for platforms with localised offers that are subject to local legislation and therefore limit network effects in practice.

Further to the comments above on the specific ex-ante mechanism, in line with its Data Strategy, BusinessEurope also calls on the European Commission to swiftly move forward in creating its proposed European Data Spaces and facilitating voluntary data pooling. Drawing on GDPR Art 20, user-centric data mobility mechanisms can lower barriers to entry, facilitate users’ multi-homing and therefore alleviate concerns related to accumulation and monopolisation of data.

3. PLATFORM WORKERS:

The EU should encourage Member States, while taking rulings of the CJEU and relevant national court decisions into account, to assess the different characteristics of workers to determine whether they are more appropriately classified as an employee or self-employed and therefore by which labour law and social protection requirements they are covered.

The labour markets and social security systems across the EU are equipped differently in each Member State when it comes to new forms of work. Therefore, platform work must be dealt with within the context of national legislation. The EU has already established legal instruments to ensure that those people working in new forms of work, for example on platforms, can be protected. It is now a matter of proper implementation and enforcement at national level. An EU legislative initiative on platform work is neither necessary nor appropriate for the following reasons:

- The recently agreed EU legislation on transparent and predictable working conditions already has minimum provisions targeted at people working on platforms who are categorised as employees, i.e. related to the provisions on ‘on-demand work’.
- Member States should implement, where necessary the Council Recommendation on access to social protection, including relating to self-employed.
- The recently agreed regulation on promoting fairness and transparency for business users of online intermediation services, the so-called “Platform to



Business (P2B) Regulation”, already places obligations on platforms to be more transparent about their terms and conditions towards the business users of the platforms, including regarding ranking systems (for those platforms that have them), and to provide an internal complaint handling system.

- With the increased transparency on terms and conditions and other measures provided by the P2B regulation, self-employed individuals working on platforms will have more information to enable them to choose which one to use.

Many people wish to work in a self-employed capacity as they are not bound by contractual obligations towards an employer and they have flexibility to organise and control their own schedule, develop their own business etc. This is also true for self-employed. Furthermore, this is consistent with promoting measures against undeclared work, which has a negative impact on employees and the economy in general in terms eg. tax collection.

If you have well-functioning labour markets within which different legal statuses are well framed at national level, being self-employed is normally a positive choice you make. Clarity must also be found at national level regarding the rights and obligations of workers, including platform workers, depending on their legal status, to avoid labour market fragmentation. This should take into account the specificities of each country, avoiding creating barriers for new forms of work to flourish while ensuring the appropriate access to social protection coverage. Taking into account the impact of the Covid-19 pandemic in public health, it is also important that platform workers have appropriate access to health provisions, according to their classification eg. as an employee or self-employed. Those provisions are determined at national level according to their labour law and social protection systems. Where problems occur is often where labour markets are not well-functioning and people may turn to such types of work due to the absence of others. Therefore, the aim should be to create better functioning labour markets (e.g. through the European Semester process), and to avoid making it more difficult to be self-employed.

There is not a typical ‘platform worker’ and they are not a clearly defined group. Some people offer their services through platforms to top up their income from another job. As stated by [Eurofound](#), this means that they are often represented through other means by way of their main employment. For others, it is their primary source of income. This also varies across countries and cities, including for the same platform. This shows that there are many different ways in which people choose to do platform work and many different reasons for choosing this form of work. In these circumstances, one-size-fits-all proposals for “platform workers” are flawed.

Those working on platforms are also generally free to work on numerous ones, e.g. they do not have any exclusivity with one. Measures to reduce this flexibility would be detrimental to the consumers, the professionals and the platforms. Whilst there are some commonalities between platforms, their business models differ greatly. These differences make it impossible to generalise the nature of work, the employment status and the applicable social protection scheme. For all these reasons, regulating ‘platform work’ as such does not make sense, given the diversity of such work, the different business models and the individuals working through platforms.



Collective representation and links with competition policy:

It is solely up to Member States and social partners at national level, respecting the different industrial relations systems, to decide if and how to tackle the issue of representation of workers engaging in new forms of work, and whether and how they need to adapt to carry on fulfilling their mission to represent collectively employers and workers' interests. It would harm national industrial relations systems and would breach the principle of subsidiarity to seek a harmonised approach on this at EU level. Indeed, it is doubtful whether the EU has the legal competence to legislate on matters relating to collective representation at all.

It is also necessary to reflect the large diversity of situations across Member States, including:

- systems, in which self-employed cannot be member of a trade union or be covered by collective agreements;
- self-employed joining/being represented in existing trade unions;
- creation of new trade unions to represent certain categories of workers (including platform workers), which in some cases negotiate working conditions de facto;
- creation of independent unions of platform workers extending certain (employee) labour rights and protections and collective bargaining possibilities to specific occupations or to specific categories of workers (e.g. dependent self-employed);
- creation of associations of self-employed, which depending on the national legislation may have the right to negotiate a collective agreement without infringing anti-trust regulation;
- exemptions at national level to competition rules prohibiting cartels for certain forms of self-employed, sectors or occupations, thereby giving them a right to negotiate;
- co-operatives, other informal structures or private companies organising and providing services to self-employed, e.g. help with invoicing, access to training, or pooling resources to offer sick, maternity and holiday pay, but not giving the legal possibility to bargain collectively or sign agreements;
- platforms developing their own solutions, e.g. codes of conduct and complementary social benefits.

Self-employed, including those offering their services working on platforms, carry out their services for and with commercial contractors and are considered as undertakings. Therefore, they are subject to the rule of prohibition of price cartels between economic actors. It is therefore logical that agreements made between self-employed persons generally go against the rules of EU competition policy, as they are considered as restricting or distorting competition within the internal market, when, for example, they directly fix prices, including wages or fees.

Additionally it has to be acknowledged that the possibility for exemptions to be made for agreements or bargaining practices that promote economic progress and in relation to public interest, has been interpreted in case law of the European Court of Justice (ECJ) as exempting collective agreements for employees from the scope of competition law. The ECJ underlined correctly the role and autonomy of social partners in a number of Member States to set (e.g.) wages as part of collective bargaining.



Even though, whilst article 101 of the TFEU does not explicitly include an exemption from competition rules for agreements on pay and working conditions, this is the case in some national law. This is of course a decision for the national level and it also shows that the existing rules, interpreted by the courts, already provide the necessary elements of flexibility. Therefore, there is no need to change existing EU competition rules to allow self-employed persons, including those working on platforms, to engage in collective bargaining or agreements concerning wages.

For justified and valid social reasons, collective agreements establish a type of price cartel for employees, by setting wages. However, this is a completely different situation to self-employed, who are undertakings/economic operators, for which the same social reasons cannot/do not apply.

Any attempt to undermine or subjugate competition law in order to address alleged bogus or false self-employment is not appropriate. If workers are found to be bogus or false self-employed, according to national legislation, they should be treated in the same way as employees, including all rights and obligations of an employee, as this is a misapplication of the legal status of self-employed and does not require any further EU legislation.

If some workers are categorized as self-employed, but in actual fact the characteristics of their work qualifies them as employees according to the national legislation, then this should be clarified by discussing the distinction between being self-employed and an employee – not by extending employment rights, such as the right to negotiate a collective agreement, to self-employed persons.

It would also likely stifle the creation and development of new, innovative business models, including platforms, on which predominantly self-employed persons operate.

Given the differences between individuals working through platforms, e.g. in terms of the amount they use it, whether it is their main source of income or not, and the fact that they often work not through one but a number of different platforms, there would be inherent difficulties in copy-pasting salaried employment collective bargaining arrangements to such a diverse group and it would not allow for legitimate representation of their different interests.

Where solutions are being developed outside social dialogue structures, such as in the form of self-regulation initiatives or codes of conduct, or providing possibilities for collective representation to some categories of self-employed, as is the case in some countries or by some platforms, it is important that the role of recognized social partners is respected.

In all cases, only the recognised social partner organisations should have the mandate/right to negotiate and implement collective agreements and the decision on which are the recognised social partner organisation is for the national level, according to their industrial relations system.

Competition policy should not act as a barrier to the freedom to form an association (e.g. an informal group wishing to represent themselves towards the management of a



platform) and the ability to discuss working conditions, training etc. However, discussions on elements such as prices, fees, including wages, if done by a group of self-employed, would breach rules on cartels. This is only possible for employees within the context of trade union membership – covered under collective bargaining. It is also important that this does not undermine the business model of certain platforms whereby individuals are working via a number of different platforms, allowing representatives of specific groups of gig workers to represent the interests of competing platforms.

CONCLUSION

BusinessEurope stands ready to contribute with further analysis as this process progresses in order to support relevant legislators. We believe that consideration of the various types of platforms that exist and content they display should be central to any reform. At the same time, further legal clarity will be needed on what is actually deemed illegal under the DSA and what issues will be left to be covered in other legislation. As a result, clearer upgraded responsibilities in relation to notice and takedown can be understood. This would be a first beneficial step in this area to ensure Europe has a safe and fair online market for consumers and businesses customers to continue benefitting from.

In relation to gatekeeper platforms that have potential market effects, the idea for a specific ex-ante control mechanism to be used in relation to global gatekeeper platforms should be carefully considered. In addition, policy-makers should carefully assess the interaction with existing regulation, such as the P2B Regulation and the possible effects between ex-ante regulation and ex-post competition law enforcement on each other. Such a mechanism must not contradict existing competition law rules, in particular Art. 102 TFEU, nor set lower intervention standards that would circumvent competition rules. Due process will be key to ensure arbitrary actions are not taken.

In relation to platform workers, we agree that the Commission should continue to map the situation and policy responses across Member States and develop a repository of practices, as this would be useful to better understand the commonalities and differences of national approaches to this issue. As a follow-up to the information gathering and analysis, the EU should facilitate a better understanding and learning between Member States and social partners on how to deal with the challenges faced and the solutions found, by organising tripartite discussions on this topic.

Discussions and learning could focus on:

- Challenges faced and solutions developed regarding collective representation of employees and self-employed in the collaborative economy. This should cover diverse national approaches, including binary systems where solely employee and self-employed categories of workers exist and other systems where more than 2 categories exist.
- How member states assess the different characteristics of workers when setting/adapting definitions of employees and self-employed, including in view of new forms of work, and thereby determining which labour law and social protection requirements apply. This should include learning on any specific criteria used by Member States and the influence of ECJ rulings.



Where Member States and social partners ask for it, the EU should support development of innovative initiatives, for example on worker representation, collective bargaining, access to social protection and measures to improve working conditions, in line with national industrial relations systems and practices. This can include initiatives led by industry, specific sectors, social partners and individual platforms. This can be done through compilations of practices and exchanges between Member States and social partners. There should be a clear acknowledgment that what works in one context may provide inspiration to others, but it is not necessarily replicable.

Before the Commission develops any opinion or approach on the issue of collective bargaining, self-employed and competition law in relation to platform workers, it should provide an overview/clarification of the different existing options for exemption from EU competition rules, e.g. in relation to public interest and economic progress, and how such exemptions cover bargaining and agreements on social topics, including through interpretation by the ECJ and national competition rules. The Commission's recent announcement to look at competition law and self-employed platform workers should be supported by an impact assessment as part of any public consultation. This could be followed up by a discussion with Member States and social partners.