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## **Online Intermediation Platforms and Fairness: An assessment of the recent Commission Proposal**

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## **Executive Summary<sup>1</sup>**

This Opinion assesses the Commission proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services (the so-called Platform-to-Business P2B proposal) and makes some suggestions to improve the effectiveness of the draft text and its consistency with other pieces of EU law.

As observed by the Commission in the impact assessment of the proposal, **online platforms intermediate more and more retail transactions. Hence, they play an increasing role in the retail supply chain in Europe** which the Commission has been investigating for several years; in particular as regards the presence, causes and consequences of B2B unfair trading practices and the possible need for EU regulation.

**These investigations showed that B2B unfair terms and practices were widespread and harmful in the retail food supply chain specifically.** Hence, in 2010, the Commission requested that stakeholders in food distribution agree on co/self-regulation. Within this Supply Chain Initiative, they agreed that certain unfair practices be alleviated and an enforcement framework be created. However, this initiative was not sufficient to ensure fairness in food distribution and an increasing number of Member States were adopting national laws to solve the issue at the risk of undermining the single market. As a consequence, the **Commission proposed in April 2018 a Directive with a black list of unfair practices to be prohibited and an institutional framework to effectively enforce those prohibitions.**

**More recent investigations now point to B2B unfair practices in online intermediation services.** Indeed, when the platforms are not contestable by innovative entrants and cannot be by-passed by their users, the risks of unfair practices are higher than in the food supply. This is because the imbalance between the platforms, which are often global and benefit from network effects on steroids due to data feedback loops, and their business users, which are often local smaller players, is stronger than the imbalance between food suppliers and retailers. Those P2B unfair practices lead an increasing number of Member States to adopt national laws to address the issue. However, those national rules threaten the digital single market and the costs of this regulatory fragmentation are probably higher than in the food sector because of the cross-border nature of many platforms' services. **This is why, two weeks after the proposal for the food distribution, the Commission adopted the proposal for online intermediation services.**

In the impact assessment of the draft regulation, the Commission identifies three main problems to be addressed: the multiplication of P2B unfair terms and practices, an enforcement gap and a fragmentation of the digital single market. To solve those problems, the Commission proposes three main solutions: more transparency on the terms and practices of the online intermediation platforms and, in some cases, online search engines; better dispute resolution mechanisms; and an EU intervention. However, those solutions are probably not sufficient to solve the identified problems if they are shown to be widespread and harmful. **Contrary to what its title suggests, the proposed regulation is more about transparency than fairness. If the objective is to ensure more fairness for the business users of online intermediation platforms, which is to be decided by the EU legislator, then the proposal needs to be improved.**

On the basis of an optimal regulatory framework determined with EU and national experiences in dealing with B2B unfair terms and practices, I suggest four improvements to the Commission proposal

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<sup>1</sup> This paper has been written with financial support from Vodafone but in full independence of this company. The Opinion reflects my views and not necessarily those of Vodafone.

if the European Parliament and the Council want to improve fairness in the relationships between online intermediation platforms and their business users:

- First, **give a clear mandate with a precise timeframe to the Commission**, supported by the recently created EU Observatory on the Online Platform Economy and in partnership with national authorities, to **investigate further the extent and the harm created by the P2B unfair practices** identified during the 2016-2017 fact-finding exercise;

If those practices are found to be extensive and harmful and if the costs of market failures are higher than those of regulatory failures, then the Commission should propose a prohibition of those terms and practices with a generic definition based on the three criteria used to define unfairness, *i.e.* (i) violation of good faith or good commercial conduct, (ii) creation of imbalance in the contractual relationship, and (iii) unilateral imposition. To increase effectiveness, this definition should be complemented by a black list of practices determined by the Commission in a delegated act;

- Second, **give extensive powers to the Commission and the national authorities to collect proportionate information from the online platforms** to determine the extent and the harm of P2B unfair practices;
- Third, **encourage the establishment and the monitoring of EU codes of conduct** between the main online intermediation platforms and representatives of professional users prohibiting the most harmful P2B practices;
- Fourth, **improve the institutional framework by requiring Member States to designate national authorities in charge of the implementation of the new rules**; those authorities should have sufficient resources and expertise and be provided with effective investigation and sanctioning powers; they should also closely cooperate with each other and with the Commission as many P2B practices have a cross-border dimension.

Such improvements to the Commission proposal will ensure that online intermediation platforms remain a powerful engine of growth and innovation in Europe, while guaranteeing efficiency and fairness in P2B relationships and preserving the fundamental right of their users to conduct their business.

## **1. Scope and aim**

This paper assesses the Commission proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services.<sup>2</sup> Section 1 deals with the market failures that can be generated by online intermediation platforms and the possible resulting unfair trading practices that these platforms may impose on their professional users. Then, Section 2 reviews current EU and national regulation of B2B unfair trading practices. Finally, Section 3 assesses the Commission proposal, in particular the alignment between the problems identified and the solutions proposed and suggests some improvements to the proposal on the basis of an optimal regulatory framework for addressing B2B unfair practices.

## **2. Market failures and B2B unfair terms and practices**

This section reviews the main market failures associated with online intermediation platforms. As these market failures may lead to unfair trading practices, this section then reviews the main B2B unfair trading practices that have been identified in the retail supply chain and in the online intermediation chain.

### **2.1. Online intermediation platforms and market failures**

Online intermediation platforms are extremely powerful engines for growth and innovation. They allow small professional users to reach out to millions of customers at very low cost, they increase customers' and traders' information and, in the end, they allow the development of new and disruptive business models.<sup>3</sup> In the words of Thomas Friedman, '*when the world is flat, you can innovate without having to emigrate..... This is going to get interesting. We are about to see creative destruction on steroids'*.<sup>4</sup> However, online platforms can also increase existing or create new market failures which may justify regulatory intervention.<sup>5</sup>

#### **- Asymmetry of information**

Online intermediation platforms lower some information asymmetries by increasing the possibilities of service providers to give information and users to receive information. Think for instance, of the rating mechanisms on many collaborative economy platforms. However, intermediation platforms also create new information asymmetries,<sup>6</sup> for instance regarding the collection and use of data by vertically integrated online platforms leveraging information relating to their sellers to give their products a competitive edge.<sup>7</sup>

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<sup>2</sup> Commission proposal of 26 April 2018 for a Regulation on promoting fairness and transparency for business users of online intermediation services, COM (2018) 238.

<sup>3</sup> Williamson and Bunting (2018).

<sup>4</sup> <https://www.nytimes.com/2005/04/03/magazine/its-a-flat-world-after-all.html>

<sup>5</sup> Martens (2016). Commission Staff Impact Assessment of 26 April 2018 for the Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, SWD(2018) 138, pp. 23-24; Podszun (2017).

<sup>6</sup> Martens (2016). This is the reason why the European Council underlined in its Conclusions of 19 October 2017 at para 11: '(...) the necessity of increased transparency in platforms' practices and uses.'

<sup>7</sup> <https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/129/12908.htm> which sets out allegations by the Booksellers Association in relation to Amazon using data relating to its Marketplace sellers for the benefit of its vertical products.

### **- Market power and dominance**

Online intermediation platforms benefit from direct and indirect network effects of an unprecedented magnitude, scale and speed which lead to market concentration.<sup>8</sup> Those network effects are reinforced by data-driven feedback loops<sup>9</sup> and the possibility for data leverage across markets<sup>10</sup> which may strengthen even further market concentration and lead to extensive data conglomerates.

To be sure, high market shares and concentration ratio are not *per se* indicators of market power for several reasons. First, digital markets are subject to innovation which is rapid and often unpredictable. In this setting, the barriers to entry and the contestability of market position by potential entrants and innovators are better indicators of market power.<sup>11</sup> Second, users of online intermediation services often multi-home on different platforms. In this case, high market shares do not necessarily allow the platforms to behave independently of their users.<sup>12</sup> However, online platforms have market power and dominance when their position is difficult to contest or, in multi-sided markets settings, where one side (often the professional providers) multi-home but not the other side (often the consumers).<sup>13</sup>

### **- Imbalance in bargaining power**

Next to market power and dominance which is assessed in an absolute manner over clients in general, online platforms may also enjoy superior bargaining power which is assessed in a relative manner over one or a few particular client(s). Indeed, the Commission observed an imbalance between platforms which are often very large and global and their business users which are often small and local. This may create a dependency of the business users which platforms can exploit by the imposition of unfair terms and practices, and those practices may not be contested by the weaker party due to fear of retaliation.

Such practices may be particularly harmful because, as noted by the Commission, online platforms intermediate more and more transactions and are increasingly the main vehicle for market access. Indeed, the Commission observes that '*growing digital trade is increasingly intermediated by online platforms. The retail value generated by EU third party sellers on platforms represented 22% of total online retail sales in 2016 (...) Sales over platforms now account for over half of all online sales in retail. According to Euromonitor, the online retail value generated by third party sellers in the EU in 2016 was € 54,566 million, representing 22% of total online retail. Other estimates suggest that around 60% of private consumption and 30% of public consumption of goods and services related to the total digital economy go via online intermediaries (...) 71% of the consumers who participated in a survey on online platform transparency found online market places to be the preferred source to buy goods or services for private use. Online sales accounted for 9% of global retail sales in 2016 and that figure is expected to rise to 13% in 2021. However, the impact of online retailing is much stronger due to web-influenced cross-channel sales.*'<sup>14</sup>

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<sup>8</sup> On the role of network effects for intermediation platforms, see Belleflamme and Peitz (2015), Martens (2016).

<sup>9</sup> On data feedback loops, see de Strel (2018) and Lerner (2014).

<sup>10</sup> On data leverage, Prüfer and Schottmüller (2017) have built a model where firms can leverage their position from data-rich markets (for instance maps) to data-less rich markets (for instance driverless cars) with products improvements based on data.

<sup>11</sup> Shelanski (2013). This has been recognised by the General Court of the EU in the Case T-79/12 *Cisco and Messaget v. Commission*, ECLI:EU:T:2013:635. The Court observed at para 69 that: '*recent and fast-growing sector which is characterised by short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power.*'

<sup>12</sup> Belleflamme and Peitz (2015). This has also been recognised by the General Court of the EU in Case T-79/12 *Cisco and Messaget v. Commission* at para 79.

<sup>13</sup> Duch-Brown (2017c).

<sup>14</sup> Impact Assessment for the Proposal for a Regulation on promoting fairness and transparency in P2B, SWD (2018) 138, p. 21.

## **2.2. Unfair terms and practices**

Such market failures lead to a series of efficiency and distributional issues that may justify regulatory intervention when the effects of market failures outweigh the effects of regulatory failures (which are inevitable but can be minimised with good rules and institutions). One of these issues is the presence of unfair terms at the contract conclusion and unfair practices before the conclusion or during the execution of the contract.

### **2.2.1. Definition of unfair terms and practices**

Unfair terms and practices can take place in B2C or B2B relationships but are more frequent in the former because the imbalance in power and knowledge is often stronger in B2C relationships. This is why B2C unfair terms and practices are more precisely defined and extensively regulated at the EU level within the so-called consumer *acquis*.<sup>15</sup>

Article 3(1) of the Unfair Contract Terms Directive (UCTD) defines *B2C unfair term* as follows:

*a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*

Article 5(2) of the Unfair Commercial Practice Directive (UCPD) defines a *B2C unfair practice* when:

- (a) *it is contrary to the requirements of professional diligence*,<sup>16</sup> and
- (b) *it materially distorts or is likely to materially distort the economic behaviour*<sup>17</sup> *with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.*

The Commission Communication on unfair trading practices in the food supply chain<sup>18</sup> defines a *B2B unfair trading practice* as

*practice that grossly deviates from good commercial conduct, is contrary to good faith and fair dealing and is unilaterally imposed by one trading partner on another.*

Thus the unfairness of a term or a practice is generally based on three cumulative criteria: (i) a violation of good faith or good commercial conduct, (ii) a creation of imbalance in the contractual relationship with the transfer of costs and shift of entrepreneurial risk to the weaker party,<sup>19</sup> and (iii) a unilateral imposition.

At the EU level, B2B unfair terms and practices are mainly discussed in relation to the retail supply chain either offline, in particular for food distribution, or online in particular for intermediation platforms.

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<sup>15</sup> On the EU consumer *acquis*, see Reich and Micklitz (2014); Weatherill (2013).

<sup>16</sup> Professional diligence is defined as *the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity*: art. 2(h) UCPD.

<sup>17</sup> Materially distort the economic behaviour of consumer is defined as '*using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise*' (art. 2(e) UCPD).

<sup>18</sup> Communication from the Commission of 15 July 2014, Tackling unfair trading practices in the business-to-business food supply chain, COM (2014) 472. In the Green Paper of 31 January 2013 on unfair trading practices in the business-to-business food and non-food supply chain in Europe, COM (2013) 37, the Commission proposed a similar but slightly less precise definition of UTPs: *practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing, they are typically imposed in a situation of imbalance by a stronger party on a weaker one*.

<sup>19</sup> Commission Green Paper on unfair trading practices in the B2B food and non-food supply chain, COM (2013) 37, p. 21.

## **2.2.2. B2B Unfair terms and practices in the retail supply chain**

### **- In the retail supply chain in general**

Since 2010, the Commission has been closely monitoring the retail supply chain which encompasses '*a wide variety of forms (shops, electronic commerce, open markets, etc.), formats (from small shops to hypermarkets), products (food, non-food, prescription and over-the-counter drugs, etc.), legal structures (independent stores, franchises, integrated groups, etc.), locations (urban/rural, city centre/suburbs, etc.).*'<sup>20</sup>

In the Retail Market Monitoring Report of July 2010, the Commission observed that: '*certain contractual requirements applied directly by retailers (...) on their suppliers or by suppliers on primary producers could, in some circumstances, be considered unfair and likely to curb the growth and even the viability of certain competitive companies' and that 'although certain national laws on unfair contractual terms between enterprises exist, they vary widely between Member States, which can lead to barriers fragmenting the internal market, distorting competition or increasing the risk of circumvention. In any event, the effectiveness of such rules is often curbed by the fear of retaliatory measures if infringements are reported.'*<sup>21</sup>

In the Green Paper of January 2013 on unfair B2B practices in the retail supply chain,<sup>22</sup> the Commission identified, on the basis of several surveys and enquiries done at both EU and national levels, seven categories of B2B unfair terms and practices:

- *Lack of written contracts* such that the parties have no lasting proof of the terms agreed upon;
- *Ambiguous contract terms* allowing the stronger contractual party to impose additional obligations during the execution of the contract;
- *Unfair transfer of commercial risk* such as the transfer of risks to the weaker party which is not the best placed to avoid them, the financing of proprietary business activities of the stronger party or the abusive use of reverse margin practices;
- *Unfair use of information*, in particular confidential information by the stronger party for instance to develop competing products which would deprive the weaker party of the results of its innovation;
- *Retroactive contract changes* which have not been agreed in a sufficiently precise manner, such as deductions from the invoiced amount to cover promotion fees, unilateral discounts based on quantities sold, listing fees;
- *Unfair termination of commercial relationship*, such termination or disruption which is sudden and unjustified or without a reasonable period of notice;
- *Territorial supply constraints* which may be imposed by some multi-national suppliers to impede retailers from sourcing identical goods cross-border in a central location and distributing them to other Member States.

As a follow-up to the Green Paper, Renda et al. (2014) did a very comprehensive study on the EU and national legal frameworks covering the B2B unfair trading practices in the retail supply chain. Out of a list of 30 terms and practices surveyed, the study identified 11 considered as representative of the core of the unfairness problem in B2B relationships. These are mapped to the seven categories of the Green Paper as elaborated in Table 1 below.

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<sup>20</sup> Report from the Commission of 5 July 2010, Retail market monitoring report, COM (2010) 355, p. 2.

<sup>21</sup> *Ibidem*, p. 7. Those unfair practices are described in the accompanying Staff Working Document, SEC (2010), pp. 40-44.

<sup>22</sup> Commission Green Paper of 31 January 2013 on unfair trading practices in the business-to-business food and non-food supply chain in Europe, COM(2013) 37. See also the Summary of the responses to this Green Paper.

**Table 1: Main B2B unfair terms and practices in the retail supply chain**

Commission Green Paper	Main B2B unfair terms and practices identified by the CEPS study
<i>Lack of written contracts</i>	- Lack of written contract
<i>Ambiguous contract terms</i>	- Lack of clarity in contract offer
<i>Unfair transfer of commercial risk</i>	- Liability disclaimers - Unilateral modification clauses - Terms unreasonably imposing or shifting risks
<i>Unfair use of information</i>	- Unfair use of confidential information - Unfair use of confidential information after contract expiry
<i>Retroactive contract changes</i>	- Abuse of economic dependence
<i>Unfair termination of a commercial relationship</i>	- Unfair breaking off of negotiation - Unfair contract termination - Refusal to negotiate

Source: Renda et al. 2014, p. 11

**- In the food supply chain in particular**

In the specific context of the retail food supply chain, a Code of Conduct was agreed in 2011 between some stakeholders and identified several unfair terms and practices.<sup>23</sup>

**Table 2: Main B2B unfair terms and practices in the retail food supply chain**

Commission Green Paper	B2B unfair terms and practices identified in Code of conduct of 2011
<i>Lack of written contracts</i>	- Refusing or avoiding to put essential terms in writing.
<i>Ambiguous contract terms</i>	
<i>Unfair transfer of commercial risk</i>	- General terms and conditions that contain unfair clauses; - Imposing a guarantee of margin via payment for no performance or a requirement to fund a contracting party's proprietary business activities or promotion, preventing a contracting party from making legitimate marketing and promotional claims on their products; - Imposing listing fees that are disproportionate to the risk incurred in stocking a new product; - Imposing on a contracting party the purchase or supply of a set of products or services tied to another set of products or services; - Deliberately disrupting delivery to obtain unjustified advantage.
<i>Unfair use of information</i>	- Use or sharing with a third party, sensitive information provided confidentially by the other contracting party, without the latter's authorization, in a way that enables it to obtain a competitive advantage; - Withholding essential information relevant to the other party in contractual negotiations and which the other party could legitimately expect to receive.
<i>Retroactive contract changes</i>	- Non-contractual retroactive unilateral changes in the cost or price of products or services.
<i>Unfair termination of a commercial relationship</i>	- Unilateral termination of a commercial relationship without notice, or subject to an unreasonably short notice period and without an objectively justified reason; - Contractual sanctions applied in a non-transparent manner and disproportionate to damages suffered or sanctions imposed without any justification. - Threatening business disruption or termination of the business relationship to obtain an advantage without objective justification (for example by

<sup>23</sup> Vertical relationships in the Food Supply Chain: Principles of Good Practice, Nov. 2011.

	punishing a contracting party for exercising its rights, demanding payment for services not rendered or goods not delivered, or demanding payments manifestly not corresponding to the value/cost of the service rendered).
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Source: Author based on the *Code of conduct of the Supply Chain Initiative*

In April 2018, the Commission proposed a Directive which prohibits two black lists of unfair terms and practices.<sup>24</sup> The first list contains practices which are always prohibited:

- late payment,
- cancellation at short notice,
- unilateral and retroactive changes of terms of trade,
- fee for waste products not caused by supplier.

The second list contains practices which are prohibited if not agreed in an unambiguous manner at the conclusion of the contract:

- return of unsold food,
- fee to stock, display or list,
- fee for promotion or marketing.

Thus, by monitoring the retail supply chain in Europe, the Commission has identified several B2B unfair practices, in particular in relation to the lack of written contracts and ambiguous terms, the transfer of risk to the weaker party, the use of information (in particular confidential information), retroactive contract changes and termination of the contract. According to the EU institutions, those terms and practices are particularly widespread and harmful in the food supply chain, which has justified a more active role of the authorities in that sector.<sup>25</sup>

### 2.2.3. Unfair terms and practices identified in the online intermediation services

Online intermediation in a business to consumer environment is a form of retail supply. To be sure, Martens (2016:13-18) explains that online intermediation, and the more general concepts of platforms and multi-sided markets, may be defined more or less broadly. Depending on this choice, online intermediation platforms can either be considered as a retailers or not, but in any case, online intermediation shares many characteristics of the retail supply.<sup>26</sup>

Thus, obvious parallels exist between B2B unfair terms and practices imposed in the retail supply chain and those imposed in the online intermediation services. Indeed the Staff Working Document accompanying the Commission Communication of January 2012 on e-commerce noted that: '*these business practices (identified in the Retail Market Monitoring Report – mentioned above) can affect electronic commerce as much as their "brick and mortar" competitors and indeed be more prevalent in that sector. Abuses of market power, especially at the expense of SMEs, are likely to exist in the online*

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<sup>24</sup> Article 3(1) and (2) of the Commission Proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain, COM (2018) 173.

<sup>25</sup> However, Sexton (2017 :11) notes that: '*there are substantial gaps in the academic literature on UTPs in food supply chains, making the scale of the problem difficult to assess.*'

<sup>26</sup> Interestingly, in a recent case regarding the interpretation of the concept of 'intermediaries' of Article 11 of the Intellectual Property Enforcement Directive 2004/48, the Court of Justice of the EU judged that online and offline intermediaries should be treated in the same way and that the Directive covers both types of intermediaries. The Court decided that: '*The fact that the provision of sales points concerns an online marketplace or a physical marketplace such as market halls is irrelevant in that connection. It is not apparent from Directive 2004/48 that the scope of the directive is limited to electronic commerce. Moreover, the objective stated in recital 10 of that directive of ensuring a high, equivalent and homogeneous level of protection of intellectual property in the internal market would be substantially weakened if an operator which provides third parties with access to a physical marketplace such as that at issue in the main proceedings, on which those third parties offer in that marketplace the sale of counterfeit branded products, could not be the subject of the injunctions referred to in the third sentence of Article 11 of that directive'*: Case C-494/15 *Hilfinger et al. v Delta Center*, ECLI:EU:C:2016:528, para 29.

*as in the offline sector. Other practices may be specific to electronic commerce.*<sup>27</sup> Worse, if the information asymmetry is higher and the market contestability is weaker for online intermediation platforms than for offline distribution infrastructures, then the risks and the costs of unfair practices are higher.

In 2016-2017, the Commission undertook an extensive fact-finding exercise on B2B practices in the online platforms environment.<sup>28</sup> In this context, Ecorys (2017) observed that: '*a total of 46% of business users responded that they have experienced problems and disagreements with the platforms in the course of their business relationship. Among the business users with more than half of turnover generated via online platforms (heavy users), the share of those that experienced problems is significantly higher (75%). Out of those who have experienced problems 21% indicated that they occurred often over the course of the business relationship. For heavy users of online platforms, a significantly higher share (32%) have experienced problems often.*'<sup>29</sup> The study has then identified the six most important unfair terms and practices. Most of them relate to conducts taking place before or during the execution of the contract while one group of practices relate to dispute resolution possibilities.

#### **- Unfair terms and practices related to conducts**

In the Table 3 below, I present the main P2B unfair practices according to the categories of the Commission Green Paper on B2B unfair practices.

**Table 3: Main unfair terms and practices in the online intermediation chain**

Commission Green Paper	Main P2B unfair terms and practices identified by the Ecorys Study
<i>Lack of written contracts</i>	
<i>Ambiguous contract terms</i>	- Search and ranking: practices related to search and ranking (lack of transparency, rules and means for users to control the results).
<i>Unfair transfer of commercial risk</i>	- Terms and conditions: lack of or very short-term prior notice about changes and continuation of use as a presumption of acceptance of changes - Data access and portability: Lack of transparency of the platforms' terms and conditions and/or their practice on data and limitation of the extent to which users can access, use and transfer data relating to or generated based on the transactions carried out through platforms - Liability disclaimers - Lack of penalties for platforms.
<i>Unfair use of information</i>	- Platforms competing with business users or limiting options: platform favouring their own products and limitations of choice of auxiliary services.
<i>Retroactive contract changes</i>	
<i>Unfair termination of a commercial relationship</i>	- Access to the platform: content or product removal / delisting / termination of an account or product.

*Source: Author on the basis of Ecorys (2017)*

<sup>27</sup> Commission Staff Working Document of 11 January 2012, Online services, including e-commerce, in the Single Market, SEC (2011) 1641, p. 83.

<sup>28</sup> The fact-finding was announced in the Communication of the Commission of 25 May 2016 on Online platforms, COM (2016) 288. The results are summarised in the Impact Assessment for the Proposal for a Regulation on promoting fairness and transparency in P2B, SWD (2018) 138 and its Annexes. See also Duch-Brown (2017b) and EY (2017)

<sup>29</sup> See p. ix of the Study.

### **- Unfair practices related to redress mechanisms**

Regarding dispute resolution, business users surveyed voiced concerns on the choice of applicable law or jurisdiction, which is often made outside the EU. They also complained about the restrictions on access to redress possibilities. Ecorys (2017: xvii) analysed the reasons for not taking steps to resolve a problem. For the heavy users, the three main reasons are: (1) uncertainty about the outcome, (2) fear of damaging the relationship with the platform and (3) procedural difficulties. For the non-heavy users, the three main reasons are: (1) marginal importance of the problem, (2) uncertainty about the results and (3) procedural difficulties.

Therefore, the possible market failures in the online intermediation sector may lead, under some circumstances, to the imposition of B2B unfair trading practices by the online platforms. Those practices are often similar to those imposed in the offline retail supply chain which have led to EU and national regulation, to which I now turn.

## **3. Regulation of B2B unfair terms and practices**

This section deals with the regulation of B2B unfair terms and practices. First, I review the general and sector-specific rules and enforcement at the EU level and then I move to the national level where more rules exist.

### **3.1. Rules and enforcement at the European level**

#### **3.1.1. General and sector-specific EU law**

There is no general rule directly regulating B2B unfair trading practices at EU level. However, some general rules have an indirect effect on those practices. Moreover, sector-specific rules regulate B2B unfair practices in the sectors where they can be particularly harmful.

#### **- General EU rules with indirect effects on B2B terms and practices**

There are few *horizontal* EU rules that have indirect effects on B2B unfair terms and practices:<sup>30</sup>

- *Competition rules* which protect firms and consumers against anti-competitive behaviours by undertakings having market power;<sup>31</sup> they prohibit certain terms and practices in vertical relationships between suppliers and retailers, or business users and intermediation platforms;<sup>32</sup>
- The *Misleading and Comparative Advertising Directive* which protects traders and consumers against misleading advertising;<sup>33</sup>
- The *Late Payment Directive* which protects firms against late payment;<sup>34</sup>

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<sup>30</sup> See Stuyck (2011); Commission Green Paper on unfair trading practices in the B2B food and non-food supply chain, COM (2013) 37, pp. 12-14; Commission Impact Assessment for the Proposal for a Regulation on promoting fairness and transparency in P2B, SWD(2018) 138, Annex 8. Some rules were also foreseen Commission Proposal of 11 October 2011 for a Regulation on a Common European Sales Law, COM (2011) 635.

<sup>31</sup> Articles 101 and 102 TFEU.

<sup>32</sup> In particular, Commission Guidelines of 20 April 2010 on Vertical Restraints, O.J. [2010] C 130/1. For the application of those rules in the online sector, see the Report of the Commission of 10 May 2017 on the e-commerce Sector Inquiry, COM (2017) 229.

<sup>33</sup> Directive 2006/114 of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ [2006] L 376/21.

<sup>34</sup> Directive 2011/7 on combating late payment in commercial transactions, OJ [2011] L 48/1.

- The *Trade Secret Directive* which protects firms against the unlawful acquisition, use and disclosure of trade secrets.<sup>35</sup>

Moreover, the *consumer acquis*<sup>36</sup> applies to B2C relationships but can also be relied upon between traders with regard to conducts they deploy vis-à-vis consumers; hence it indirectly protects businesses from their competitors imposing unfair practices on consumers.<sup>37</sup>

However, all those rules only regulate indirectly B2B unfair practices and cannot effectively remedy many of the terms and practices identified above for the following reasons:

- Competition rules require the presence of (i) a high level of market power which is assessed over clients in general but do not necessarily cover dependency relationships assessed over one or few particular clients, and (ii) an anti-competitive behaviour which is not necessarily determined with the same normative criteria than those used for unfair practices.<sup>38</sup> Moreover antitrust rules only intervene *ex-post*.<sup>39</sup> Interestingly, the insufficiency of competition rules to deal with some causes of unfair practices is recognised by the competition authorities themselves.<sup>40</sup> In particular, the fear/dependency issues, combined with the difficulty in establishing a theory of harm make it particularly difficult to challenge online platforms.
- The Directives on misleading advertising and on late payment prohibit only specific types of B2B unfair practices and not the main ones identified above;
- Finally, the consumer acquis could address only a few of the unfair practices identified above, mainly the ones covering the lack of written contract and unfair use of information.<sup>41</sup>

The EU has also adopted *semi-horizontal rules* that apply to some categories of services independently of the economic sector where they are provided. This is the case of the *e-commerce Directive* which provides for transparency obligations and liability exemptions for the providers of some types of

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<sup>35</sup> Directive 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ (2016) L 157/1.

<sup>36</sup> In particular the Unfair Contract Terms Directive and the Unfair Commercial Practices Directive.

<sup>37</sup> Stuyck (2011). Indeed, Recital 8 of the UCPD notes that: *'This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it'*. Moreover, as explained below, some Member States have extended the consumer acquis to B2B relationships.

<sup>38</sup> In that regard, Recital 9 of Regulation 1/2003 notes that: *'In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration'*.

<sup>39</sup> Also in that sense: Renda et al. (2014 :17);

<sup>40</sup> Commission Green Paper on unfair trading practices in the B2B food and non-food supply chain, COM (2013) 37, p. 10 ; Commission Services Impact Assessment for the Proposal for a Regulation on promoting fairness and transparency in P2B, SWD(2018) 138, p. 42 ; Report of the European Competition Network of May 2012 on competition law enforcement and market monitoring activities by European competition authorities in the food sector; Valletti (2018).

<sup>41</sup> As noted by Renda et al. (2014:64), This is explicitly recognised by the UCPD where Recital 8 states that: *'It is understood that there are other commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition'*. Thus on the need to have EU rules to fight against B2B unfair practices I disagree with Stuyck (2011) according to whom: *'the field that can be occupied by such rules is very limited in view of the existence of the spill over effect of B2C rules in this area and of extensive protection of intellectual property rights. In addition, there is no evidence of important obstacles for the achievement of the internal market as a result of disparities of legislation in this field.'* I think Stuyck overestimates the effectiveness of existing EU rules in regulating B2B practices and underestimates the costs the fragmentation of national rules.

information society services.<sup>42</sup> Those provisions are thus applicable to the online intermediation platforms.

#### **- Sectoral EU rules with direct effect on B2B unfair terms and practices**

Given the ineffectiveness of existing horizontal rules to address B2B unfair trading practices, the EU has adopted *specific rules* in the sectors where those practices were perceived as widespread and harmful and/or where the services provided were seen as fundamental to the economy or the society. In particular, this is the case in:<sup>43</sup>

- The *network industries* where a stricter regulatory approach has been motivated by the transition from monopoly to competition, the large size of some players and the essential nature of the services provided. For instance, the Open Internet Regulation imposes on the providers of Internet access services a series of obligation related to transparency and net neutrality.<sup>44</sup> The recently agreed European Electronic Communications Code imposes on the providers of electronic communications services several obligations related to transparency, bundling and contract termination;<sup>45</sup>
- The *financial sector*: the Payment Services Directive<sup>46</sup> imposes on the providers of payment services obligations with regard to transparency, liability and access to customer data.
- The *food retail distribution* sector: as already explained, the Commission has just proposed the prohibition of some B2B unfair terms and practices.<sup>47</sup> The evolution which led to this proposal is briefly described in the following paragraphs.

#### **3.1.2. The regulatory evolution in the food retail supply chain**

The evolution of the regulation of the food retail sector is particularly interesting and shows some parallels with the online intermediation services as both are retail supply services. It also highlights a greater willingness to act in the offline space in contrast to a perceived nervousness towards imposing regulation in the online ecosystem.

Due to the increasing complaints from food suppliers, several investigations and fact-finding exercises were launched to determine whether unfair terms and practices were imposed in the food supply chain and, if it was the case, what could be their causes and consequences. At EU level, the Commission

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<sup>42</sup> Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ [2000] L 178/1. Information society service is defined as '*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*': art. 1(b) of the Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ [2015] L 241/1.

<sup>43</sup> Renda et al. (2012 :97-107) also identify those three sectors as the three most common sectors for which Member States have adopted rules to regulate unilateral conducts.

<sup>44</sup> Regulation 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services and Regulation 531/2012 on roaming on public mobile communications networks within the Union, OJ [2015] L 310/1. Internet access service is defined as '*a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used*': art. 2(1) of the Regulation.

<sup>45</sup> Articles 95-100 of the Directive of the European Parliament and of the Council establishing the European Electronic Communications Code, whose draft is available at : [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSL:ST\\_10692\\_2018\\_INIT&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSL:ST_10692_2018_INIT&from=EN)

<sup>46</sup> Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market OJ [2015] L 337/35.

<sup>47</sup> Commission Proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain, COM (2018) 173.

set up in 2010 the High-Level Forum for Better Functioning of the Food Supply Chain.<sup>48</sup> Also, in May 2012, the European Competition Network, which assembles the national competition authorities and the Commission, adopted a Report on competition enforcement in the food sector.<sup>49</sup>

At the request of the Commission, the B2B Forum of the High-Level Forum for Better Functioning of the Food Supply Chain agreed in November 2011 on a set of good principles and a list of examples of unfair and fair practices in food distribution.<sup>50</sup> Then in January 2013, a framework for the implementation and enforcement of those principles was established.<sup>51</sup>

Although noting the progress made thanks to self-regulation, in July 2014, the Commission called for an improvement of the rules and the enforcement of the Supply Chain Initiative, as it was now called, as well as complementary regulatory action.<sup>52</sup> This led the members of the Supply Chain Initiative to agree in November 2017 on additional principles on fair dealing, information and confidentiality<sup>53</sup> and, in February 2018, on revised and improved rules of governance and operations.<sup>54</sup>

However, the Commission found this improved self-regulation was not effective enough as agricultural providers – the main supposed beneficiaries of the scheme – did not sign up to the scheme due to confidentiality and enforcement concerns. Moreover, more and more Member States were adopting national legislations to regulate B2B terms and practices in food distribution, leading to increasing risks of regulatory fragmentation of the single market. Therefore, in April 2018, the Commission proposed a Directive establishing a black list of prohibited B2B unfair terms and practices and setting up an effective institutional framework to enforce such prohibitions.<sup>55</sup> Thus, over nearly 10 years, the food retail supply chain went from fact-finding and investigation to self-regulation to the proposal for hard regulation.

### **3.2. Rules and enforcement at the national level**

Contrary to the EU level where rules of B2B unfair practices are merely indirect or sectoral, Member States have adopted many national general rules to regulate these practices.

#### **3.2.1. Substantive and institutional rules**

The extensive comparative studies by Renda et al. (2012) and (2014) show the wide diversity of national rules regulating B2B terms and practices:<sup>56</sup>

- *General principles of civil and/or commercial laws* which contain a duty of fairness such as *contra bonos mores* conduct, performance/negotiations in accordance with the principles of

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<sup>48</sup> Commission Decision of 30 July 2010 establishing the High Level Forum for a Better Functioning Food Supply Chain, OJ [2010] C 201/03.

<sup>49</sup> Report of the European Competition Network of May 2012 on competition law enforcement and market monitoring activities by European competition authorities in the food sector.

<sup>50</sup> <https://supplychaininitiative.eu/about-initiative/principles-good-practice-vertical-relationships-food-supply-chain>

<sup>51</sup> <https://supplychaininitiative.eu/about-initiative/framework>

<sup>52</sup> Communication from the Commission of 15 July 2014, Tackling unfair trading practices in the business-to-business food supply chain, COM (2014) 472. See also the Report of the Commission of 29 January 2016 on unfair business-to-business trading practices in the food supply chain, COM (2016) 32.

<sup>53</sup> <https://supplychaininitiative.eu/recommendation-good-practice-relation-principles-fair-dealing-information-confidentiality-and>

<sup>54</sup> <https://supplychaininitiative.eu/about-initiative/rules>

<sup>55</sup> Commission Proposal for a Directive on unfair trading practices in B2B relationships in the food supply chain, COM (2018) 173.

<sup>56</sup> This has also been confirmed recently by the Commission Services Impact Assessment for the Proposal for a Regulation on promoting fairness and transparency in P2B, SWD (2018) 138, pp. 90-91. For comparative overview of specific national laws against B2B unfair practices in the food distribution, see Cafaggi and Iamiceli (2018) and Swinnen and Vandevelde (2017).

good faith, good morals, fairness or loyalty. For instance, the civil codes of many Member States condemn behaviours which are contrary to *bona fides*;

- *Extension of existing EU laws*: some Members are interpreting more broadly EU competition law concepts - like dominance or abuse – to cover more anti-competitive/unfair practices while others have extended the scope of the EU consumer acquis to B2B relationships;<sup>57</sup>
- *Adoption of general rules to directly address some unilateral conduct* which are considered as unfair such as abuses of economic dependence or superior bargaining power, sales below costs or tied sales;<sup>58</sup>
- *Adoption of co/self-regulation schemes* which are often sectoral; for instance in several Member States, national Codes of Conduct prohibiting unfair practices in food distribution have been adopted by stakeholders.<sup>59</sup>

National practices show a large diversity in the scope of such rules: some are horizontal and apply to all the sectors of the economy; others are semi-horizontal and apply to some categories of activities (such as retail distribution); and others are sectoral and apply only to specific economic sectors. For this last category, Renda et al. (2012:97-107) observed that the most regulated sectors for unilateral conducts are the network industries, the financial services sector and the retail distribution of food.

The effectiveness of the law not only depends on good rules, which are only pieces of paper, but also on good enforcement. Here again, national practices are diverse depending on the type of rules to be enforced and the traditions of the Member States concerned. The main enforcement mechanisms rely on: (i) judicial courts, (ii) administrative authorities which may have different investigation and sanctioning powers, and (iii) co/self-regulatory bodies. Interestingly, Renda et al. (2014) show that judicial courts alone are often not effective enough because the weaker party in the contract may fear retaliation if it brings a case before a court. The authors also show that co/self-regulation is most effective when combined with public judicial and administrative enforcement which will give sufficient incentives to firms to comply with the private rules. Thus as explained by Cafaggi and Iamiceli (2018), the three branches of the ‘enforcement triangle’ are complement rather than substitute.

### **3.2.2. National rules and the single market**

The number of national rules on B2B unfair terms and practices and their diversity across Member States may undermine the single market when those rules pass the Treaty’s four freedoms test<sup>60</sup> and are not harmonised across the EU. Indeed, such a patchwork of national rules can considerably increase the costs of doing business cross-border. This has already been recognised for rules against unilateral conducts in general and can be a bigger problem for P2B unfair practices in particular.

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<sup>57</sup> Renda (2014:64) notes that 8 Member States have extended the Unfair Commercial Practices Directive to B2B relationships; among those, 2 have operated a full extension, including the black list of unfair commercial practices: Austria and Sweden; 4 have not extended the list of practices contained in the Directive (Denmark, Finland, Germany, Spain); 1 has done so only limited to misleading practices (France); and 1 has limited the extension to relationships between businesses and micro-enterprises (Italy). Few other countries have applied or used other types of lists as source of interpretation in B2B relations.

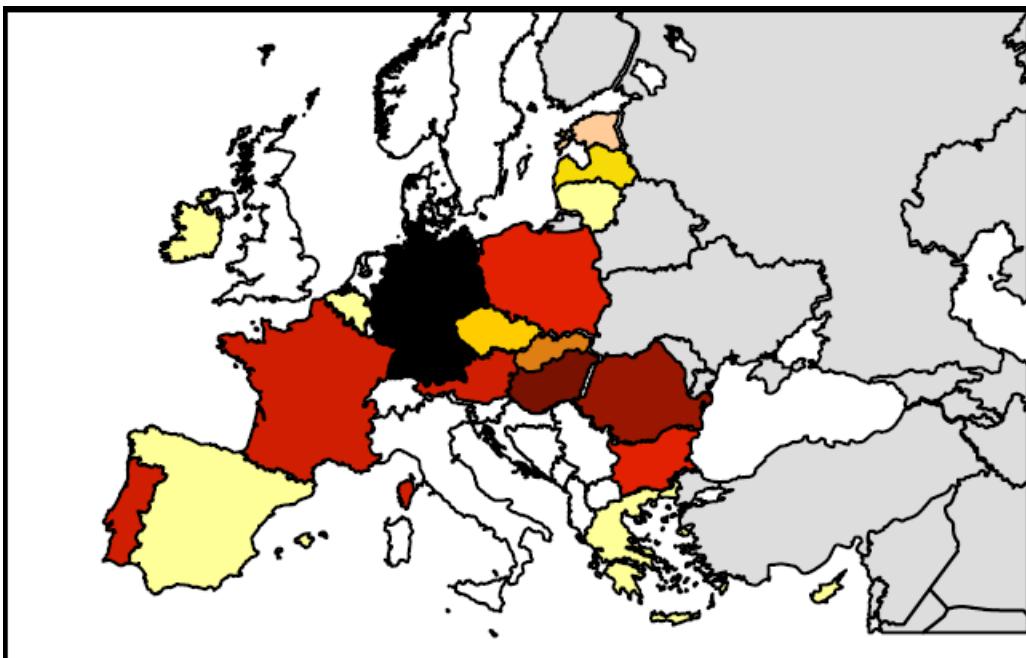
<sup>58</sup> As explained by Renda et al. (2012:8), some Member States have adopted those rules within national competition provisions while others have adopted them outside competition law.

<sup>59</sup> Commission Staff Impact Assessment for the proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain, SWD (2018) 92.

<sup>60</sup> According to Stuyck (2011:22), there is ‘no judgments in which a national measure restricting free movement of goods has been found to be justified solely on the ground of the protection of fairness in commercial transactions.’

Renda et al. (2012) show the degree of fragmentation generated by diverging legal rules on unilateral conduct that are stricter than Article 102 TFEU. This fragmentation is illustrated in Figure 1 below where the darker the colour, the greater the number of stricter legal provisions found at national level: Hungary and Germany were the countries with the highest number of rules that are stricter than Article 102 TFEU (resp. seven and six), followed by Romania and Slovakia (with five), then Austria, France and Portugal (with four), followed by Bulgaria and Poland (with three). In the following Table, red means a rule which is much stricter than Article 102 TFUE, yellow slightly stricter and green equivalent to EU law.

**Figure 1: Fragmentation of legal rules on unilateral conduct in the EU27**



	Dominance and Abuse	Economic Dependence	Sales below cost	Tying	Unfair competition	Grocery	Financial Services	Network industries
Austria	Red	Yellow	Yellow	Green	Yellow	Yellow	Green	Yellow
Belgium	Green	Yellow	Green	Red	Yellow	Green	Yellow	Green
Bulgaria	Red	Green	Yellow	Red	Green	Green	Green	Green
Cyprus	Green	Yellow	Green	Yellow	Green	Green	Green	Green
Czech Republic	Green	Yellow	Yellow	Green	Green	Yellow	Green	Green
Estonia	Yellow	Green	Green	Green	Green	Yellow	Green	Green
France	Green	Yellow	Red	Red	Green	Yellow	Yellow	Green
Germany	Red	Red	Red	Red	Green	Yellow	Green	Yellow
Greece	Green	Yellow	Green	Green	Green	Green	Green	Green
Hungary	Red	Red	Green	Red	Yellow	Yellow	Yellow	Yellow
Ireland	Green	Green	Yellow	Yellow	Green	Yellow	Yellow	Green
Latvia	Yellow	Yellow	Green	Green	Green	Yellow	Green	Green
Lithuania	Red	Green	Green	Green	Green	Green	Green	Green
Poland	Yellow	Green	Green	Red	Green	Yellow	Yellow	Green
Portugal	Green	Yellow	Red	Red	Green	Green	Yellow	Green
Romania	Yellow	Yellow	Green	Yellow	Green	Yellow	Yellow	Yellow
Slovakia	Green	Yellow	Green	Yellow	Green	Yellow	Yellow	Yellow
Spain	Green	Yellow	Green	Green	Green	Green	Green	Green

Source: Renda et al. 2012, p. 109

This study concludes that: '*such fragmentation can hamper the internal market, in particular by increasing legal uncertainty and raising compliance costs for affected undertakings. Companies wishing to engage in cross-border trade are hindered by (i) the existence of a wide divergence in the interpretation of the concepts of dominance and abuse thereof; (ii) the legal uncertainty surrounding*

*the exact features of national legislation and its enforcement; and (iii) the need to change contracts and commercial conduct to adhere to national rules.'*

In the more general study on B2B unfair practices which followed, Renda et al. (2014:17) conclude in the same way: '*In terms of legal instrument, the landscape is very fragmented: some Member States use antitrust law anyway to tackle Unfair Trading Practices, by stretching it beyond the scope of EU competition law; some Member States also use so-called "unfair competition" laws; a number of Member States use contract law, tort law, specific B2B laws, etc. to capture some or all the Unfair Trading Practices defined in the Green Paper; and in yet other cases, national legislation takes a more "functional" approach, i.e. it targets specific practices without specifying whether the legal rules belong to the domain of contract, torts or competition. Such a wide variety of legal instruments results in different enforcement practices with various combination of private and public enforcement and little coordination within and between national enforcers.*' The study recommends addressing this fragmentation at the EU level.

The problem of regulatory fragmentation is even more important in a P2B context because the risk of fragmentation may increase over time given the mounting pressure to regulate platforms, which has cost implications due to the cross-border nature of many services offered by online intermediation platforms. Indeed, the European Commission observes an emerging trend of regulating P2B relationships at the national level. So far, Austria, Belgium, France, Italy and Germany have adopted or are considering online platform-specific legislation dealing with transparency, most-favoured-nation clause or fairness. The Commission also notes that this trend will develop in light of the foreseen growth of online trade and the increasing intermediation by online platforms.<sup>61</sup> If the evolution of the national regulation in the food retail distribution is any benchmark,<sup>62</sup> the Commission's prediction is probably right. The costs of this regulatory fragmentation can be high because fragmentation increases legal uncertainty (which, in turn, may undermine business and consumer trust) as well as the compliance costs. Worse, the costs of fragmentation are higher in the cases of online platforms than for the retail sector in general or for the food retail distribution in particular (where an EU intervention was deemed necessary) because of the intrinsically cross-border nature of most of the services offered by digital platforms.

### 3.3. Summary

The Table 4 below summarises the main types of rules and enforcement mechanisms against B2B unfair terms and practices at EU and national level. At EU level, most rules are sectoral and the enforcement is at best done within a network of national authorities. At the national level, rules are horizontal and sectoral, their number is increasing in some sectors (such as food supply or online intermediation) and enforcement is diversely done with a combination of judicial and administrative authorities, possibly complemented with industry bodies.

**Table 4: Summary of rules against B2B unfair terms and practices**

	<b>Rules (general or sectoral)</b>	<b>Co-self-regulation (often sectoral)</b>	<b>Enforcement</b>
<b>EU Level</b>	- Some horizontal rules have indirect effects - Sector rules, esp. network industries, financial services and food distribution	Some sector initiatives: food supply and in regulated sectors	- Only one EU enforcer : DG COMP - EU Network of national authorities (ECN, CPC ...)

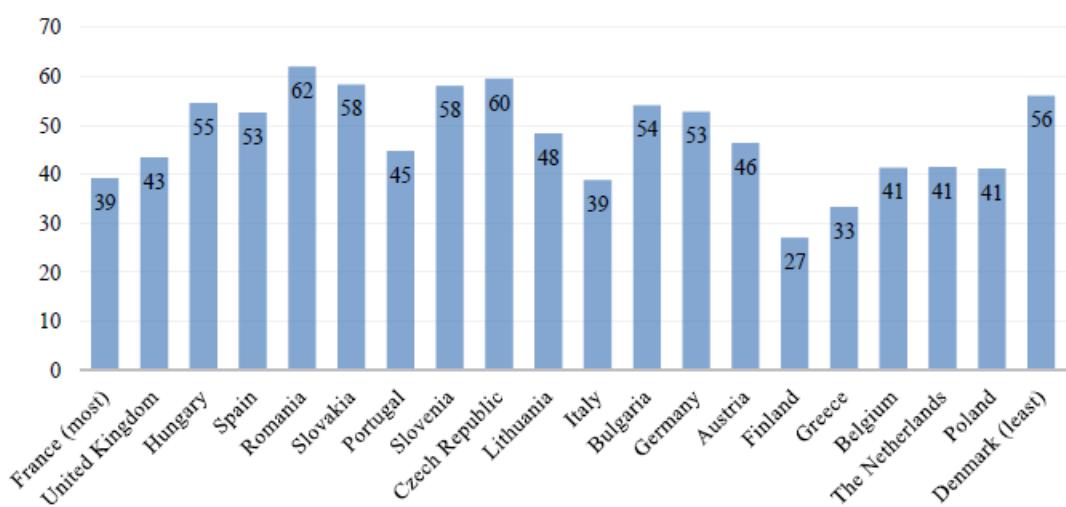
<sup>61</sup> Commission Impact Assessment for the Proposal for a Regulation on promoting fairness and transparency in P2B, SWD(2018) 138, Annex 8, pp. 32-34

<sup>62</sup> See Cafaggi and Iamiceli (2018).

<b>National level</b>	<ul style="list-style-type: none"> <li>- Several horizontal rules: general principles, extension of EU law, particular rules</li> <li>- Increasing number of rules in some sector (food, online platforms)</li> </ul>	<p>Some sector initiatives: food supply and in regulated sectors</p>	<p>Three complementary branches:</p> <ul style="list-style-type: none"> <li>- Judicial Courts</li> <li>- Administrative authorities</li> <li>- Industry bodies</li> </ul>
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Interestingly, in the food supply chain, Swinnen and Vandeveldé (2017) show that there is not always a correlation between the number and stringency of national rules and their effectiveness. They suggest that the quality of the rules and their enforcement mechanisms are more important than their quantity.

**Table 5: Perceived occurrence (in %) of Unfair Trading Practices by Member State, ranked from most stringent to least stringent UTP regulatory framework**



Source: Swinnen and Vandeveldé (2017:46)

## 4. Assessment of the Commission Proposal and suggestions for improvements

In this last section, I assess the recent Commission proposal on fairness and transparency in P2B. First, I analyse the correlation between the problems defined in the impact assessment and the solutions proposed in the draft law; then I propose an optimal regulatory framework to tackle B2B unfair terms and practices and, on the basis of which I make some suggestions to improve the Commission proposal.

### 4.1. Assessment of the Commission proposal

Based on its extensive fact-finding exercise, the Commission has identified three main problems:

- First, a substantive problem: the possible multiplication of P2B unfair terms and practices. According to the Commission '*this dependency situation [between online intermediation platforms and their business users] allows for a number of potentially harmful trading practices on the part of online platforms which limit business users' sales through online platforms and undermine their trust. These practices are not associated with any structural changes in the supplying industries. Practices identified and detailed in this Impact Assessment are: sudden, unexplained changes in terms and conditions without prior notice; the delisting of products and services and the suspension of accounts without clear statement of reasons; issues related to*

*ranking (including paid-for ranking) of businesses and products; unclear conditions for access to, and use of data collected by platforms; the discrimination of businesses and favouring of platforms' own competing services, and most-favoured nation clauses'.<sup>63</sup>*

- Second, an enforcement gap as the redress mechanisms do not appear to be effective. According to the Commission, '*the current regulatory framework may not be effective in preventing some of these practices, or in providing redress'*.<sup>64</sup>
- Third, a regulatory fragmentation undermining the digital single market. According to the Commission, '*the emerging regulatory fragmentation in the EU complicates the regulatory environment for online platforms and constitutes a significant risk for the EU platform economy. Compared to other Single Market areas, the platform economy possesses an intrinsically cross-border nature (and, in many cases indeed, global). The highly targeted but diverging national platform-specific legislations which start appearing therefore, establish a real risk of re-fragmentation of the single market'*'.<sup>65</sup>

To address these problems, the Commission proposes three main actions:

- First, more transparency for practices which have been found widespread and potentially harmful: the terms and conditions (Art. 3), the contract suspension and termination (Art. 4), the parameters determining ranking results (Art. 5), the differentiated treatment and internal discrimination (Art. 6), the access to data (Art. 7) and the most-favoured nation clauses (Art. 8).
- Second, better dispute resolution mechanisms with the establishment of an internal complaint-handling system for the large intermediation platforms (Art. 9), the identification of mediators (Arts. 10 and 11) and the opening of judicial actions to professional representative organisations and public bodies (Art. 12);
- Third, intervention at European level with the proposal of a Regulation - which is the strongest EU legal act - possibly complemented with EU codes of conduct (Art. 13) and the establishment of an Observatory on Online Platform Economy.<sup>66</sup>

Confronting the problems identified with the solutions proposed, I think that the Commission's draft goes in the right direction but may fall short in remedying all the problems identified if the risks of P2B unfair terms and practices were convincingly shown as widespread and harmful.

- First, transparency obligations allow a better understanding of how the market functions and contribute to the identification of possible P2B unfair practices.<sup>67</sup> In doing so, they increase the effectiveness of existing rules such as antitrust, consumer protection or data protection.<sup>68</sup> However I think that those transparency obligations are not enough to lead to the end of the P2B unfair terms and practices identified by the Commission because, on the one hand, the transparency foreseen is limited and, on the other hand and more fundamentally,

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<sup>63</sup> Commission Impact Assessment for the Proposal for a Regulation on promoting fairness and transparency in P2B, SWD (2018) 138, p. 10.

<sup>64</sup> *Ibidem*.

<sup>65</sup> *Ibidem*.

<sup>66</sup> Commission Decision of 26 April 2018 on setting up the group of experts for the Observatory on the Online Platform Economy.

<sup>67</sup> Commission Impact Assessment for the Proposal for a Regulation on promoting fairness and transparency in P2B, SWD (2018) 138, p. 43.

<sup>68</sup> Krämer et al. (2017 :66-68).

transparency solves some information asymmetry, but not market power or dependency issues.

- Second, internal complaint mechanisms, mediation and broader standing for judicial action improve enforcement. However, they do not solve the fear factor which is one of the main problems in a dependency context. To remedy the fear factor, an administrative authority with the possibility of receiving confidential complaints and launching ex-officio cases should be in charge.
- Third, intervention at EU level is justified and welcome given the cross-border nature of many online services. However, I think that a Regulation is not necessarily the most appropriate legal instrument when many substantive and institutional issues are covered and the national frameworks are heterogeneous.

In a nutshell, the proposed regulation is more about transparency than fairness. If the objective is to ensure more fairness for the business users of online intermediation platforms, which is to be decided by EU co-legislators, then the proposal needs to be improved. To make suggestions in this regard, I develop, on the basis of EU and national experience described in Section 3 above, an optimal regulatory framework to deal with P2B unfair practices to which I now turn.

#### **4.2. Optimal regulatory framework for a possible regulation of P2B unfair terms and practices**

This optimal regulatory framework deals with the objectives and principles, the types of the rules, the enforcement mechanisms and the level of intervention.

##### **- Objectives and principles of the rules**

Regulating P2B unfair practices can have several objectives:

- (i) Increase *market static and/or dynamic efficiency*; to achieve this objective, Valletti (2018) proposes to distinguish between practices agreed ex-ante at the contract conclusion and practices that occur ex-post during the execution of the contract. As the former typically lead to efficiencies for both parties while the latter reduce or eliminate the efficiencies for the weaker party, Valletti recommends to limit, with some well-defined exceptions, the prohibition to the ex-post practices;
- (ii) Ensure a *fair distribution of the welfare surplus* generated by market transactions among the players of the transaction;
- (iii) Protect and ensure a *fair balance between different human rights* at stake such as privacy and personal data, freedom of expression and information, freedom to conduct business and right to property.<sup>69</sup>

These objectives may conflict with each other. For instance, rules aiming at efficiency may in some circumstances reduce distributional fairness and vice versa.<sup>70</sup> It is crucial that the co-legislators, in adopting rules, sets the objectives, try to design the rules in order to minimise the conflict between objectives, and when trade-offs are inevitable, decides explicitly on them.<sup>71</sup>

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<sup>69</sup> Those rights are protected resp. by Articles 7, 8, 11, 16 and 17 of the Charter of Fundamental Rights of the European Union.

<sup>70</sup> Such conflict is mentioned by Sexton (2017) for the regulation of unfair practices in food distribution.

<sup>71</sup> Similarly, in the more general context of the regulation of retail supply, the Commission notes that: '*any intervention in the field of contractual relations and, to start with, any position taken on the abusive character of some business practices should be based on an analysis of the direct or indirect impact of these practices on overriding public objectives which should be determined. These objectives could for example relate to the level of innovation, the maintenance and growth of a network of producers or manufacturers, in particular SMEs (i.e. birth and death rates in the relevant retail supply chain), welfare of*

In my view, regulation of P2B unfair terms and practices should mainly aim at stimulating dynamic efficiency, given the importance and the pace of innovation in the digital markets and at protecting the freedom to conduct business of online platforms and business users alike. Moreover, the regulation may also aim at a fair distribution of the surplus of the transactions between the business users, the consumers and the platforms, but such objective should be carefully calibrated and the possible conflict with the efficiency objective should be minimised.

Then the co-legislators should apply the *proportionality* test, which is a general principle of EU law,<sup>72</sup> when setting the rules. Therefore the co-legislators should intervene when there are clear market failures and the intervention should be as minimally distortive as possible in order to remedy these market failures.

#### - **Type of rules**

Once the co-legislators decide to intervene with clear objectives and in a proportionate manner, they then need to choose the legal techniques and the type of rules. Rules may be principle-based with a generic definition of unfairness or more detailed with a black list of specific clauses. On the one hand, principles-based rules have the advantage of being easily adaptable, which is key when technology and markets are evolving quickly.<sup>73</sup> On the other hand, they have the drawback of being more legally uncertain which, in turn, can lower effectiveness and increase the risks of type I and II errors (respectively over-enforcement and under-enforcement). Such issues may be minimised with interpretative guidance and/or good institutions enforcing the rules.<sup>74</sup>

In my opinion, rules against P2B unfair terms and practices should be *principle-based* to adapt easily to fast and often unpredictable evolutions of the digital markets.<sup>75</sup> And to reduce the drawbacks of principles-based rules, the generic definition of unfairness should be complemented with a targeted and proportionate black list of particularly detrimental terms and practices.<sup>76</sup> Such a black list could be adopted by the Commission in a delegated act which is more easily reviewed than a legislative act. Moreover, the generic definition could also be clarified with interpretative guidance adopted by the enforcers or, at the EU level, by the European Commission. The generic definition may also be supplemented with co/self-regulation schemes which clarify with a balanced dialogue among all stakeholders, the specific terms and practices to be alleviated in a particular context or sector.<sup>77</sup>

Following Renda et al. (2014), I also think that the EU rules should also be *functional* and regulate unfair terms and practices rather than fields (contract, unfair competition, torts) leaving to Member States the task of indicating which combination of instruments should be used.

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*consumers, etc.'* : Commission Staff Working Document of 5 July 2010 on Retail Services in the Internal Market, SEC(2010) 807, p. 44.

<sup>72</sup> Article 5 TUE.

<sup>73</sup> Renda (2014: 18), de Strel and Larouche (2016: 38-39).

<sup>74</sup> de Strel and Sibony (2017). This is what the Commission services have done for the UCPD: Commission Staff Working Document of 25 May 2016 on Guidance on the implementation/application of the Directive 2005/29 on Unfair commercial practices, SWD (2016) 163.

<sup>75</sup> For the regulation of B2B unfair practices in food distribution, Valletti (2018) recommends the reliance of detailed rules instead of principles-based ones in order to reduce the risks of type II error. However, I think such risks may be prevented with interpretative guidance and good institutions. Moreover, as the digital markets are evolving more quickly than food distribution (to the extent and until they can still be separated), the case for principles-based rules is higher in the digital sector than the food sector.

<sup>76</sup> In the UCTD and UCPD, there is a mix of principle-based prohibition and a list of black clauses.

<sup>77</sup> Williamson and Bunting (2018:22-27) also underline the importance of code and self-regulation in governing digital markets.

#### **- Type of enforcement**

Next to good rules, good enforcement is key. Past experiences with B2B and B2C unfair terms and practices show that weak effectiveness of prohibition is often more due to lack of redress than poorly designed rules.<sup>78</sup> Enforcement can be based on judicial courts, administrative authorities and the stakeholders themselves.

In my opinion, the three branches of the enforcement triangle are complementary:

- Judicial courts are useful because of their horizontal competence and their experience in applying general principles of law. But they are not enough because of their lack of specific expertise and more importantly, the fear factor in a dependency relationship;
- Therefore, courts should be complemented with '*powerful, agile administrative body empowered to launch ex officio investigations, actively protecting the confidentiality of complainants, and credibly exercising their power to impose sanctions and mediate between the involved parties*' (Renda, 2014: 18); those authorities should have the necessary resources and expertise as well as sufficient powers to investigate and collect information and to sanction;
- Moreover, when co/self-regulation is agreed, their enforcement needs to be closely monitored and reported, ideally to a public authority.

#### **- Level of regulation**

The determination of the optimal level of regulation, or in more EU legal terms the application of the subsidiarity principle, is a complex matter. It often involves a trade-off between the internalisation of cross-countries externalities (calling for an intervention at the EU level) and the accommodation of heterogeneous preferences and the possibility of regulatory experimentation (calling for an intervention at the national level).<sup>79</sup>

Applying those criteria to the regulation of P2B practices leads to a trade-off between, on the one hand, the frequent cross-border dimension of services offered by online platforms and, on the other hand, the diversity of regulatory preferences amongst Member States (illustrated by the current diversity of their national laws) and the value of regulatory experimentation for novel issues such as data access or ranking transparency. In my view, the appropriate balance should be a regulation at the EU level for practices which have clear cross-border effects and where there is little value in experimenting with different regulatory solutions.

### **4.3. Suggestions for improvements**

On the basis of the assessment of the Commission proposal and the optimal regulatory framework just explained, I suggest the following improvements to the Commission draft in order to increase its effectiveness and consistency with other EU laws, in particular the rules on retail supply.

#### **- Unfair practices**

Given the identification of some P2B unfair terms practices in the fact-finding exercise of the Commission and the insufficiency of mere transparency obligations if those practices are widespread

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<sup>78</sup> This is one of the main conclusion of the REFIT analysis on the EU consumer acquis: Commission Staff Working Document of 23 May 2017, SWD (2017) 209. Also de Strel and Sibony (2017).

<sup>79</sup> For general references on the optimal level of regulation and the so-called economic theory of fiscal federalism, see Oates (2005); for an application of this theory to the EU, see Alesina et al. (2000); for application of this theory on the digital single market, see de Strel and Defraigne (2011).

and harmful, the adopted EU law should give a clear mandate with a short timeframe to the Commission to:

- Investigate further the dependency issues and resulting unfair trading practices by online intermediation platforms and to determine in a precise manner to what extent those practices are widespread and harmful;
- If those terms and practices are found to be widespread and harmful and if the costs of market failures are higher than those of regulatory failures, propose<sup>80</sup> a Directive prohibiting unfair terms and practices defined in a generic manner on the basis of three criteria used to determine unfairness: (i) violation of good faith or good commercial conduct, (ii) creation of an imbalance in the contractual relationship and (iii) unilateral imposition. To increase legal certainty, such a generic definition should be complemented with a black list of terms and practices which have been found to be widespread and for which there is little value in experimenting different regulatory solutions at national level. To increase flexibility, this list should be adopted by the Commission in a delegated act.

In exercising this mandate, the Commission should be supported by the newly created Observatory on the Online Platform Economy and should partner with the authorities designated at national level to enforce the Regulation (see *infra* the proposal on the institutional design). These authorities could be the national competition authorities<sup>81</sup> and/or the consumer protection authorities.

To ensure that this mandate could be exercised effectively, the Commission and the designated national authorities should have sufficient power to collect the necessary and proportionate information, including confidential information, from the online intermediation platforms.<sup>82</sup>

Moreover, the adopted EU law should already at this stage encourage the conclusion between the main intermediation platforms and business users of EU-wide Codes of Conduct to alleviate the most harmful practices.<sup>83</sup> To be effective, a close and independent monitoring of such Codes of conduct should also be foreseen.

#### ***- Effective institutional framework***

Given the key importance of effective enforcement mechanisms, the adopted Regulation should, following the good practice of the proposed Directive on B2B unfair practices in the food supply distribution, provide for the designation of a national authority in charge of enforcing the law. Such authorities should have adequate investigation powers as well as the right to receive confidential complaints and open *ex-officio* cases to address the fear factor in the dependency relationship. The national authorities should also have sufficient sanctioning powers.<sup>84</sup>

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<sup>80</sup> The part of the mandate should be drafted in a manner that respect the right of initiative of the Commission.

<sup>81</sup> In that regard, the European Competition Network could analyse the P2B unfair practices as it did in 2012 for the B2B unfair practices in the retail food distribution.

<sup>82</sup> In that regard, see the proposals I made with some colleagues in Krämer et al. (2017). In the food distribution, Sexton (2017) undermines the importance of getting information to assess correctly the scale of the problem raised by unfair trading practices

<sup>83</sup> The proposed article 13 already foresees that codes of conduct should contribute to the proper application of the regulation. Note that Article 16 of the e-commerce directive also encourages the conclusion, by providers of information society services, of EU code of conduct for the proper implementation of the principles and the rules contained in the directive.

<sup>84</sup> Commission Proposal for a Directive on unfair trading practices in B2B relationships in the food supply chain, COM (2018) 173, Articles 4-6.

Moreover, given the cross-border dimension and effects of many P2B unfair terms and practices, those national enforcement authorities should closely cooperate with each other and with the Commission and provide each other with mutual assistance in investigations that have a cross-border dimension.<sup>85</sup> Such cooperation could be established with a specific EU network among the authorities.<sup>86</sup>

In that regard, more ambitious proposals can also be envisaged. For the food supply chain, Swinnen and Vandevelde (2017:56) suggest the establishment of an '*European adjudicator (modelled after the Groceries Code Adjudicator in the UK), which can receive confidential complaints from across the Union, aggregate them and then refer them to appropriate national authority, where the necessary action and sanctions will be taken. This should not only address the ‘fear factor’, but also preserve the regulatory heterogeneity and different legal traditions across the Member States.*' A similar EU adjudicator could also be foreseen in the context of online intermediation platforms. One step further would be to explore the necessity and the legal feasibility (in particular with regard to the *Meroni* doctrine)<sup>87</sup> of establishing in the EU an equivalent to the US Federal Trade Commission which could directly be charged with enforcing EU rules regarding the operations of online platforms.

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<sup>85</sup> *Ibidem*, Article 7.

<sup>86</sup> Which could be an extension of the current expert group on electronic commerce set up by the Commission Decision of 24 October 2005, OJ (2005) L 282/20.

<sup>87</sup> Case 9-56, *Meroni v ECSC High Authority*, ECLI:EU:C:1958:7.

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