

Potential unintended consequences from amendments to the EU's P2B regulation

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1 Introduction

1.1 Background

Online platforms offer many benefits to business users and consumers, and play an important role in society in bringing people and/or businesses together. Platforms facilitate social and commercial exchanges of goods, services and information that would not happen but for their ability to match buyers and sellers.

For consumers, the most widely cited benefits of online platforms relate to greater choice, improved convenience and increased transparency.¹ Some of the main benefits identified by business users are that platforms:²

- reduce the effects of geographic barriers;
- support new and different types of business;
- lower the cost of customer acquisition.

The European Commission's proposal for a 'Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services' (P2B Regulation) focuses on the relationship between online platforms and their business users. The Regulation aims to promote fairness and transparency for business users by altering the balance of power between them in negotiations over terms and conditions (T&Cs).

The P2B Regulation covers the providers of *online intermediation services*. More precisely, these can be defined as information society services that

¹ Oxera (2015), 'Benefits of online platforms', October.

² Oxera (2015), 'Benefits of online platforms', October.

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i) facilitate direct transactions between businesses and consumers, and ii) maintain a contractual relationship with those parties.³ In principle, therefore, online e-commerce market places, online software application stores and online social media are all covered by the Regulation. This includes platforms such as Amazon Marketplace, Amazon Prime, eBay, Booking.com, Skyscanner, Deliveroo, Google Shopping and BlaBlaCar, but also digital assistance platforms such as Amazon's Alexa, the Google Assistant and Apple's Siri.

Although the original scope of the P2B Regulation includes search engines under Article 5 only, where it suggests online search engines should communicate the main parameters that determine ranking, we understand that the European Parliament has suggested an amendment to include search in the broader regulation. Therefore, for this note, we have assumed that search engines would be fully covered by the Regulation. Similarly, we understand that an amendment has been proposed to include mobile operating systems within the scope.

We note that the definition set out by the P2B Regulation does raise questions on its scope. For example, it is unclear whether platforms such as Trivago are included in the P2B Regulation, as they do not have a contractual relationship with business users.

Oxera's understanding is that the overall aim of the proposal is to ensure that platforms provide appropriate transparency to business users and ensure that business users are able to claim redress from platforms if a platform is liable for a breach of the agreed terms and conditions. This is a laudable policy objective given the large network effects and important governance role played by platforms in some markets. In some instances large numbers of business users are transacting with a single or small number of platforms and the regulation aims to set a minimum standard for transparency and resolving disputes between platforms and business users. As drafted, the regulation covers a wide variety of platforms offering a diverse range products and services across the European economy.

In designing good regulation, it is important to consider both the intended and the potential unintended consequences of an intervention, particularly when the regulation affects a large range of products and services that vary significantly in their market characteristics. For example, regulation that improves outcomes for streaming media users may not necessarily improve outcomes for job seekers if the market failure is different or non-existent.

While the overall aim of the proposal seems sensible, as drafted, some of the proposed amendments to the Regulation may have unintended consequences. These potential unintended consequences should be tested for in the specific markets to which they would apply, in order to understand whether they outweigh the original positive intention.

1.2 Scope of this note

This note discusses several amendments to the proposed P2B Regulation that have been put forward and describes the potential unintended consequences of those on European platforms, business users and consumers. The aim of

³ European Commission (2018), 'Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services', 26 April, para. 8.

the note is to highlight some of the implications of each of the proposed amendments.

While looking at the impact on the different user groups, we take into account the fact that platforms may be different in nature, and that some types of platforms (and users of those platforms) may be affected more than others.

What does good regulation look like?

In this note, we examine the high-level economic arguments around the proposed amendments to the P2B Regulation. It is important to remember that platforms exist in many diverse markets—from advanced financial transactions, to dog walking and dating. The amendments will have vastly different effects in each of these markets and well-intended but broad-sweeping amendments are likely to have unintended consequences in specific markets.

In order to avoid unintended consequences, well-designed regulation should first identify the market failure it is trying to fix and then test whether the proposed intervention is likely to produce better or worse outcomes than the market without the market failure. In this instance, it will be important to test the effect of proposed amendments on a wide range of different markets where platforms operate.

2 Article 3—terms and conditions

2.1 Amendment

Member of the European Parliament (MEP) Anna Záborská has put forward an amendment for Article 3(3.2) of the P2B Regulation, which specifies that a notice period shall be given for updates of T&Cs. She suggests amending the text to the following:

The ~~envisaged~~ modifications shall not be implemented before the expiry of a notice period which is reasonable and proportionate to the nature and extent of the ~~envisaged~~ modifications and to their consequences for the business user concerned. That notice period shall be at least 15 days from the date on which the provider of online intermediation services notifies the business users concerned about the ~~envisaged~~ modifications. ***During this period business users should not be able to submit new goods, content or services to the platform.***

2.2 Implications for platforms

The amendment suggests that businesses would have to refrain from submitting new goods, content or services for 15 days when platforms update their T&Cs. The objective of this amendment is not immediately clear, and it is likely to affect platforms and their users in several ways.

In 2018, 6,140 and 1,434 new applications were released on Google Play and the Apple Store every day, respectively.⁴ Zalando adds over 1,900 new products every day, and has added 250 new business users in 2018 so far.⁵ A simple calculation shows that, if the amendment were to be implemented, then each time the T&Cs changed over 92,000 Google Play apps and 20,000 Apple Store apps would be affected, not taking into account the fact that existing apps would have to hold off from updating. Similarly, 28,500 new products

⁴ Source: Statista. Google Play: <https://www.statista.com/statistics/276703/android-app-releases-worldwide/>, Apple store: <https://www.statista.com/statistics/276705/ios-app-releases-worldwide/>

⁵ Coresight Research (2018), 'Zalando's Capital Markets Day 2018: Doubling Sales—Margins Can Wait', <https://www.funnglobalretailtech.com/news/zalandos-capital-markets-day-2018-doubling-sales-margins-can-wait/>.

would have to be held off from being uploaded on Zalando each time its T&Cs were updated.⁶

This is likely to have a severe effect on platforms operating in the EU. If a product is launched but cannot be submitted to a platform, consumers will be unable to purchase, view or consume via their preferred platform and are likely to divert to other sources. Platforms are likely to lose business if they are not able to show full content, as consumers can go to other platforms or providers that are not updating their T&Cs, or non-European platforms in general. For certain types of platforms, this may be particularly harmful. For example, music concerts of popular singers/bands or West End shows generally sell out in hours, if not minutes.⁷ Missing out on selling these tickets is likely to harm ticket sales platforms, in terms of both lost sales and reputation.

There are many other examples that show that being able to sell goods or services in the first week of release is crucial. For example, Adele sold over 800,000 copies of her album '25' in the UK in the first week,⁸ and the Playstation 4 and Xbox One game 'Monster Hunter: World' sold 5 million copies in the first three days.⁹ Similarly, in the first four weeks of availability, Samsung shipped just over 8 million Galaxy S9 and S9 Plus smartphones. Sales in the first month account for approximately 20% of the volumes sold during the first year of release.¹⁰

Over time, the amendment would reduce the incentive for platforms to innovate and develop their services, as this would require updates to their T&Cs, thereby reducing competition between platforms and traditional providers.

2.3 Implications for businesses

The amendment would also affect businesses, as they may not be able to promote goods, services and content on certain platforms at all times.

First, uncertainty arises regarding whether business users can launch new products, content or services on all platforms simultaneously, at a moment carefully planned by the businesses. New product launches are usually planned and announced far in advance, and go hand in hand with global marketing campaigns. Any uncertainty around updates of European platforms' T&Cs creates difficulty for businesses trying to plan a campaign worldwide.

Second, being restricted from selling new goods, services or content on a specific platform because it has updated its T&Cs may lead to damage for the business user or selling party in terms of lost sales and brand reputation. For example, if a launch has been planned for a new design of shoes, but the new product cannot be submitted to a major platform such as Zalando, the business user may sell significantly less in the first few weeks, especially if the launch is planned for a specific period such as Christmas or summer.

⁶ Estimated by multiplying the number of daily uploaded new applications and daily new products on Zalando by 15.

⁷ For example, Coldplay's concert in Ireland in 2017 was sold out in 30 minutes. See Brady, S. (2016), 'Coldplay tickets SOLD OUT in just 30 minutes', *Irish Independent*, <https://www.independent.ie/entertainment/music/music-news/coldplay-tickets-sold-out-in-just-30-minutes-35111806.html>.

⁸ Source: Kreps, D. (2015), 'Adele's '25' Sells Over Three Million Copies in First Week', *Rolling Stone*, <https://www.rollingstone.com/music/music-news/adeles-25-sells-over-three-million-copies-in-first-week-62463/>.

⁹ Source: Brown, M. (2018), 'Monster Hunter: World ships 5 million copies over launch weekend', Windows Central, <https://www.windowscentral.com/monster-hunter-world-ships-5-million-copies-over-launch-weekend>.

¹⁰ Source: Canalys estimates and forecast, 'Smartphone Analysis', April 2018, <https://www.canalys.com/>.

2.4 Implications for consumers

There are no benefits to consumers from having to wait for content, products or services. The amendment may even be harmful to consumers.

First, as shown above, consumers generally want to access products or services quickly, and do not benefit from not being able to access the newest good services. Typical examples of time-sensitive goods include films, tickets to sporting events or concerts, or empty seats on a departing flight. Not having access to these goods, or increased search costs as goods are not available on all platforms simultaneously, may therefore be harmful. The harm may be even greater when a bug or another error is found in an app, as consumers may have to keep using the bad-quality service while the T&Cs are updated.

Second, consumers may have to incur the inconvenience of using multiple platforms to ensure that they have access to a full range of products or services. A major benefit of platforms is that they bring together buyers and sellers, and decrease search costs for consumers. Because of the amendment, part of this benefit may be reversed, as it increases uncertainty for consumers about whether platforms offer the full range of services, products or content. The benefit of comparing platforms, i.e. facilitating greater transparency and improved matching, will be undermined due to lack of information. A survey among European consumers undertaken by Oxera estimated that comparison websites saved consumers between 8 minutes and 15 minutes in one month, and €12 to €117 in one year. In fact, 66% to 88% of the respondents said that they are likely to find cheaper products through a comparison platform.¹¹

3 Article 4—suspension and termination

3.1 Amendment

There have been two amendments suggested regarding Article 4(1), which specifies that platforms should inform business users about the reason for suspending or terminating the provision of its online intermediation services to a given business user.

MEP Christel Schaldemose has suggested the following:

Where a provider of online intermediation services decides to suspend, **delist** or terminate, in whole or in part, the provision of its online intermediation services to a given business user, it shall **inform** the business user concerned **at least 15 days before implementing that decision, and provide the business user** with a statement of reasons for that decision.

The Austrian presidency of the European Council has proposed the following amendment:

Where a provider of online intermediation services decides to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, it shall, **in a retrievable manner**, provide the business user concerned, **at least [x] days before that decision enters into effect** ~~without undue delay~~, with a statement of reasons for that decision ~~in a verifiable manner~~.

Both amendments suggest that platforms have to inform business users a certain time in advance about suspending or terminating certain products, goods or content. Put differently, platforms would have to wait before they can

¹¹ Oxera (2015), 'Benefits of online platforms', October, p. 32.

suspend or terminate (parts of businesses), as they need to notify the business users.

While the Council's amendment does not set out a specific number of days, MEP Schaldemose suggests platforms should inform business users at least 15 days in advance. For this note, we assess these amendments as one, given their similarities. We will use a notice period of 15 days as a benchmark to assess the effects.

Having a notice period for delisting may help businesses plan and find alternative solutions in some instances. However, given the wide range of products and services covered by the P2B Regulation, this amendment could raise some unintended consequences, particularly if it limits platforms' ability to remove illegal content or maintain their own quality standards.

3.2 Implications for platforms

Platforms play an important role as *governors* of online markets. They bring together consumers and businesses, and consumers and businesses trust platforms to ensure quality of content, goods and services.¹² Iansiti and Levien (2004) suggest that a platform regulates connections among ecosystem members so as to increase diversity and productivity and overcome problems related to information asymmetry and lack of coordination. The regulatory role is developed through price setting and imposing rules and constraints, creating inducements and otherwise shaping behaviours.

The same authors explain this concept through the example of eBay, which has effectively created and shared value within its ecosystem. The platform has increased the productivity of network users and encouraged business users and consumers to join the platform and coordinate their activities. On the business side, eBay's Seller's Assistant helps new sellers prepare professional-looking online listings, while its review system helps consumers differentiate between good and bad sellers. In fact, sellers with consistently good evaluations attain PowerSeller status, while those with bad evaluations are excluded from future transactions.¹³

This last practice is now very common among platforms, with most having policies that set out thresholds and standards for products, content and services to maintain high quality and protect consumers from accessing 'bad' content, goods or services. The Play store, for example, does not accept apps that include sexually explicit content, violence, threats, harassment or bullying.¹⁴ BlaBlaCar, a carpooling platform, reserves the right to suspend a driver's account if the average review is less than or equal to 3.¹⁵ Similarly, Asos Marketplace is committed to cruelty-free fashion, so in order not to harm its reputation, requires its boutiques not to sell vintage furs, new furs or exotic skins.¹⁶

Many platforms have large teams that ensure the quality of their platforms by removing content that is not of acceptable quality or in line with their policy. For

¹² Iansiti, M. and Levien, R. (2004), *The Keystone Advantage: What the New Dynamics of Business Ecosystems Mean for Strategy, Innovation, and Sustainability*, Harvard Business School Press.

¹³ Iansiti, M. and Levien, R. (2004), 'Strategy as Ecology', *Harvard Business Review*, March; **82**:3, pp. 68–78.

¹⁴ See Google Play website, 'Bullying and Harassment', <https://play.google.com/about/restricted-content/inappropriate-content/bullying-harassment/>.

¹⁵ See BlaBlaCar website, 'Terms & Conditions', <https://blog.blablacar.co.uk/about-us/terms-and-conditions>.

¹⁶ See Asos Marketplace website, 'How do I start a boutique on Marketplace?', <https://marketplace.asos.com/help/faq-boutiques#how-do-i-start-a-boutique>.

example, Facebook's Community Operations team, with 7,500 moderators,¹⁷ is charged with examining the queries of members, and removes content that is not acceptable to ensure the quality of their platform. These quality standards cover not just illegal content, but also aim to ban pornography, nudity and content that incites hatred or shows cruelty and insensibility. They are based on community input and recommendations from technology and public safety experts, and are therefore updated regularly.

The proposed amendment suggests that platforms would have to notify users before taking down any content. In some instances this could be beneficial, but in others it could expose consumers to potentially harmful content, low-quality goods or services, and could risk harming the platform's brand and consumer loyalty.

In order to have effective competition between platforms and service providers, platforms need the freedom to differentiate themselves and position their brand in the market by removing infringing content rapidly. If businesses are reducing the quality of their offering below what the platform is happy to trade, i.e. seller feedback is falling, then consumer trust in the platform may be eroded if the low-quality goods are consistently available for periods of 15 days. Platforms rely on the trust of their users; if there is too much doubt around the quality on offer over the platform, users are less likely to engage, thereby reducing the network effects that make platforms beneficial to both businesses and consumers.

The lack of control imposed by a platform on the posted content could have a detrimental effect on the platform's reputation if persistently low-quality goods or services are available for 15 days at a time—as in the case of iTunes Ping, a software-based, music-oriented social networking service developed by Apple Inc. In the 24 hours after its launch, the platform was flooded with spam and several fake accounts of famous artists were created.¹⁸ This, among other reasons, led to Apple closing the platform in 2012.

The fact that certain platforms or brands wish to maintain their quality is also recognised in competition law. Recently, the European Court of Justice decided in *Coty Germany GmbH vs Parfümerie Akzente GmbH* that luxury brands could ban online sales of their products on Amazon and other online market places, to maintain an 'air of luxury'.¹⁹ Platforms are no different; they want to maintain their quality standards. The P2B Regulation as proposed would not allow a privacy-focused app store to quickly and effectively delist apps that are not meeting their privacy standards.

If the amendment is intended to apply to illegal content, then it contradicts other regulations regarding the taking-down of information and goods from platforms. Even though other regulations—for example regarding copyright violation—may concern illegal content, platforms are pushed to take down particular content as soon as possible, as it may be harmful to users, and therefore the platform brand. Moreover, the European Commission also relies on self-regulation in the context of its Strategy for a Better Internet for

¹⁷ Ingram, D. (2018), 'Facebook releases long-secret rules on how it polices the service', *Reuters*, <https://www.reuters.com/article/us-facebook-abuse/facebook-releases-long-secret-rules-on-how-it-polices-the-service-idUSKBN1HV0VR>.

¹⁸ Halliday, J. (2010), 'Apple's Ping succumbs to the spammers', *The Guardian*, <https://www.theguardian.com/technology/pda/2010/sep/03/apple-ping-spam>.

¹⁹ CJEU, Judgment of the Court (First Chamber) of 6 December 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*.

Children.²⁰ In March 2018, the Commission published details of the current voluntary arrangement to tackle illegal content online, recommending that all companies should remove harmful content within one hour of its referral, as 'terrorist content is most harmful in the first hours of its appearance online'.²¹

3.3 Implications for business users

This amendment seems to provide a benefit to business users, as their content, services and products cannot be taken down without notice. However, this is likely to lead to unintended consequences. Given that it will be more difficult for platforms to delist or terminate the provision of their online intermediation services to a given user, platforms may react by tightening their policy regarding which new business users they allow, thereby increasing entry barriers. Indeed, it is reasonable to assume that platforms will do more thorough research 'at the gate' when allowing new business users onto their platform.

3.4 Implications for consumers

While one of the benefits of platforms for consumers is that they bring together business users and reduce search costs, consumers do not benefit from having access to absolutely every product, service or content that is available, for two reasons.

First, certain content or products may be harmful for consumers, even when legal. For example, consumers may choose certain platforms for the control they impose, such as the lack of violent and pornographic content on platforms such as Google Play, and the delisting of poor-quality products sold on Amazon. Second, consumers often benefit from specialised or 'niche' platforms. For example, Metdehand ('handmade') is a Dutch marketplace where only handmade goods are sold. This attracts consumers specifically looking for handmade products, who otherwise would have to search for handmade goods on more generic marketplaces such as Amazon.

Not only do platforms protect consumers from inappropriate or harmful content, they also ensure a certain standard quality. Platforms can guarantee high value of services/products to consumers through peer reviews, consumer scores and rating systems. If platforms have to wait before taking down content, goods and services, consumers may be exposed to known poor-quality services or goods.

There may be a particular issue with online reviews, if the scope of Article 4 covers online reviews. In order to have well-functioning rating mechanisms, platforms should be able to handle the potential shortcomings with reputational ratings that may undermine their reliability, such as fake reviews. Indeed, the importance of dealing with the issue of fake reviews was stressed in a briefing to the European Parliament dated October 2015.²² Many platforms take active action against these reviews. For example, in one week Amazon removed hundreds of buyers' and sellers' accounts found guilty of violating the

²⁰ European Commission (2018), Digital Single Market: 'Creating a Better Internet for Kids', policy, <https://ec.europa.eu/digital-single-market/en/policies/better-internet-kids>.

²¹ European Commission (2018), 'A Europe that protects: Commission reinforces EU response to illegal content online', press release, 1 March, http://europa.eu/rapid/press-release_IP-18-1169_en.htm.

²² European Parliament (2015), 'Online consumer reviews: the case of misleading or fake reviews', October, Briefing, <https://www.eesc.europa.eu/sites/default/files/resources/docs/online-consumer-reviews---the-case-of-misleading-or-fake-reviews.pdf>.

company's terms of service regarding writing reviews.²³ TripAdvisor has set out a clear policy describing what it considers to be fake reviews and when it will remove them.²⁴

This is also recognised by the European Commission in its technical report entitled 'An Economic Policy Perspective on Online Platforms'. In this report, the Commission mentions that:

Platforms can leverage their access to data and data collection capacities to improve the institutional set-up by adding mechanisms that reduce ex-post uncertainty, for a given level of ex-ante transaction costs.²⁵

The proposed amendment might prevent removal of reviews soon after they are posted, meaning that consumers would be exposed to fake reviews that may convey a wrong expectation of quality.

4 Article 6—differentiated treatment (I)

In this note, we discuss multiple suggested amendments to Article 6. As the amendments differ in content, we discuss them in separate sections. In this section, we discuss an amendment proposed by MEP Schaldemose, who has suggested that consumers should be allowed to set a default option, while in sections 5 and 6, we discuss two amendments relating to differentiated treatment.

4.1 Amendment

MEP Schaldemose has suggested adding a paragraph to Article 6(1) on transparency in relation to differentiated treatment:

Providers of online intermediation services that provide, or control businesses that provide, goods or services that compete with those provided by business users, shall allow consumers to select which good or service to use as default when the consumer uses the online intermediation service for the first time. The consumer shall also be allowed not to select a default option.

4.2 Implications for platforms

If this amendment were to be implemented, consumers would be able to decide which business user to use as default, preventing platforms from engaging in 'pay for prominence' or other strategic selection of service providers (such as dynamically selecting a service provider based on the need in the instant).

Without evidence from testing, this amendment could go beyond what is necessary to prevent platforms from harmful behaviour from vertical integration. Vertical integration and providing prominence to own services is one way in which platforms compete. Potential problems can arise when a platform has market power, and leverages that market power to dominate another market and cause long-term harm. This potential harm is, however, covered by existing competition law. It is not clear that there is a separate market failure that requires a regulation against vertical integration and

²³ Hanbury, M. (2018), 'Amazon has an underground subculture that trades reviews for deals — and the company is finally cracking down', *Business Insider*, <http://uk.businessinsider.com/amazon-bad-review-practices-crackdown-2018-4?r=US&IR=T>.

²⁴ TripAdvisor (2018), 'How Does TripAdvisor Catch Fake Reviews?', <https://www.tripadvisor.com/TripAdvisorInsights/w3688>.

²⁵ Martens, B. (2016), 'An Economic Policy Perspective on Online Platforms', Institute for Prospective Technological Studies Digital Economy Working Paper 2016/05, JRC101501, p. 30.

exclusivity such as this amendment. This amendment could therefore restrict competitive dynamics between platforms in several ways.

First, it is likely to be in platforms' interest to provide prominence to businesses that are most valuable to the other side of the market, as that makes a platform more attractive (especially open ecosystem platforms, which can 'pre-select' high-quality businesses).²⁶ When consumers are able to set a default from all options available, this may affect their perception of the quality of the platform. In fact, platforms compete on the quality of their selection and they do that by prioritising contents precisely, selecting the best option available and the ones that best fit user needs.²⁷

Second, there are likely to be issues of maintaining a quality user experience that would result from implementing the amendment. First, for platforms to offer consumers the choice to set a default, they would have to be aware of all available alternatives. Even if platforms have this information, this raises issues regarding the number of alternatives that are presented when consumers can choose their default (especially in open ecosystems). For example, there are over 30 different websites through which hotels can be booked. Should all be presented to consumers, and in which order? Second, platforms would have to decide on the level to which a default can be set. For example, should a default be set for the use of maps in general, or would it be more search-specific? Should a consumer set a default when shopping in general, when shopping for a certain category (e.g. groceries), or should it be product-specific (e.g. when buying wine)?

Third, European platforms will lose out on income from selling pay-for-prominence places. It is a business model used by many platforms, including Google, Etsy and eBay. For example, the average cost per click for an ad on Google Shopping was \$0.42 in 2016.²⁸

Finally, it is not only platforms that make revenue from pay for prominence—device manufacturers do too. Device manufacturers can enter into a revenue-sharing agreement (RSA) with Google, which gives the device manufacturers the opportunity to receive a share of the advertising revenue from searches carried out on their devices in exchange for non-exclusive prominent placement of the Google apps on the device.²⁹ This can be especially beneficial for small device manufacturers, as it allows them to keep prices low for consumers. According to device manufacturers interviewed for Oxera (2015), manufacturers received between 1% and 29% of the annual revenues from RSAs, varying between €2m and €800m.³⁰ The RSA helps smaller manufacturers to finance their innovations, and encourages manufacturers to produce handsets that reach a large number of consumers.³¹

4.3 Implications for business users

While allowing consumers to set a default generally comes from the idea of creating a level playing field for businesses, and is a measure that is

²⁶ Krämer, J., Schnurr, D. and de Streel, A. (2017), 'Internet Platforms and Non-Discrimination', Project Report, Centre on Regulation in Europe, p. 22.

²⁷ Renda, A. (2015), 'Antitrust, Regulation and the Neutrality Trap: A plea for a smart, evidence-based internet policy', CEPS Special Report 104.

²⁸ Johnson, T. (2017), '2016 Google Shopping Performance by Category', cpcstrategy, <https://www.cpcstrategy.com/blog/2017/01/2016-google-shopping-performance-across-categories/>.

²⁹ Oxera (2018), 'Android in Europe, Benefits to consumers and businesses', October, p. 22.

³⁰ Ibid.

³¹ Ibid., p. 21.

sometimes enforced through competition law, it is unlikely to be appropriate to apply this ex ante to all platforms.

A major implication of the amendment is that it may increase the entry barriers for new business users, because consumers set a default only once and are therefore not exposed to other, new, companies. If the platform does not have the incentive to nudge users to change to explore other options and to try out new entrants, competition between business users may be suppressed. This discourages innovation and presents a potential barrier to entry for new competition, effectively 'freezing' the market with the current providers.

There are several ways through which the 'ranking' of options for consumers can be determined, of which setting a default is one and paid prominence is another. As described above, setting a default option has some disadvantages in terms of entry barriers and it may reduce incentives for businesses to innovate, as consumers are not likely to ever be presented with these (new) options. This can be overcome with paid prominence and other tools as a form of active promotion. In the absence of this, it can be more difficult for new (and possibly better) products and services to gain a foothold.

Businesses benefit from being able to pay for prominence. The average return on advertisement spend for Google Shopping was 542% in 2016, with the highest return for watches and jewellery (993%).³² A rate per click was on average \$0.42, while the conversion ratio was 2.46% and average order value was \$91.70.

4.4 Implications for consumers

A main benefit of platforms is that consumers find more businesses and products when using platforms. According to Oxera's survey, a majority of the respondents (85%) agreed that when using platforms to make purchases, there was a larger range of products available and, in most cases, *producers that the users were not aware of*.³³ For consumers who choose to set a default, this benefit is (largely) eliminated, as consumers will not experience new options and will not come across new businesses.

Another main benefit of platforms to consumers is that they can lead to lower prices due to an increase in supplier competition, which is driven by reduced barriers to entry, especially for small providers; and increased transparency.³⁴ As shown above, the amendment is likely to increase barriers to entry and innovation, and to decrease future competition. Businesses that are locked in by consumers as defaults therefore face less competition, which generally leads to increased prices.

Another potentially negative effect on consumers is that they may find themselves overloaded with options when asked to set a default, which can be confusing and may lead to sub-optimal choices. For consumers to be able to set a default, they should be fully informed about the quality and preferences of the choices, which is unlikely to be the case. As mentioned above, platforms have incentives to pre-select high-quality businesses. Similarly, economic theory finds that when businesses compete in quality, those businesses that offer higher quality have an incentive to pay for more prominent places, as they

³² Johnson, T. (2017), '2016 Google Shopping Performance by Category', [cpcstrategy, https://www.cpcstrategy.com/blog/2017/01/2016-google-shopping-performance-across-categories/](https://www.cpcstrategy.com/blog/2017/01/2016-google-shopping-performance-across-categories/).

³³ Oxera (2015), 'Benefits of online platforms', October, p. 40.

³⁴ Increases in competition may in turn lead firms to improve the quality of the offering to consumers. They may therefore benefit from lower prices, better quality or a more diverse range of products. See Oxera (2015), 'Benefits of online platforms', October, p. 19.

make more profit.³⁵ The quality of the business is therefore signalled to consumers, which is eliminated when consumers are given the choice between over 30 options to set as default. As a consequence, consumers' welfare can be higher in the presence of sponsored ranking.³⁶

A final negative effect on consumers may be that even if a consumer is fully aware of all options and can make an informed choice, the preferred option may be search-specific. For example, while Google Maps may be preferred for driving routes, other maps may be better suited to mountain bike trials. Similarly, a consumer is likely to prefer TripAdvisor to gather information on restaurants because of the volume of reviews, but may choose TheFork to book a table to exploit the discounts available. The possibility for users to multi-home is effective for fostering competition between platforms: recent research has shown that the multiplicity of channels that firms can use to reach end-users has promoted benefits for end-users.³⁷

5 Article 6—differentiated treatment (II)

5.1 Amendment

According to Article 6, the P2B Regulation requires platforms to include in their T&Cs a description of any differentiated treatment they give to business users on services or goods, in terms of:

- access that the provider, or that the business user which that provider controls, may have to any personal data or other data;
- ranking;
- any direct or indirect remuneration charged for the use of the online intermediation services concerned.

MEP Schaldemose has suggested adding:

any direct or indirect remuneration charged for the use of the online intermediation services concerned **or any ancillary services, and any technical or economic benefit that it does not extend to all business users**

It is not fully clear what the objective of the amendment is. The proposed amendment, as worded, could imply several different levels of disclosure of differential treatment.

One interpretation is that platforms have to make clear the different options for using the platform that business users have, such as premium listings and ancillary services like data provision. Alternatively, it could be interpreted as meaning that platforms have to reveal every contractual relationship they have with each business user. If the amendment were interpreted in this broader way, it could have several unintended consequences.

³⁵ Armstrong, M., Vickers, J. and Zhou, J. (2009), 'Prominence and consumer search', *The RAND Journal of Economics*, section 3; Athey, S. and Ellison, G. (2011), 'Position auctions with consumer search', *The Quarterly Journal of Economics*, **126**:3, pp. 1213–70; Chen, Y. and He, C. (2011), 'Paid placement: advertising and search on the internet', *The Economic Journal*, **121**; and Kramer, J. and Zierke, O. (2017), 'From net neutrality to application store neutrality? The impact of application stores' ranking policies on application quality and welfare', working paper.

³⁶ See Athey, S. and Ellison, G. (2011), 'Position auctions with consumer search', *The Quarterly Journal of Economics*, **126**:3, pp. 1213–70; Chen, Y. and He, C. (2011), 'Paid placement: advertising and search on the internet', *The Economic Journal*, **121**

³⁷ Nooren, P., Koers, W., Bangma, M., Berkers, F. and Boerkers, M. (2014), 'Regulation in the Converged Telecom-Media-Internet Value Web', TNO Report R11428.

5.2 Implications for platforms

Adding ancillary services and any technical and economic benefit to the proposed article extends transparency beyond the minimum needed for platforms to operate as effective market places, in contravention of the Commission's better regulation guidelines.³⁸ Having to include differentiated treatments in T&Cs implies that all business users can perfectly observe the deals their competitors get at platforms, and all platforms can perfectly observe the deals their competitors agree with businesses.

Providing certain business users with economic or technical benefit can be a strategy for platforms to enter a certain market. For example, new price comparison websites may give large insurers certain benefits such as negotiating temporary lower prices, more visibility or prominence, to convince them to join the platform. If platforms have to proactively share all differentiated treatment, this may have several negative effects.

First, platforms' negotiation power decreases, which is especially harmful for new platforms. In the price comparison website example above, if any insurer is able to observe the contract given to the first insurer, the insurers have a stronger position to negotiate a similar deal. This implies that a new platform cannot attract some businesses with attractive deals (and may therefore not be able to attract any businesses).

Businesses are free to agree bespoke deals with platforms that do not have the obligation to treat every business equally and can design deals that best fit certain types of platforms. The amendment therefore restricts the freedom of contracting. For example, while some hotels would prefer to show more pictures on Booking.com, others may prefer to get access to data on viewings of their advertisements. If the amendment is interpreted to mean platforms must disclose the contractual deal that each business user gets, then business users can perfectly observe their competitors' cost of customer acquisition and platforms may be less incentivised to provide bespoke and good deals to business users.

Second, the amendment may increase entry barriers. If platforms must disclose the contractual arrangements with different businesses, when a new platform seeks to enter the market, incumbent platforms may have the knowledge to undercut the new entrants offer deals or to negotiate with business users to not access the platform.

5.3 Implications for business users

While transparency generally benefits businesses, because it can be efficiency-enhancing, too much transparency may facilitate collusion between competitors. As explained by the OECD:

increased price transparency could help sellers engage in conscious parallelism which, although not illegal in most countries, nevertheless harms consumers.³⁹

In addition to facilitating conscious parallelism, increased price transparency could also encourage tacit or outright collusion by generally making it easier for co-operating firms to detect and therefore punish deviating firms.⁴⁰

³⁸ See, for example, European Commission website, 'Better regulation: why and how', https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en.

³⁹ OECD (2001), 'Policy Roundtables: Price Transparency'.

⁴⁰ OECD (2001), 'Policy Roundtables: Price Transparency'.

Another potentially harmful effect on businesses follows from platforms' decreased incentive to negotiate bespoke deals. As mentioned above, platforms, like any other businesses, are free to negotiate the best deals with all business users, on all aspects of the contract. If the amendment is interpreted broadly to cover all contractual arrangements, platforms may be less likely to do so, which makes it more difficult for businesses to agree a deal that is better than their competitors'.

5.4 Implications for consumers

Unintended consequences of disclosing contractual arrangements between platforms and business users are likely to feed through to consumers. For example, if platforms are less incentivised to innovate, consumers may experience lower quality.

Similarly, if competition between platforms decreases because of increased entry barriers or increased coordination, and therefore prices for businesses rise, it is likely that businesses will increase their prices to consumers.

6 Article 6—differentiated treatment (III)

6.1 Amendment

MEP Marco Zullo and MEP Dario Tanburrano have suggested adding a paragraph to Article 6(1):

Article 6.1b (new):

Providers of online intermediation services and online search engines may not in any way endow with technical or economic advantages their offer of their own services or of services they control to commercial users, nor may they in any way interfere in the relationship between commercial users in competition with them and consumers to whom said commercial users offer goods and services, including by blocking or restricting the flow of information and communications, including publicity and marketing, between these parties.

6.2 Implications for platforms

This amendment removes the opportunity for any technical or economic advantage from integrated services and prohibits any benefits that could flow from it—such as data sharing between platform and service.

With the current antitrust laws and the transparency suggested in Article 6, there is likely to be sufficient control on differentiated treatment by platforms. This amendment is an unnecessary restriction to platforms, as it eliminates incentives and ability to build or offer access to a vertically integrated business. As is clear from economic theory and empirical evidence, vertical integration can have many benefits for different stakeholders.

Vertical integration may boost innovation and quality. As set out by Lui (2016), vertical integration can bring better coordination within the integrated firm, which increases the incentive to innovate at both levels.⁴¹ This is intuitive as well as theoretical: if a business user is also operating a platform, it has a higher incentive to improve quality at both levels. For example, a platform such as Amazon Prime collects data on how consumers watch content (including type of films and TV series they like). With this data, Amazon Studios can

⁴¹ This is mostly the case if at both levels innovation is important, which is true for many platforms and business users. See Lui, X. (2016), 'Vertical integration and innovation, international journal of industrial organisation', **47**, July, pp. 88–120.

produce content that is in line with consumers' demand, thereby providing consumers with content they want and improving the platform's overall quality.

The suggested amendment appears to set a very low hurdle for infringement, as an economic advantage would be created any time that information on purchase history is shared between the integrated business and the platform. For platforms that largely depend on their own services, this is likely to be particularly harmful. For example, Amazon is partly a marketplace and partly operates as a traditional reseller of goods.⁴² Not being allowed to endow any economic or technical advantage on the goods it buys and sells, such as using sales data of certain categories when increasing stock, is likely to negatively affect a large part of Amazon's business model.

A final potential harm to platforms is that the amendment may prevent certain new platforms from being developed. Several of today's prominent platforms were first developed as stand-alone online stores and only later allowed for third-party business users to list on the website. For example, Funda.nl is a Dutch housing website developed by a real estate agency association. Only after becoming established did it allow advertisements of other real estate agents on Funda.nl, so that the platform would provide a full overview of available houses to consumers. If, at the time, Funda.nl had not been allowed to provide any economic or technical advantage to advertisements of its own houses, such as listing them first or allowing more photos for those houses, it might not have decided to open up the website for other estate agents.

6.3 Implications for businesses

As mentioned above, competition law deals with differentiated treatment that causes harm by dominant market players. It may not be necessary to eliminate differentiated treatment above and beyond what is covered in competition law and Article 6, as the potential benefits to businesses from creating an even more level playing field may not outweigh the harm to businesses when fewer platforms are created or platforms' level of innovation is lowered.

6.4 Implications for consumers

Consumers can benefit from vertical integration in several ways. First, as set out above, vertical integration is likely to increase the quality and innovation of the integrated platform. Not only will an integrated firm be able to offer consumers higher-quality products, as in the Amazon Prime example above, a platform may also be able to improve the consumer experience by extending a platform's value added beyond the core purpose of the platform.

A good example of this is in search. When Google's search engine was first developed, consumers searching for 'who won the UEFA Champions league in 1988' would see links to several webpages that might provide the answer. Investment by Google in search research and development has meant that now Google search provides the direct answer based on the information it has access to. Similarly, when searching for 'hairdresser', Google shows a map with nearby hairdressers, rather than listing general websites of hairdressers. These features decrease search costs for consumers and improve the quality of the experience. As search develops, with voice search via digital assistants, the ability to integrate direct answers into search results will be vital for the search industry to continue innovating and improving consumers' lives.

⁴² In Q3 2018, approximately 53% of units were sold by third-party sellers on Amazon. See Statista (2018), 'Percentage of paid units sold by third-party sellers on Amazon platform as of 3rd quarter 2018', <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/>.

Second, integrated firms may be able to charge lower prices due to the lack of double marginalisation. Without integration, a platform charges business users a price based on costs and a margin. Business users determine the price they set for consumers based on what they pay platforms (among other factors) and their own margin. A business user that is integrated with the platform does not have to pay the 'internal' price to the platform, which includes a margin to the platform, thereby lowering the costs to business users, leading to lower prices. If the price of the integrated service or good is lower, this incentivises other business users to lower their prices to compete with the integrated service or good. If the integrated service or product has to be priced independently of the platform, as if they were two separate entities, the price is likely to be higher. This may spill over to other products and services.

7 New proposal: scale thresholds

7.1 Amendment

It has been suggested that problems relating to inappropriate conduct are more likely to arise with regard to platforms with a greater 'market relevance'; while symmetric regulatory obligations may prove excessively burdensome for smaller platforms, which are constrained by choice and competition in the market.

As such, a more targeted regulatory approach based on easily applicable thresholds has been proposed, with the intention of avoiding an inappropriate regulatory burden for platforms with low market relevance while still ensuring fairness in business practices for platforms with high market relevance.

The thresholds suggested for exempting platforms from the most burdensome regulatory provisions are:

- **at a national level:** active users of the platform represent less than 10% of Internet users in a member state;
- **at a European level:** active users of the platform represent less than 5% of all EU Internet users.

While these thresholds identify small and large platforms they do not necessarily identify the source of any market failure, which in this context is significant market power.

7.2 Implications for platforms

First, we note that under these threshold definitions, a platform's eligibility for regulation can depend more on the size and significance of the service it is offering (such as online shopping, or transport services) rather than the platform's individual position *within* a specific market. There are likely to be many platforms serving niche interests that will not meet the '10% of all national Internet users' threshold, but that actually hold a substantial share within their own market. For example, a platform for selling and buying car parts for a particular vehicle may have a very high market share but not have to conform to the regulations.

Furthermore, there is a danger that an asymmetric application of the regulation would reinforce the power of large platforms by making it harder for new players to enter the market. While being exempt from the regulations may appear beneficial for smaller firms and entrants (which can avoid compliance

costs), the fact that business users know these platforms are exempt may also have *negative* effects on these smaller platforms.

The nature of platform businesses means that entrants need to attract users on both sides of the platform (typically consumers and businesses) in order to generate the network effects that make platforms valuable to both sides. In order to be attractive to its business users, the new entrant platform has to offer a high degree of certainty that it will provide a fair deal and fully deliver the expected product or service. In specifying minimum standards for the business relationship, this certainty is being provided by the regulation itself. If new entrant platforms are understood to be exempt from the regulation they may be perceived as less reliable than existing larger platforms, making it harder for them to attract the business users they need to grow successfully.

Thresholds like these can create perverse incentives. For example, businesses may be incentivised to reduce their growth and stay below the threshold to avoid facing regulation. This could, for example, lead businesses to set up lots of smaller, less efficient businesses rather than growing a single business to a more efficient scale that attracts regulation. This is particularly problematic in the case of businesses—such as platforms—that are characterised by strong network effects. Where network effects are important, fragmentation can result in significant consumer detriment.

An example of this perverse growth incentive can be seen in the UK regulation requiring energy companies above a certain size to pay the Energy Company Obligation (ECO) to fund improved energy efficiency in the homes of those most in need. The threshold creates perverse incentives for new entrant energy companies to stay below the threshold as long as possible, even turning away new consumers so as to avoid paying the obligation charge. This can be seen in the large lack of new energy retailers making the move from having less than 250,000 customers to more than 250,000 customers.

7.3 Implications for businesses

Businesses using online platforms will face an increase in uncertainty and/or changes in their incentives to use platforms if the proposed thresholds are implemented. In the absence of thresholds—where the proposed regulation would be applied symmetrically to all platforms—a business would benefit from the ‘insurance’ the regulation provides no matter which platform(s) they choose to use, from the largest global platforms to smaller, local or niche platforms.

With a somewhat arbitrary threshold limiting the scope of the regulation to only a subset of platforms, businesses must now invest time and effort themselves to determine whether their legal protections apply. To avoid this uncertainty, businesses may prefer to partner with only the largest platforms that are definitely included within the scope of the regulation—forgoing the possible benefits of a better-suited service for the certainty of a regulated platform.

7.4 Implications for consumers

For consumers, if the regulation creates a split market, as seen in the UK energy example, this may have the long-term consequence of reducing the dynamic competitiveness in the marketplace.

Successful niche platforms, which may have significant market power in their niche, will be less likely to challenge larger incumbent players if part of that challenge involves embracing regulation that would affect their existing strong position.

If the thresholds reduce the incentive to reveal areas of market power and reduce the incentive of small platforms to grow, the lack of competition is likely to affect consumers in the form of less choice, reduced innovation and/or higher prices. For example, a niche booking platform may seek to expand to new business users by accepting lower commission payments on sales—a saving that could be passed on to consumers; while an online retail platform may attract new suppliers by offering to share details of the product features or add-ons most valued by consumers—allowing producers to innovate more easily.

These benefits would be lost if the competitive pressure brought about by new and growing platforms is lost.
