

Platform-to-business regulation:

Maximising the opportunities the P2B regulation offers SMEs and platforms in Spain and abroad

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Executive Summary

With online platforms playing a key role, the digital economy presents small and medium-sized enterprises (SMEs) a whole new world of opportunities for growth and insights. Now, and especially in the midst of the Covid-19 pandemic, the pressure to digitise is on, and the way governments deal with platform-to-business relations will shape the future for smaller players in the market. Spain's digital strategy, named España Digital 2025, highlights the SME digital divide as a top priority, given that small businesses are the backbone of the Spanish economy.¹ However, to effectively harness the potential of online platforms, it is up to SMEs to weigh the advantages and drawbacks of the digital tools at their disposal.

Small businesses have already publicly criticised online platforms for acting as gatekeepers and tipping the market to their advantage.² Meanwhile, around the globe, data asymmetry and winner-take-all dynamics are what concern governments most about online platforms' potential monopolistic behaviour.^{3,4} So much so that the dominance of digital platforms has propelled Europe, the US and China to initiate steps to ensure healthy competition in the market.

In this setting, the European Union has taken significant measures to mitigate the frictions of the platform economy to ensure better access for consumers and businesses to digital services. Within the framework of its Digital Market Strategy, in July 2019 the EU implemented: Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services to promote transparency and fairness between platforms and businesses (P2B regulation).⁵

In broad strokes, this new regulation promotes transparency by requiring platforms to spell out their terms and conditions and so offer SMEs a clearer idea of the "rules of the game". In addition, it seeks fairness by providing their business users with complaint handling mechanisms, therefore strengthening SME bargaining power. Furthermore, in its emphasis on promoting transparency, the regulation should make it easier to hold platforms accountable and allow businesses to design their business models strategically. In the long-term, the regulation opens the door for national actors to step in and level the playing field when needed.

This report explores the context and value of the P2B regulation as the first of its kind to address the asymmetry between online platforms and businesses. To assess the impact the regulation could have on SMEs in Spain, the report explores the current state of digitisation in the country and the barriers that exist. One of the biggest challenges that effects both European and Spanish SMEs is the need for a driving digital strategy. It is a demanding task, considering SMEs' characteristic vulnerability has been further exacerbated during pandemic times, and only those with a digital strategy in place have proved to be resilient.

The report then draws on the findings of two working group sessions involving nine Spain-based experts from law, academia, and the private and public sectors, as well as written interviews with practising lawyers from firms based in different EU countries, Spain-based SME associations/agencies, and local experts on digital transformation. It offers a snapshot of the first impressions this broad range of perspectives expressed on the regulation, ranging from positive to sceptical.

¹Government of Spain 2020

²European Commission 2018

³Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary 2020

⁴Australian Competition and Consumer commission 2019

⁵For regulation source see: [Eur-lex.europa.eu](http://eur-lex.europa.eu) 2019

The general opinion is that the P2B regulation defines best practices while not posing a burden for platforms themselves but offering small businesses a channel to address any grievances they may have. However, as the regulation's main objective is to shape platform behaviour in the long-term, it runs the peril of being ineffective if SMEs and the associations that support them do not exercise their attributed rights.

Therefore, for the P2B regulation to have a positive impact depends on a collaborative effort between national policymakers, SME associations, digitisation agencies and chambers of commerce. In this light, the report offers four lines of action that draw on considerable relevant expertise to illustrate how both platforms and SMEs can maximise the benefits the regulation proposes both in Spain and abroad. These recommended actions seek to enhance the legal certainty proposed by the regulation, promote awareness of it among SMEs, and ensure that there are no negative impacts on platform innovation.

Glossary

Business user

A private individual acting in a commercial or professional capacity, or a legal person (eg a company), that uses online intermediation services to offer goods or services to consumers for purposes relating to their trade, business, craft or profession.⁶

Coopetition

A recently modern phenomenon where organisations both compete and cooperate, merging the words cooperation and competition.⁷

Digital transformation

The integration of digital technology into all areas of a business, fundamentally changing how they operate and deliver value to customers.⁸

Ex ante regulation

Regulation that seeks to identify problems beforehand and shape stakeholder behaviour and responses through regulatory intervention. May consist of obligations and duties in the running of the activity or requirements to access the market.

E-commerce marketplaces

An electronic marketplace provides opportunities for conducting business in the same way as traditional markets except that the transactions are executed via electronic channels, usually an internet-based platform. It brings multiple buyers and sellers together in one central market space. For example, booking.com, Amazon (dual-format).

Gatekeeper

Firms that have acquired a disproportionate level of economic power and control over platform ecosystems.⁹

Legal redress

Access to the courts to gain reparation for a wrong.

Multi-homing

In settings where multiple platforms co-exist, horizontal differentiation can result in customers choosing to join and use several platforms.¹⁰

Network effects

In economics, the network effect refers to a phenomenon whereby a larger number of users or customers increases the value of a good or service. Issues such as the quality or utility of the product, its price or brand awareness define the scope of this effect. Among online service platforms or networks such as social media, it is usually a crucial success factor.

Online intermediation services

Online intermediation services allow business users to offer goods or services to consumers, to facilitate the initiating of direct transactions between those business users and consumers, irrespective of where those transactions will ultimately conclude.

⁶ Eur-lex.europa.eu 2019

⁷ Cuofano 2021

⁸ The Enterprisers Project 2021

⁹ Stolton 2020a

¹⁰ Duch-Brown 2017

Parity clause

Platforms use parity clauses (also known as most favoured nation clauses) to prevent platform users from offering lower prices or better terms on other platforms or their own website.

Platform-to-business (P2B) regulation

The EU regulation enacted in July 2019 and implemented in July 2020, known as the (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

Platform economy

The platform economy encompasses all digital platforms that put users in contact with the services and goods offered by one or more companies. This definition includes platforms that facilitate commercial transactions, such as Amazon or Uber, but also the technological frameworks that allow for the development of digital businesses, which include social network platforms.

Ranking

The relative prominence given to the goods or services offered through online intermediation services as presented, organised or communicated by the provider, irrespective of the technological means used to present, organise or communicate it. This can result from the use of algorithmic sequencing, rating or review mechanisms, visual highlights or other saliency tools, or various combinations of the above.¹¹

SME

As defined by the European Commission, a business is categorised as a micro, small and medium-sized enterprise if it employs fewer than 250 persons and has an annual turnover not exceeding 50 million EUR. The EU definition does not consider an enterprise that has significant additional resources, because it is owned by, linked to or partnered with a larger enterprise to be an SME.¹²

Super app

A “one stop shop” that aggregates several apps providing the user with several services in a single service space.¹³

Vertical integration

A strategy whereby a company owns or controls its suppliers, distributors or retail locations in order to manage its value or supply chain. Vertical integration benefits companies by allowing them to control processes, reduce costs and improve efficiencies.¹⁴

¹¹ European Commission 2020b

¹² Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs 2017

¹³ Sarraco 2020

¹⁴ Hayes 2021

Introduction

Online platforms have drastically changed the way we do business. So much so that the digital economy has become a platform economy. Platforms make it much easier for consumers to find what they are looking for, and for businesses, in turn, to gain more visibility and reach, and achieve higher rates of customer retention. Online competition is fierce for businesses as platforms have drastically reduced the transaction costs of searching, comparing, matching or negotiating.¹⁵

Fundamental to building and preserving trust in the digital economy, online platforms' reputation systems are critical for online consumers as they rely on recommendations, rankings, and reviews when purchasing online. For example, search engines tend to be the primary source for discovering new brands and products ahead of televised advertising and word of mouth recommendation. Social media channels are not far behind either when it comes to creating brand awareness as younger internet users research brands and products on social media more often than search engines.

Over the 40 years since the launch of the first public e-commerce site or search engine, small businesses have become increasingly dependent on online platforms to reach and sell to their consumers. Joining a platform allows businesses to enlarge their commercial scope, reach a wider audience of consumers, and gain scale with affordable costs. This can occur to such an extent that the businesses can find themselves locked into the service the platforms provide.

In the whirlwind of innovation, larger players in the platform economy are evolving rapidly, quickly identifying new business opportunities and disrupting existing marketplaces. Facebook, for example, is no longer just a social media platform, having delved into e-commerce in 2017. Google has shifted from simply being a search engine to offering other services, such as the price comparison service Google Shopping. Furthermore, the rise of super apps like WeChat in China signals the growing trend of how global social networks are also digital payment services. WhatsApp also rolled out a payment service in India in November 2020.^{16, 17}

The data derived from online interactions and the innovative applications that follow have facilitated online platforms' dominant position in the market. Some compare their position in the market to the oil barons and railroad tycoons of the 19th century.¹⁸ This is partly due, as the US House of Representatives attests, to "data advantages that dominant online platform companies have over smaller competitors and start-ups. Platforms exploit these data advantages reinforcing their dominance in the market, which can serve as a barrier to entry."¹⁹

Alarm bells begin to ring around potential monopolistic behaviour when dominant platform operators buy competitors or show preference towards their own service. Collecting, processing and using platform data gives the platform a privileged position over competing business users. The data offers an overarching view of the market which gives foresight on business trends and anticipation of market needs. Market dominance coupled with an increasing economic dependence on platforms further aggravate the asymmetry between businesses and the platforms they use.

¹⁵ Rodriguez de las Heras Ballell 2017a

¹⁶ WeChat emerged as a chat service and overtime it has become a social media platform with a wallet feature allowing users to emit any financial transaction.

¹⁷ Singh 2020

¹⁸ Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary 2020

¹⁹ Ibid.

In their journey to exponential growth, platforms pose a threat to user privacy and compromise healthy competition in the market. In October 2020, the US House Judiciary Committee released an investigative report on dominant platforms which motivated the Federal Trade Commission to accuse Facebook of buying up rivals to ensure its dominance.²⁰ Since 2019, Amazon has been under investigation in the EU to assess whether its use of retailer data is in breach of anti-competition rules.²¹ Similarly, Alibaba is under scrutiny from the Chinese financial regulatory agencies for restricting vendors from selling on other marketplaces.²² The main concern for governments around the world is how to curb the anti-competitive activity that poses a peril to SME growth without limiting the innovation they foster or undermining the benefits they offer small businesses to compete in a global market.

Europe has taken the first steps towards mitigating the frictions of the platform economy to ensure better access for consumers and businesses to digital services with its Digital Single Market strategy. The strategy's main concern is to create a level playing field for all actors in the market as it recognises that a common framework would infuse legal predictability and mitigate fragmentation while unleashing the growth potential of the digital economy.²³ In July 2019, the European Union adopted Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services to promote transparency and fairness between platforms and businesses. Otherwise known as the platform-to-business (P2B) regulation, which crystallises Europe's commitment to face unfair contracts and trading practices in platform-to-business relations.

In the context of this strategy, the recently proposed Digital Services Act package aims to strengthen the Single Digital Market and promote innovation and competitiveness in the platform economy. The package spotlights the dominant position of large online platforms and the need to guarantee fair competition as well as the widest choice possible for consumers in the digital economy.

About this report

The P2B regulation aims to improve fairness and transparency for EU businesses using online platforms (even if located outside the EU) to sell to EU consumers – specifically providing “trust, predictability and legal certainty” for EU business users of platforms.

This report explores the P2B regulation's current context, the main drivers behind it and the main concerns regarding the regulation. Given the lack of literature produced in Spain regarding the matter, the report features interviews from economic, business, legal and academic perspectives to facilitate a better understanding of the regulation's potential impact and the expected evolution of regulation in Spain. It concludes with recommendations for SMEs and policymakers in light of an analysis of the regulation's opportunities and blind spots.

Digital platforms, especially during pandemic times, have provided SMEs with opportunities to innovate and offered access to wider markets than they could reach on their own. The report explores what areas need addressing to ensure that SMEs can reap the benefits of digitisation and in this case, platform use.

²⁰ Robertson and Brandom 2020

²² Zhong 2020

²¹ Reuters 2019

²³ Rodríguez de las Heras Ballell 2017b

Methodology

The content of the report draws on desk research and interviews with practising lawyers from firms based in different EU countries, Spain-based SME associations/agencies, and local experts on digital transformation. This report does focus on the general challenges SMEs face across different sectors regarding digital transformation but does not provide any analysis of challenges or barriers that are sector specific.

In November 2020, the lead author of the report held two working group sessions with nine Spain-based experts from law, academia and the private and public sectors to gain insights into the regulation's opportunities and challenges. The working group sessions did not include representation from SME associations and accounts for the absence through the desk-based research and written interviews mentioned above. The report's conclusion and recommendations draw on the discussions of the two sessions and the collective outputs.

Why now?

Spain's stance on digitisation for SMEs has mostly focused on closing the digital gap – by providing SMEs with tools to support their digital transformation. As reflected in the 2020 Digital Economy Social Index (DESI), later discussed in the report, transformation has been slow. Considering digitisation as a priority during the pandemic, Spain's digital strategy, which is called España Digital 2025 has set measures to accelerate SME digitisation by “strengthening networks to support innovation for digitisation, identifying and reducing barriers... and accompanying them in the processes of organisational change and in the development of new business models”.²⁴

As online platforms play a fundamental role in SME digitisation, it is critical that actions towards SME digitisation address the key role that platforms play in the SME digital journey and the subsequent growing dependency that SMEs have on online platforms for growth, global expansion and gaining scale. As the EU takes steps to reduce platform-to-business frictions, the strategies in place must reflect the particular barriers that SMEs face in platform-to-business relations on a national level.

Given that the P2B regulation offers opportunities to level the playing field between platforms and businesses, it is crucial that SMEs, as the backbone of the Spanish economy, formulate their digital strategies with the regulation in mind. As the pressure to digitise is on, this report urges policymakers, SME associations, digitisation agencies and chambers of commerce in Spain, to ask themselves: How can SMEs maximise the opportunities presented by the P2B regulation? What further actions ensure equitable growth of both platforms and SMEs?

²⁴ Government of Spain 2020



Digitise or die

Platforms have played a critical role in offering digital solutions to SMEs, enabling them to participate in the digital economy and become more relevant to consumers. However, the platform-to-business relationship is complex. Therefore, to help build an understanding of the dynamics of this relationship, this section will provide context to where SMEs find themselves in the digital transformation process.

According to the Organisation for Economic Cooperation and Development (OECD), there is an urgent need to address digital adoption in SMEs. The longer it takes for them to implement digital technologies, the wider inequalities among people, firms and locations will grow. Bridging the SME digital gap “will generate a historical shift of aggregate productivity and well-being in countries, regions and communities”.²⁵

The Digital Economy and Society Index (DESI) shows that, before the pandemic, the digitisation of SMEs in EU member states was falling behind the digitisation of larger companies. In the case of e-commerce, 17.5% of SMEs sold products online in 2019, contrasting the 39% of online sales made by large enterprises. Small business use of technologies like cloud services (17%) and big data (12%), also marks a big difference in comparison to their larger counterparts, with a more advanced use of cloud services and big data, of 38% and 32% respectively.²⁶

The same index informs that Spain has fallen behind in the ranking from occupying 11th place in 2018 to ranking 13 out of the 28 member states in 2020. Spain falls within the European member state average but a look at leading nations in the ranking (Belgium, Finland, Malta and Ireland) can provide some perspective on how much Spanish SMEs need to catch up. In Ireland for example, 35% of SMEs sell online with a total turnover of 29%, which is well above Spain’s 19% and 9%, respectively.

Given that more than 60% of Spaniards are e-commerce users, there is plenty of opportunity for SMEs.²⁷ *España Nación Digital* (Spain Digital Nation), a report published by *Adigital, Asociación Española de la Economía Digital* (Spanish Digital Economy Association) in 2019, concludes that Spain is at a critical moment in its digital transformation.²⁸ Straddling the border between those digitally advanced nations and those nations categorised as secondary, Spain has yet to fully reap the benefits of digital technologies as its European counterparts have.

“There is a fundamental challenge common to Spanish SMEs, and that is learning and understanding what digital transformation is. Without understanding what digital transformation consists of, it is difficult to assess what it can contribute to the company’s business model and what needs digitisation can cover.”

Iñaki Uriarte Landa - Legal Director, Adigital

²⁵ OECD 2019

²⁶ European Commission 2020d

²⁷ Alexander and Ellen 2017

²⁸ Adigital 2019

Integration of digital technology in businesses: comparing Spain with leading countries

	Spain (2020)	Leading country Ranked #1 per each category (2020)	EU (Average of member states)
Electronic information sharing ♥ % enterprises ▲	43% (ranked #8)	52.6% (Belgium)	34%
Social media ● % enterprises	29% (ranked #11)	44.2% (Finland)	25%
Big data ★ % enterprises	11% (ranked #16)	24.4% (Malta)	12%
Cloud ■ % enterprises	16.3% (ranked #14)	50.2% (Finland)	18%
SMEs selling online % SMEs	19% (ranked #13)	35.1% (Ireland)	11%
E-Commerce turnover % SME turnover	9% (ranked #18)	29% (Ireland)	11%
Selling online cross-border % SMEs	7.4% (ranked #18)	18% (Ireland)	8%

- ♥ An ERP (Enterprise Resource Planning) is a software package that businesses use to share information between different departments (e.g. accounting, planning, production, marketing).
- ▲ All enterprises, without financial sector (10 persons employed or more).
- Businesses using two or more of the following social media: social networks, enterprise's blog or microblog, multimedia content sharing websites, wiki-based knowledge-sharing tools. Using social media means the enterprise has a user profile, an account or a user license depending on the requirements and the type of social media.
- ★ Enterprises analysing big data from any data source.
- Businesses purchasing at least one of the following cloud computing services: hosting of the enterprise's database, accounting software applications, CRM software, computing power.

Figure 1: Integration of digital technology – business digitisation and e-commerce, comparing Spain with leading countries. Image source: Digital Future Society. Data source: DESI, Digital Economy and Society Index.

What does digital transformation mean for small business?

When talking about SME digitisation, we must recognise several dimensions, including access, skills and use. There is a clear difference between knowing how to operate a specific technology and using the technology to problem solve and generate beneficial outcomes.^{29,30} Relating to business digital transformation processes, it is businesses with strong digital strategies that understand better how to “take advantage of the growth opportunities offered by digital technologies and how to incorporate and apply them within the organisation”.³¹ For instance, using the Digrow model as a reference, a micro-firm can be at a low maturity level if it has no digital customer experience, the majority of its clients are face to face or through telephone.³² A medium maturity level means the business uses one online channel such as an email inbox to interact with its customers. At the top end of the spectrum, a firm that exhibits high digital maturity would employ different digital channels and interact with potential customers and use data derived from these services to help them make business decisions.

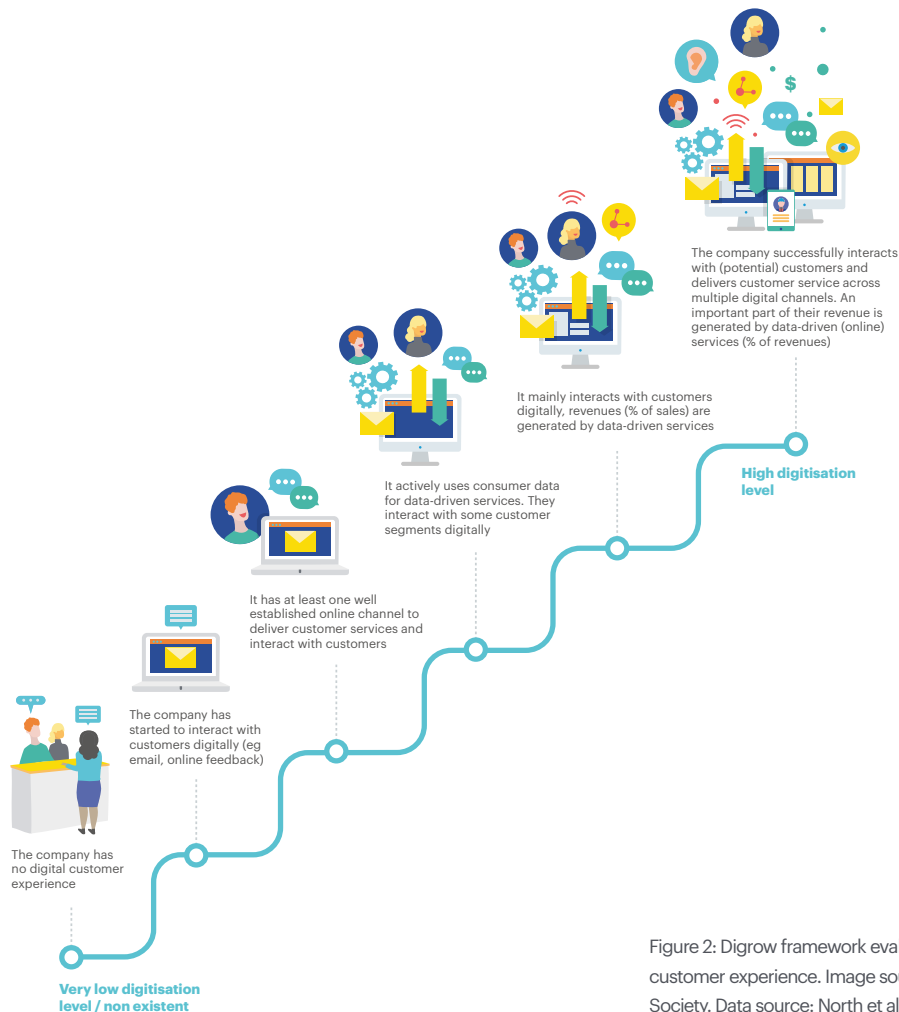


Figure 2: Digrow framework evaluation grid: digital customer experience. Image source: Digital Future Society. Data source: North et al. 2018

²⁹ Digital Future Society 2019

³¹ Zubillaga Rego et al. 2019

³⁰ Alexander and Ellen 2017

³² North et al 2018

Behind the digital divide affecting Spanish businesses

According to the Ministry of Industry, Commerce and Tourism, there are currently more than 1.3 million SMEs in Spain, which constitute 99.8% of Spanish businesses.³³ An overwhelming majority of these SMEs are micro-firms, businesses with less than 10 employees. A study on the digital transformation of Spanish SMEs, conducted before the onset of the Covid-19 pandemic, shows that small businesses have a lot of ground to cover to keep up with larger companies. Spanish SMEs have adequate infrastructure and access to devices but lack the advanced skills necessary to move on to the later stages of the digitisation process, such as using specialised software. Investment in digital technologies remains low, as more than half of these companies do not invest in them.

According to a survey by the *Instituto Nacional de Estadística* (Spanish Statistical Office), there is a correlation between the size of the business and its use of digital technologies. The larger the business, the more likely it is to have a webpage, use social media and sell through e-commerce. In a country where 95% of businesses have less than 10 employees, we can generalise that a majority of Spanish businesses are on the low end of the digital transformation spectrum.³⁴

ICT use by Spanish SMEs

	Micro-firms (less than 10 employees)	SMEs (10-249 employees)
Access to computer	81.92%	99.16%
Internet connection	78.17%	90.18%
Internet connection and webpage	28.80%	78.10%
Use social media	35.20%	63.03%
Sell through e-commerce	9.50%	25.46%
Buy through e-commerce	17.90%	34.94%

Figure 3: Survey on the use of ICT in SMEs in Spain. Image source: Digital Future Society. Data source: Instituto Nacional de Estadística 2020.

³³ Ipyme.org 2019

³⁴ El País 2018

“The main challenge for SMEs in Spain is incorporating digital technologies into their business processes in such a way that allows them to be more competitive. This is no easy task; it implies changes in the way companies operate, digital upskilling, etc. Fortunately, technology is more affordable than it was years ago, but this is only a small part of the whole process.”

Luis Prieto Cuerdo - Director of Digital Economy, Red.es

Yes, most SMEs are well equipped with 82% of micro-firms having access to a computer and 78% enjoying an internet connection. In summary, however, it is a poor awareness, scarce resources, and a lack of a digital strategy that create the main barriers and challenges preventing SMEs benefitting from the use of digital technologies. Some argue that it is not about money or technology, the challenge is mainly “about owner-managers’ and employees’ knowledge: know-how and know-why”.³⁵ Although these three factors continue to present challenges for small businesses, the pandemic has greatly influenced the way they have adapted to survive.



The know-why or poor awareness

Small businesses have shown a limited understanding of digital transformation and all its dimensions. In a study carried out by Vodafone, only 7% of the businesses surveyed expressed concern for digitisation.³⁶ Their main concerns were evolution of the sector, profits, competition and new markets, among many others. However, when it comes to reaping the benefits of being digital, digitisation means going beyond the use of devices and software. It involves integrating technology into all areas of a business and putting the client at the centre of operations. Small businesses do not understand how business models should evolve digitally in order to be more competitive and relevant to their clients. And if they do recognise their benefits, often they face other barriers such as insufficient time or resources.

Covid-19 in many ways has put pressure on small businesses to digitise (their production, customer relations, processes) and in that regard, the pandemic has presented an unprecedented opportunity for going digital as the digital realm offers the only channel for business to survive. However, according to a study of SMEs in the Basque country, the businesses that most easily adapted to imposed limitations, already had a digital approach or strategy in place before the outbreak of Covid-19.³⁷ This reveals that a prior strategy and a planned predisposition are key success factors for businesses to go digital, even under pressing circumstances such as those posed by the pandemic.

³⁵ Arendt 2008

³⁷ Zubillaga Rego and Peletier Espiga 2020

³⁶ Observatorio Vodafone de la Empresa 2019

2

Lack of resources to invest or resistance to invest

According to a 2017 study published by El Observatorio de Competitividad Empresarial (the Spanish Observatory for Competitiveness), although Spanish businesses are aware of the need to digitise and the benefits of digitisation, more than half of the businesses interviewed have no investment plans for digital technologies. As mentioned previously, since the pandemic, most business owners have had no other option but to evolve digitally yet investing in digitisation is a challenging prospect for owners. Seven out of ten businesses recognise they will have difficulties making ends meet due to rent and other expenses such as paying off bank loans and salaries. This affects the capacity of small businesses to reorganise their finances, invest and think digitally.³⁸

“When businesses prioritise acquiring technology without understanding how that technology is going to transform their activity, many of those investments will surely go towards increasing production efficiency. Digital solutions might lead to greater efficiency, but not necessarily to greater added value.”

Luis Vives - Deputy Dean for Programmes and Associate Professor of General Management and Strategy, ESADE

In light of the significant blow to the economy the lockdown measures provoked, the EU announced a recovery effort in October 2020 that includes a 672.5 billion EUR plan to ensure member states encourage green and digital transitions in an effort to become sustainable and resilient.³⁹ In Catalonia, for example, the government created a body of experts, called the Catalonia-Next Generation EU Advisory Committee, to select projects that contribute to digital transformation, such as the digitisation of services. The committee has a special focus on supporting competitiveness and SME job creation.⁴⁰

³⁸ El Pais 2020

³⁹ Council of the EU 2020

⁴⁰ Calleja 2020

3

The know-how: a need to transform operations

For SMEs in Spain to gain a competitive advantage, they must be able to translate awareness into know-how, and this often entails transforming operations. One of the main obstacles for SMEs is finding qualified professionals to help them. According to a Vodafone study, only 14% of SMEs depend on their own employees to carry out their digital strategy. The rest depend on the partial/full support of external providers.⁴¹

Pressured by the uncertainty the pandemic has created, businesses that see this situation as an opportunity have been more innovative and experimental than would otherwise have been possible.⁴² However, SMEs are especially vulnerable, and such experimentation is risky. Smaller companies have a lower probability of survival than larger companies.⁴³ According to an OECD report, due to the structural and financial challenges previously mentioned, only 29% of SMEs in OECD countries survive their fifth year.⁴⁴

Interestingly enough, although their size is generally perceived as a weakness, small businesses can adopt a competitive edge over larger counterparts, as they are more flexible and agile, amplifying their potential to be disruptive. Here, the challenge of effectively adopting the know-how is key so they stay relevant.⁴⁵

Platforms: key to bridging the digital divide

SMEs, as considered earlier, face a number of barriers and challenges in their quest to become digitally relevant. In light of this situation, platforms provide SMEs with opportunities to bridge this digital divide. And, as SMEs experience the exceptional circumstances brought about by the pandemic, many, if not all, will depend on digital platforms for survival.

Platform business models centre around the very pain points illustrated above. Platforms are tailoring their products, more and more, to bridge the knowledge gap and offer an affordable way for SMEs to take part in the digital economy. Businesses may alleviate costs such as logistics, payments and complaint-handling mechanisms by outsourcing their activities through digital platform use. Additionally, platforms play an important role in promoting the synergies that allow SMEs to enhance their visibility in the digital market and generate trust with their consumers. This is because the platform algorithms can recommend additional products, offer discounts for repeated transactions, and provide rating and reputation-creating systems.

⁴¹ Observatorio Vodafone de la Empresa 2019

⁴² Zubillaga Rego and Peletier Espiga 2020

⁴³ OECD 2017

⁴⁴ González 2018

⁴⁵ Forbes Council 2019

A little bit more about online platforms

The main business activity of online platforms is precisely to create, manage, regulate, and supervise a digital environment that enables its users (sellers, buyers, advertisers or developers) to interact, negotiate, conclude and perform transactions, or carry out other activities within and in relation to the relevant community. Online platforms can be transactional such as online marketplaces like eBay, where transactions take place on the platform itself, or non-transactional, like the Google search engine that facilitates no transactions.

The P2B Regulation applies to both transactional and non-transactional platforms, as both types of platforms “have an intrinsic cross-border potential and are of particular importance for the proper functioning of the European Union’s internal market in today’s economy”.⁴⁶

Therefore, the existence of a platform stems from the activity of an operator and a community of users. Although there is no consensus on a definition of online platforms, they, on the whole, use information technology as a means to:

- facilitate and extract value from interactions and transactions between users
- collect data in order to improve the service and experience of the user
- build networks in which the more users interact on the platform the more value the platform offers to the users – also known as network effects
- create and shape new markets to be more efficient and potentially disrupt existing ones⁴⁷

To understand what the P2B regulation seeks to address the following section will provide context on what these platforms do, what constitutes their market power and how they provide value to the digital economy.

Data is at the heart of the digital era

One thing distinguishing online platforms from their brick-and-mortar predecessors is the mass amounts of data collected from business activity and consumer behaviour, and the intelligence derived from it. This data provides platforms with a competitive advantage. The more data collected, the easier it is for platforms to attain a dominant position in the market by creating barriers for new players and therefore allowing them to exert their dominance to expand into adjacent markets.

⁴⁶ Eur-lex.europa.eu 2019

⁴⁷ Ibid.

Estimates clearly illustrate the expansive mechanics behind data capture: “more than 70% of websites have a Google tracker and 20% of websites have a Facebook tracker. Estimates also say that of the apps available on Google Play store, 88% send user data back to Google, and 43% send user data back to Facebook.”⁴⁸

The value that digital platforms create is not through data alone but also via facilitating strong network effects. Major platforms thrive on the virtuous feedback loop; the more contact there is with users the larger the datasets are, and these are both critical for developing data-driven technology and applications. The more sophisticated and “accurate” these technologies are, the better placed the platforms are in the market.⁴⁹

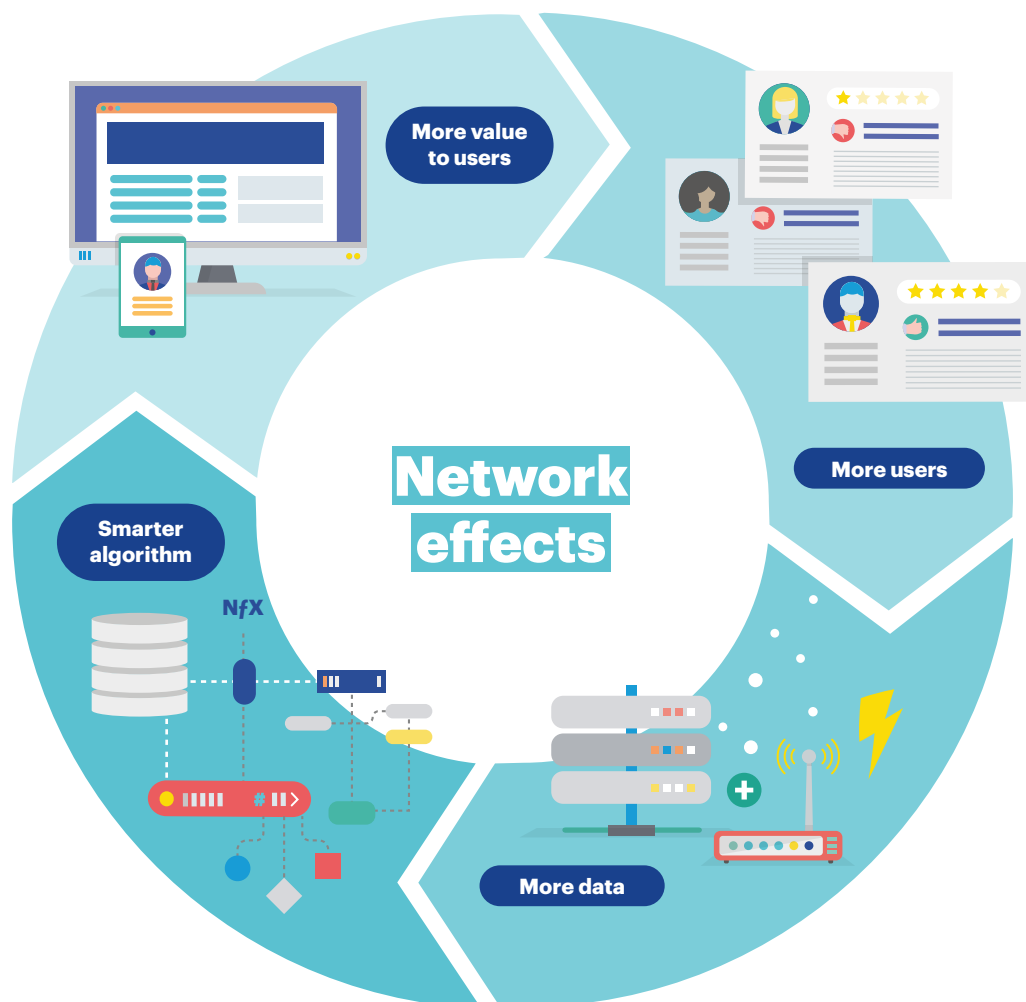


Figure 4: Network effects of online platforms: more users generate a virtuous cycle for businesses. Image source: Digital Future Society

⁴⁸ Australian Competition and Consumer commission 2019

⁴⁹ Ibid.

How top platforms generate revenue

To help give a better understanding of the dynamics listed above, and the impact they have on the market, here is a short description of how the top intermediation platforms generate revenue:

Google and Facebook

Both companies rely on advertising to generate most of their revenue. As multi-sided platforms, Google and Facebook offer services to consumers free-of-charge in exchange for their data and attention, while also selling advertising opportunities to businesses and advertisers. Google Search and Ads support at least 163 billion EUR of economic activity for European companies.⁵⁰ The revenue is used to invest in improving the services provided to attract more users to their platforms, and also to develop and innovate data-driven applications. Data collected goes beyond user interaction with the service; it also includes data collected with other websites and apps and, in Google's case, from the user's device.

Amazon

Founded as an online bookstore, Amazon quickly began to dominate the e-commerce market in the US, putting traditional stores out of business.⁵¹ Amazon soon expanded into the European market breaking into the UK, Germany and France but it struggles to dominate the market in eastern and northern Europe. Due to local competition, Amazon's online retail sales in Europe amount to 9.8% of the market share, which is nowhere near the 37.9% market share it enjoys in North America.⁵² Overall, the platform aims to sell a wide variety of products by offering low prices, operating on very tight profit margins, and providing a competitive alternative to traditional physical stores. The marketplace leads e-commerce in Spain, with a turnover of 7.5 million EUR in 2019.⁵³ This revenue stream has served as a foundation for other businesses that are key to Amazon's success globally:

- Amazon Prime is a subscription service that incentivises customers to spend and be loyal to the platform.
- Amazon Web Services (AWS) is a cloud infrastructure that competes with Alibaba, Google, Microsoft and IBM. AWS is the world leader, enjoying a market share of 33% in the second quarter of 2020, and is also the top cloud provider in Europe.⁵⁴
- Amazon Advertising Services presents a threat to Google and Facebook's dominance of ad sales.

⁵⁰ PublicFirst 2020

⁵¹ Easter and Dave 2017

⁵² Sabanoglu 2020

⁵³ DA Retail 2020

⁵⁴ Richter 2020

eBay

The digital commerce business eBay is a perfect example of an electronic marketplace (transactional platform) as it connects third-party sellers with online buyers. It generates revenue by taking a fee on every successful transaction. Apart from the marketplace, eBay also generates revenue by advertising on its classifieds platform and providing services to its sellers. As a global platform, eBay is second in the cross-border e-commerce market in Europe, representing a turnover of 17 billion EUR in 2019.⁵⁵ In Spain, 95% of companies on the eBay marketplace export to another country. Contrary to Amazon, however, eBay does not have its own branded products. The platform does use big data and machine learning solutions to address use cases such as personalisation, merchandising and A/B testing for new features that improve user experience.

Booking.com

Booking.com holds a 67.7% online travel agency (OTA) market share in Europe followed by Expedia and HRS at 12.8% and 6.3% respectively. Booking Holdings, Booking.com's parent company, owns five other travel brands and operates in more than 225 countries; it was the leading OTA worldwide in 2019.⁵⁶

Booking.com, however, is the holdings, biggest brand.⁵⁷ The majority of Booking Holdings revenue is comprised of its agency revenues, which are made via travel reservations, commissions and travel insurance fees. Booking.com, for example, charges commission on confirmed stays after the guest has checked out and paid. Booking Holdings' second source of revenue is the merchant model through which hotels sell rooms at a wholesale price with Booking determining that price.⁵⁸ The parent company's third source of revenue is advertising and other revenues such as marketing and business analytics services. Booking.com Analytics, released in 2016, is a software tool based on big data that "empowers property owners to grow their businesses with actionable data". Additionally, professional users of Booking.com can give a larger share of commission to Booking in exchange for more visibility.⁵⁹

⁵⁵ Cross-Border Commerce Europe 2020

⁵⁶ Lock 2020

⁵⁷ Hershman 2018

⁵⁸ Liao et al. 2017

⁵⁹ Booking.com for Partners 2020

2

Platforms and SMEs

Putting platforms in context

As exemplified in the previous section, online marketplaces primarily provide small businesses with a digital transactional environment to interact, negotiate and trade with customers. Additionally, SMEs gain visibility and reach new markets and new clients. Online platforms facilitate direct contact between business users and the customers, irrespective of whether the final transaction takes place on or outside the platform.

A perfect illustration of the impact online platforms have on the European market is the fact that the three largest shares of online retail sales in the EU include third-party merchants on Amazon, Amazon direct sales and third-party merchants on eBay.⁶⁰ According to a European Commission report, currently, one million businesses in the EU sell their goods and services through online platforms. Online marketplaces can provide other value-added services – that range from integrating payment gateways to providing logistic services for small businesses. The more an online platform vertically integrates (increasingly takes care of different aspects of the commercial cycle), the more business users become dependent on it.

Search engines and social media platforms also play an important role in the offering of goods and services to consumers. They are instrumental in helping small businesses gain visibility and accessibility, as consumers use them to search for and compare available offers and businesses. To illustrate this point, 47% of all EU businesses use at least one social media channel to promote their business, and 82% depend on search engines to promote their products and services.⁶¹ Moreover, search rankings can significantly impact consumer decisions and therefore, play a prominent role in the commercial success of small businesses.

⁶⁰ Duch-Brown 2017

⁶¹ Ibid.



Figure 5: Platforms offer a helping hand to SMEs. Image source: Digital Future Society

Platform benefits for SMEs

Platforms offer small businesses many opportunities, and a lot has been written on how online platforms have disrupted small business performance. To provide some context regarding the P2B regulation, this section will focus on four aspects in which online platforms have been key to small business growth. Overall, platforms:



Allow businesses to gain visibility, and reach new markets and consumer segments

Leading online platforms have strong network effects that, in turn, help small businesses gain visibility, directing services towards wider markets and audiences, and create access to new consumer segments. Businesses that choose to commercialise their products independently have a difficult time doing so, considering the amount of traffic and information available on the web. This is especially true in an overinformed digital environment and a highly competitive global market where capturing attention and retaining potential customers' interest is very tough.

According to the Amazon report, *Impacto de Amazon en las Pymes Españolas 2020 (Amazon's Impact on Spanish SMEs 2020)*, there are just over 9,000 Spanish based SMEs that sell through Amazon. From June 2019-2020, half of these registered SMEs exported internationally, making up to 450 million EUR in sales, 50 million more than the year before.⁶²

Considering that small businesses, on the whole, have limited resources and reduced scope of action, they face a tremendous challenge to stay visible and capture clients. Platforms provide precious visibility-enhancing tools for small businesses. Not only do these tools provide small businesses with greater visibility, they also play a big role in creating trust between businesses and consumers.

Online Review Systems

As product reviews increase, the more likely users are to visit the site to both read reviews and write them. Several online platforms, including Amazon, have become repositories of reliable consumer reviews and provide businesses with useful data on consumer behaviours and preferences.

Leading e-commerce platforms leverage the strategic potential of review systems through design.⁶³ In 2008, Amazon started asking consumers "Was this review helpful?". This prompt, according to user experience (UX) expert Jared Spool, promoted the most helpful reviews and increased sales in these categories by 20%. This design decision contributed 2.7 billion USD to Amazon's revenue for the year.⁶⁴

⁶² Amazon-prensa.es 2020

⁶³ Gutt et al 2019

⁶⁴ Spool 2009

2

Enable businesses to strengthen relationships with their consumer base

SMEs struggle to gain and preserve reputation and generate consumer trust. Here, platforms provide SMEs with powerful opportunities to create trust.⁶⁵ For consumers, platforms provide a trustworthy framework, ensure a secure payment system, provide clear policies on data privacy and information about e-sellers. They also supervise and oversee a compliance system and, in many cases, dispute resolution systems.⁶⁶ Online platforms help generate trust between businesses and consumers through the use of reputation and recommendation systems. This is a barrier faced by small businesses commercialising products and services on their own website, as their online reputation is less established. Successfully managed review systems create value for buyers and sellers alike.⁶⁷

Incentives to maintain an effective review system, depend on a large and active client base, which is an asset that online platforms provide their business users. Platforms implement strategies to minimise bias and potentially fraudulent reviews. Amazon and Google, for example, implement review-quality algorithms that remove offending content from their platforms. They can also assess how much weight to place on each rating.⁶⁸

According to an annual survey published by IAB Spain, 59% of Spanish consumers surveyed claim to depend on social media platforms before purchasing online. The main channel through which they looked for information was Facebook, however, there is also growing interest in Instagram as a main source for research.⁶⁹

3

Offer small businesses a competitive edge against bigger players in the market

As mentioned above, e-commerce platforms have proved beneficial for smaller businesses enabling them to gain more market information to better compete with their competitors.⁷⁰ As platforms encourage transparency between businesses, retailers can track competitors' prices and product lines, and adjust their own offers based on the information the platforms make available.

In theory, platforms remove barriers preventing small businesses from competing with bigger players in the market. Unlike large players, small businesses lack the resources, infrastructure, or staff required to expand globally or serve customers in cross-border transactions. In many aspects, platforms level the playing field for big, medium and small players.

⁶⁵ Rodríguez de las Heras Ballell 2020

⁶⁶ Duch-Brown 2017

⁶⁷ Donaker et al. 2019

⁶⁸ Ibid.

⁶⁹ IABSpain 2020

⁷⁰ Duch-Brown 2017

The lockdown brought on by the Covid-19 pandemic has enhanced this opportunity further. According to a 2020 Facebook/Deloitte study on the effects of the pandemic, over 50% of Spaniards surveyed acknowledged that they switched to buying from small, local commerce thanks to social media channels.⁷¹

4

Alleviate trade and operational costs and investment needs for SMEs

SMEs rely on specialised services, such as delivery and advertising, provided by online platforms. Considering small business, on the whole, lack the human resources to reap the benefits of digital technologies effectively, online platforms fill this gap by providing business users with marketing tools, such as analysis and communication software. All major platforms offer businesses a user interface that allows them to understand the metrics and strategise accordingly.

According to the IAB survey of social media use in Spain, more than half of surveyed users consume social media to stay informed about brands, and 43% use these channels to contact customer service.⁷²

Cloud computing services, also facilitated by online platforms, make it simpler and cheaper to implement processes/collect and manage data, which allows business users to use big data and data analytics in their decision-making processes.

As mentioned in Part 1, Spanish businesses, especially small and medium-sized businesses, fall behind in investment and use of cloud computing services. In Spain, the most common cloud SaaS (software as a service) solutions are the Google G Suite apps, Microsoft 365 apps, Dropbox, Hootsuite and Shopify among others.⁷³

⁷¹ Deloitte LLP 2020

⁷² IAB Spain 2020

⁷³ Acronis 2020

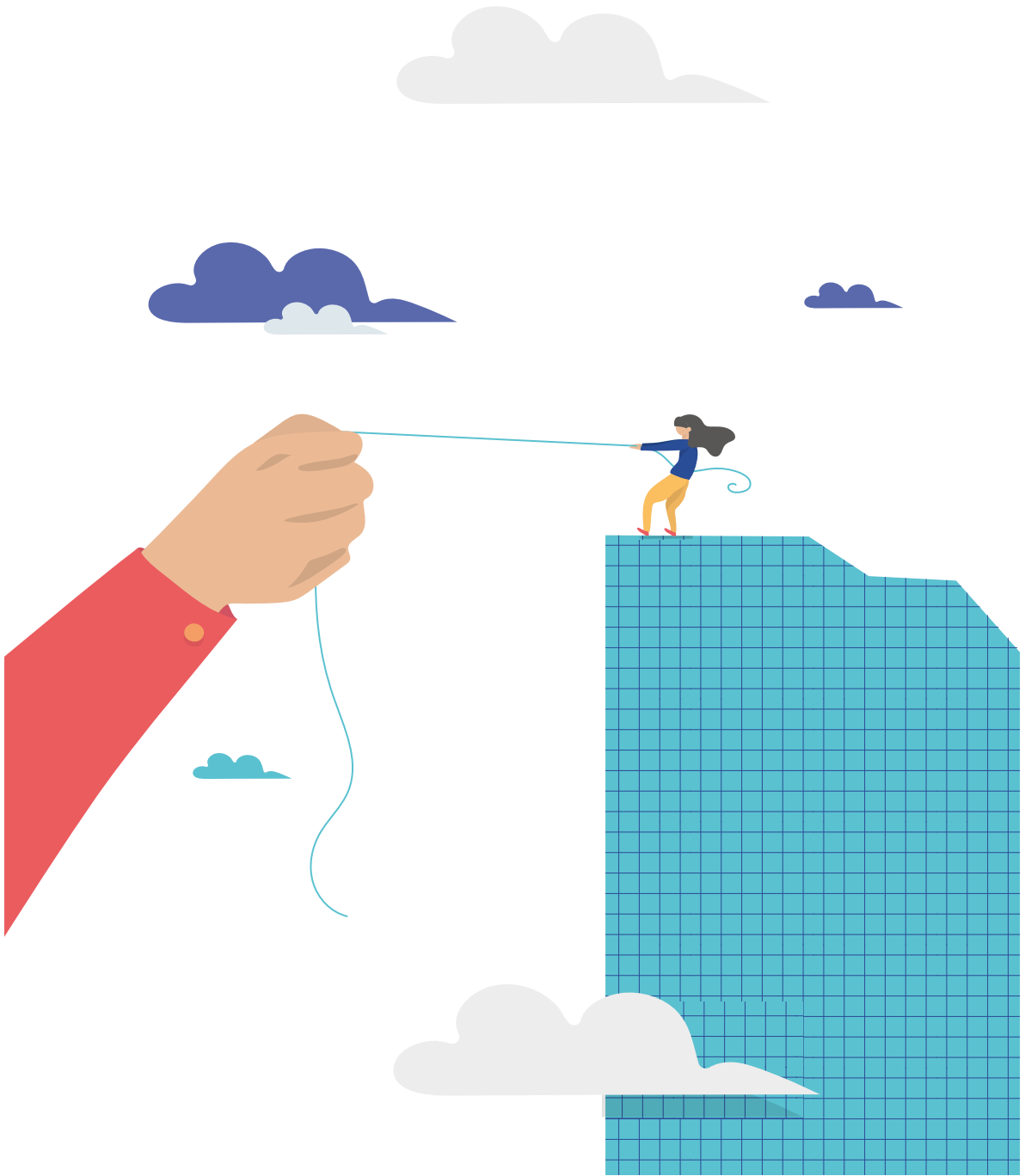


Figure 6: Platforms act in their own interests. Image source: Digital Future Society

Platform pain points for SMEs

Although platforms do offer SMEs opportunities, there is growing concern over market dominance and its consequent effect on SME growth. The list below briefly touches upon the main pain points. In their interactions with online platforms, SMEs:

1

Lose sight of their customers

Online platforms perform the role of gatekeeper, helping build trust between business users and their client base. However, the role of gatekeeper means that businesses can only access their customers via the platform. Customers shift their loyalty from businesses to online platforms, as they will more often remember that they had purchased an item on eBay rather than through the seller. This locks businesses into a situation where, they have no other choice but to use the platform as, without it, they would lose access to the market. A hotel that depends on a booking platform to book reservations, for example, loses the right to obtain the direct contact details of the customer (which includes payment data, customer preferences and purchase history), as legally, the platform is the contractual partner. This takes away a natural interface between the hotel and its client base and removes additional opportunities for customer follow-up, such as, to offer them a special discount.⁷⁴ As law professor, Christopher Busch, explains “in this situation, the customer’s data protection interests contradict access to data for the hotel. These interests must be balanced.”⁷⁵

There is no greater example of this change in customer loyalty than platform loyalty programmes, such as Amazon Prime. With Amazon Prime, providers only gain access to this growing group of customers if they have an active presence on Amazon as a business user.⁷⁶

2

Lose valuable information

With platforms intermediating between suppliers and customers, it is the platform operators and not the SMEs that have access to the valuable data. Busch argues that, when aggregated, this data “provides an important source for product and process innovations and thus for competitiveness of companies”.⁷⁷

Platforms collect data provided by business users and consumers as registered users but can also observe, infer and predict data based on big data analytics. Business users do not usually have access to these platform-wide and market-wide datasets.^{78, 79}

⁷⁴ Internet Governance Forum Berlin 2019

⁷⁵ Ibid.

⁷⁶ Busch 2020

⁷⁷ Ibid.

⁷⁸ Martens et al.

⁷⁹ World Economic Forum 2014

The data asymmetry between platform and the business users does not only arise from the amount and the variety of data that the platform collects, observes, or infers, but especially from the multiplier effect of combining and aggregating the data of multiple business users, and consumers. Such an all-embracing view of platforms is difficult to replicate at a single-business level, and is hardly contestable.^{80, 81}

Amazon under investigation

At the time of writing this report, the EU Commission is performing two antitrust investigations into Amazon. One of the investigations relates to the use of non-public seller data to the benefit of its own retail business. As an intermediary, Amazon has access to third-party seller data, including details on shipped and ordered products, the sellers' revenues and past performance, and consumer claims on products.

According to the Commission, these large quantities of non-public seller data are accessible to Amazon's retail business and feed into the automation of that business' systems. The preliminary findings show that data is aggregated and used to calibrate Amazon's retail offers and strategic business decisions. European Commissioner Margrethe Vestager, emphasises the need for fairness: "rules, should not artificially favour Amazon's own retail offers or advantage the offers of retailers using Amazon's logistics and delivery services. With e-commerce booming, and Amazon being the leading e-commerce platform, a fair and undistorted access to consumers online is important for all sellers."⁸²

3

Compete with platform operators

The operational data that platform operators create and therefore have access to has permitted them to innovate their business model and act as both operators and providers. This is also known as vertical integration.

Below are a few examples of vertical integration in practice:

- The App Store, an application store created by Apple to market apps, integrates vertically as the tech giant also produces and sells its own apps on the store. The App Store, for example, sells Apple Music which competes with other music streaming apps such as Spotify. Apple then charges Spotify a 30% cut on every subscription the competing music app sells through the store.
- Google started as a search engine but integrated vertically by offering a comparison-shopping service called Google Shopping. The service allows users to search for products on online shopping websites and compare prices between vendors.

⁸⁰ Crémer et al. 2019

⁸² European Commission 2020a

⁸¹ Graef 2016

- Amazon, as an e-commerce platform, expanded its business model to include distributing its own goods through its platform, competing directly with sellers using its platform and about which Amazon collects large amounts of data about products they sell, transactions, and customers.⁸³

In addition to controlling different aspects of the supply chain, these online platforms benefit immensely from the data asymmetry explained above. Data gives online platforms a competitive edge in the market as it enables them to develop innovative algorithms, such as ranking algorithms, that make the user experience seamless. This is problematic when online platforms design such algorithms to favour their own interests. Law professor Christoph Busch explains how the role of gatekeeper eventually leads “platform operators [to] use their algorithms to control which recommendations or rankings are displayed to the customers... At the minimum, there is a risk that the results will be distorted by the platform’s own interests”.⁸⁴

The Google Shopping case

In 2017, EU antitrust regulators fined Alphabet (Google’s parent company) 2.42 billion EUR for promoting its own shopping service over those of smaller rivals.⁸⁵ A seven-year investigation, originally prompted from complaints in the EU and US, found that on average Google’s search algorithms demoted rival shopping services to the fourth page of search results. Consumers would rarely see the rival services in their Google search results.

Appearing on Google’s search results has a definite impact on business success. On desktops, the 10 highest-ranking search results receive approximately 95% of all clicks on generic search results and the first result on the second page only receives about 1% of clicks.⁸⁶

As seen in the Google shopping case, self-preferencing based on unknown criteria or remuneration factors may distort the market and mislead consumers in their choice. Transparency of classification criteria, including remuneration, benefits business users competing with the platform operator and consumers looking to make an informed choice. Tommaso Valetti, former chief competition economist of the European Commission’s Directorate General for Competition asked, with reference to Amazon but also applicable to other gatekeepers, whether the operator of a major online marketplace which also sells as a retailer in that marketplace can be both “an umpire and have a team”.^{87, 88}

⁸³ Bostoen 2018

⁸⁴ Duch-Brown 2017

⁸⁵ Gilchrist and Balakrishnan 2017

⁸⁶ European Commission 2017

⁸⁷ Zdzieborska and Vischer 2019

⁸⁸ Valletti 2019

4

Are subject to unfair business practices

Online platforms may exploit their asymmetric position and the high dependency business users place on them to exert a stronger bargaining power. This would result in unfair practices and potentially lead to imbalanced contracts. According to an EU Commission report, these practices entail:

- **Changing terms and conditions with no notice or little prior notice.** Businesses report that 19% of the problems faced when dealing with platforms relate to vague terms and conditions, or to unexpected or unnoticed changes of those terms and conditions. Issues relating to this have led to losses, in some cases amounting to 95% of revenue.⁸⁹
- **Not providing reasons or providing vague reasons for terminating or suspending accounts.**⁹⁰ The same EC report, mentioned above, explains how account suspension and delisting can significantly impact small businesses. The more dependent that business users are on the platform, the higher the negative impact of suspension or termination is for their business. These impacts have included a loss of 10% turnover and the laying off of up to 20 employees for several weeks.⁹¹
- **Not disclosing product classification parameters, bias in classification or self-preferencing.** 15% of businesses report regular problems concerning ranking. 15% of heavy business users claim that problems were due to biases in search-related practices.^{92, 93} Business users' ability to reach their targeted customer base strongly depends upon transparent, predictable, fair and unbiased classification systems.
- **Treating users unequally.** Apart from self-preferencing, non-vertically integrated online platforms can also engage in differentiated treatment among its users. For example, a hotel booking platform can rank hotels preferentially on the condition that they pay more commission fees. Another way a platform can treat businesses unequally is by blocking an app that "interferes with its ability to gain revenues through advertising".⁹⁴ Amazon, for example, only grants improved visibility, higher search rankings and better consumer access to merchants who also use its logistics services. This could reduce competition in this market to the detriment of providers of rival logistics services.⁹⁵
- **Unfair use of parity clauses.** Online platforms, most often hotel booking platforms, set parity clauses to ensure their business users do not offer better rates or deals on other platforms. Wide price parity clauses can prevent a hotel operating on an online platform from offering a better price on other channels. In contrast, if these clauses are narrow, they can prohibit the hotel from offering better terms on its own website.⁹⁶ There are claims that hotel platforms like Expedia and Booking.com downgrade hotel rankings if they offer lower prices on other hotel booking platforms.⁹⁷ EU competition authorities, such as in Germany, France, and Italy have

⁸⁹ European Commission 2018

⁹⁰ European Commission 2020b

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Graef 2019

⁹⁵ Ibid.

⁹⁶ Solek 2019

⁹⁷ Ibid.

concluded that wide price parity clauses breach competition rules as they restrict market competition among hotel booking platforms. In a 2017 interview, Economist Jean Tirole criticised these clauses, arguing that “if the platform is guaranteed the lowest price, there is no incentive for you to look anywhere else; you have become a ‘unique’ customer, and so the platform can set large fees to the merchant to get access to you”.⁹⁸

5

Face obstacles in seeking legal redress

Businesses also find themselves in a tight spot when they encounter unfair practices while using platforms. SMEs in Europe claim platform complaint-handling systems are lacking and often find themselves incapable of addressing problems regarding the suspension of accounts, meeting the new terms & conditions imposed by the platform, etc. The delay in response or no response at all could mean a significant impact on their business. Redress then becomes limited, inexistent or at least uncertain.

Small businesses do not recur to the judicial system to resolve complaints and disputes because of the time it takes to address possible discrimination relating to P2B activity. In addition, professional users do not address these issues for fear of being banned or treated differently by the platform operators.

⁹⁸ Price 2017

3

P2B regulation

A Digital Single Market strategy

The European Commission adopted the Digital Single Market strategy in 2015 to try and ensure citizens, businesses and governments fully reap the benefits of digitisation. One of the Commission's main concerns, it is understood, was to unlock the potential of e-commerce by creating the right conditions for businesses to flourish and unleashing cross-border online trade.

The role of online platforms in fostering e-commerce in Europe was pivotal. Therefore, under this pillar, one of the top priorities was to address the fairness and transparency of online platforms relating to SMEs.

In 2016 and 2017, the European Commission investigated the role of online platforms (like search engines, social networks and app stores). The investigation included a public consultation, studies, and scientific workshops, all with the objective of understanding the opportunities and challenges associated with online platforms. Based on the findings, the European Commission proposed regulation in 2017 to handle platform-to-business relations in order to determine how to regulate online platforms and promote trust, transparency and fairness. The EC conducted a behavioural study on transparency in online platforms, published in early 2018, which served as a basis for the Digital Service Act package. The so-called package's main objective is to strengthen the digital single market and promote innovation and competitiveness in the European digital space. The package proposes two legislative initiatives: the Digital Services Act (DSA) and the Digital Markets Act (DMA).

DSA, DMA and defining gatekeeper platforms

At the time of writing the report, the European Commission has recently proposed the Digital Services Act package. This legal framework includes a review of the e-commerce directive (adopted in 2000) with a common set of responsibilities for platforms. Secondly, it establishes ex ante regulation of digital platforms with a gatekeeper role. This proposal seeks to tackle the main issues associated with digital platforms ranging from user safety, misinformation, and consumer well-being. One of the main contentions regarding platforms and anti-competition law is the way the regulation defines market power and dominance in the digital space. To illustrate the diversity of the platform ecosystem, the EU Commission has made a distinction between platforms, using terms such as gatekeepers and very large online platforms to distinguish those platforms that pose most significant risks. However, size is not a determining factor in defining a gatekeeper platform. The platform's position and potential impact defines the scope, though the final list of criteria remains unclear. Still, Armin Jungbluth head of the Digital Services division at the German Economy Ministry, has described defining the scope as the "most difficult first step".⁹⁹

⁹⁹ Stolton 2020b

The former European Commissioner for the Internal Market, Industry, Entrepreneurship and SMEs, Elżbieta Bieńkowska, stated how the P2B regulation is especially designed for SMEs. This is because “many of them do not have the bargaining muscle to enter into a dispute with a big platform...[with] these new rules they have a new safety net and will no longer worry about being randomly kicked off a platform or untransparent ranking in search results”.¹⁰⁰

This package consists of two key elements: the P2B regulation and the Observatory of the Online Platform Economy (OPE). The P2B regulation is an ex ante regulation that presents “a first-ever set of rules creating a fair, transparent and predictable business environment for smaller businesses and traders on online platforms”.¹⁰¹ Along with the regulation, the Commission created the OPE to monitor how the platform economy develops.



Figure 7: The P2B regulation aims to shape platform best practices. Image source: Digital Future Society

¹⁰⁰ European Commission 2019a

¹⁰¹ Eur-lex.europa.eu 2019

What does it do?

In summary, the P2B regulation offers the following group of measures to “level the playing field” in platform and SME relations. Intending to address the unfair advantage that platforms have, the measures seek to mitigate information asymmetry, increase transparency and resolve complaint handling between platforms and businesses. This section addresses the main points the regulation tackles.

The regulation does not affect all online platforms. Addressed as Online Intermediation Platforms, the three types of platform targeted are:

1

Online e-commerce marketplaces, such as Amazon Marketplace, Facebook Marketplace, eBay

2

Online software application services, like the Apple App Store, Google Play, and Microsoft Store

3

Online social media services, such as Facebook or Instagram

The regulation requires platforms to:

Provide a clear understanding of the terms and conditions. As mentioned in the previous section, small businesses report how platforms negatively impact their business because of opaque or ambiguous terms, sudden and unexplained account suspensions, and the changing of terms and conditions with no or little prior notice. Therefore, platforms must provide terms and conditions in plain and intelligible language describing, in particular, the conditions that could lead to account suspension, termination or restriction.

This point addresses the fact that many businesses using platform services do not have the legal understanding, know-how and human resources needed to mount a challenge to a change or modification in their contractual agreement.¹⁰² For this reason, platforms must announce changes to the Terms and Conditions, with a minimum 15 days’ notice, depending on the nature of the modification.¹⁰³ Platforms should also provide businesses with more than 15 days’ notice in cases where the businesses need to make complex adaptations such as reprogram their services or adapt their goods to continue to use the platform.

¹⁰² European Commission 2020g

¹⁰³ Eur-lex.europa.eu 2019

Failure to comply with the requirements on adjusting platform terms and conditions will render them null and void. Either a court will determine this failure, on a case-by-case assessment, or platform and business users will deal with it if the business user decides to lodge a complaint.¹⁰⁴

The P2B regulation dissuades platforms from terminating accounts. It also states that termination should only be used as a last recourse and requires platforms to explain the action at least 30 days before it will occur. Further to this, platforms should also use other measures such as restricting individual listings and lowering the ranking of goods or services instead of suspending the account. The terms and conditions must clearly specify the platform rule infringements that will trigger suspension, termination, downrating or other penalties. The severity of these defined penalties will then depend on the severity of the infringement.

Provide understanding and transparency on seemingly anti-competitive behaviour. To ensure that small businesses understand the unilateral bargaining power platforms have, the regulation requires platforms to highlight the advantages they enjoy, facilitating informed decisions. This includes platform ranking factors for goods and services, how the online platform providers treat and rank their own services and goods, and the conditions behind parity clauses (most favoured nation clauses):

1

Platform ranking factors for goods and services

Platform providers, including online intermediation services and search engines, have to inform businesses about the criteria/conditions they use to rank goods and services.

The European Commission has adopted guidelines on the transparency requirements related to ranking.¹⁰⁵ These offer practical guidance and examples on how online intermediation services can describe and present the main parameters in the most meaningful way for business users. The guidelines have two detailed annexes that provide illustrative examples of ranking parameters and of direct or indirect remuneration.¹⁰⁶

2

How the online platform providers treat and rank their own services and goods

As discussed previously, online intermediation service providers often give advantages to their own offerings, which could, in turn, be anti-competitive for small business users. The P2B regulation requires platform providers to explain the reasons behind any differentiated treatment. This includes ranking factors, whether there are any direct or indirect payments charged and what access the online intermediation service has to personal and non-personal data that business users, websites or consumers provide for or generate through their use of the service concerned.

¹⁰⁴ European Commission 2020g

¹⁰⁵ European Commission 2020b

¹⁰⁶ Ibid.

3

The conditions behind parity clauses (most favoured nation clauses)

Platform providers must also describe the reasoning behind parity clauses. This includes information on economic, commercial and legal considerations that restrict business users from offering better deals on goods or services on their own website or through other online services. This will give business users a better idea of whether they would be able to offer better conditions or lower prices on their own website or through other providers.

4

Description of data access policies

Online intermediation service providers need to describe their data access policies (technical and contractual aspects) and whether they share data with other business users or third parties.¹⁰⁷

5

Provide adequate avenues for dispute resolution

Online platforms must provide adequate avenues for dispute resolution. This includes online platforms with more than 50 staff members and more than 10 million EUR turnover setting up internal complaint mechanisms. They must also inform business users about how the internal complaint-handling system operates.¹⁰⁸ Furthermore, the regulation requires platforms to provide the names of two or more mediators so that platforms and business users can reach an agreement out of court, should any disputes arise. Smaller platforms, as defined by the EU rules as small enterprises, are again, exempt from providing external mediation.¹⁰⁹

¹⁰⁷ European Commission 2020g

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

4

Insights from experts

As seen in the previous section, the regulation provides a set of standards for platform-to-business relations, emphasising the need for transparency between both actors. The effectiveness of the ex ante regulation has yet to be seen, but there are some initial insights that experts have made since the drafting of the regulation to its implementation. This part of the report explores the differing perspectives.

One of the main questions this report seeks to address is whether the proposed measures are enough to ensure a transparent and fair relation between platforms and professional users. According to the initial insights of the European Economic and Social Committee, having transparency as a cornerstone of the P2B regulation is not enough to regulate a dynamic and complex market such as the digital market. Promoting transparency and understanding of terms and conditions cannot ease the differences between global actors and small business users.¹¹⁰

Regarding its objective to promote fairness, the regulation tries to address the barrier SMEs face when lodging a complaint either internally through the platform or externally via the judicial system. However, as Sebastiano Toffaletti from Digital SME Alliance expressed in 2018 regarding the initial proposal for the regulation, SMEs do not have the “power” to confront big platforms, considering they will have disproportionate levels of legal resources available to them.¹¹¹ This still rings true.

Below, the following section addresses the tensions mentioned above and summarises written interviews with legal practitioners from different member states on their perspective on the regulation. Following the regulation’s main attributes, this section seeks to convey its importance, and the possible impact these rules will have on both platforms and SMEs.

A platform economy regulation pioneer

This regulation is the first-ever attempt to **set a standard for the platform economy**, created to deal with the growing platform dependence SMEs have and the influence this has on their future. In establishing these rules, the EU has taken a stance, establishing good codes of conduct for platforms to follow. It is innovative because before the P2B regulation, there were various regulatory texts used directly or indirectly to resolve disputes between businesses. These texts fall under unfair competition, advertising law or contractual law.

Overall, the EU’s decision to implement ex ante regulation to curb the growing influence of larger players in the platform economy is part of a wider debate on the regulation of markets before or after market failure. In this case, ex ante regulation seeks to shape the behaviour of online platforms to level the playing field, ensure legal certainty and protect interests. Some argue that ex ante approaches are not adequate measures given the dynamic and fast-paced evolution of the market and could create market failures and indirectly hinder innovation.¹¹² Such policy measures should be carefully considered, given the potential drawbacks of the regulation could indirectly increase transaction costs, impose burdensome duties on actors, or foster regulatory arbitrage – in which platforms could exploit differences or loopholes within the regulation.

¹¹⁰ European Economic and Social Committee 2018

¹¹² Lee-Makiyama and Narayanam Gopalakrishnan 2020

¹¹¹ Böhm 2018

“The P2B Regulation is the first attempt to introduce a horizontal and competition-based regulation adapted to the platform economy. Until recently, platforms were subject to a myriad of different and piecemeal rules and regulations, and the services they provide and activities they carry out, had not been regulated in their entirety.”

Dr Gayle Kimberley - Senior Associate, GVZH Advocates

“The regulation is innovative in that, rather than being directly aimed at consumer protection (unlike laws such as the EU Unfair Commercial Practices Directive), it regulates the relationship between online platforms and the EU businesses that use platforms to sell their goods/services to EU consumers.”

Dr Kuan Hon - Director of Privacy, Security and Information Law, Fieldfisher LLP

Positive reception

Since its implementation in July 2020, there has been an overall positive view of the regulation as it does not ban practices, nor does it limit contractual freedom. The only exception relates to those terms and conditions that become null and void if they do not comply with the requirements of regulation.¹¹³ Still, at its incipient stage, it remains to be seen how each member state will implement the regulation and the subsequent impact it will have. Overall, hopes are that increased transparency will benefit both parties in the long run. By prioritising transparency and fairness, businesses using third-party online platforms will benefit from several new safeguards. For now, the regulation’s effectiveness depends on how it is implemented and whether the obligations are made effective.

“The regulation is also intended to indirectly increase consumers’ trust of the online platform economy, which will also increase healthy competition while leading to increased consumer choice.”

Dr Gayle Kimberley - Senior Associate, GVZH Advocates

“The impact should be positive for SMEs since it does not impose any obligations on them and seeks to offer them greater transparency, clarity and guarantees.”

Ane Alonso Murga - IP and IT Lawyer, Cuatrecasas

On prioritising transparency

Transparency is the cornerstone of the regulation. This emphasis on transparency between P2B relations is done so in the hopes it will promote fairness between platforms and their business users. The clear benefit of promoting transparency to the providers of online intermediation services is they become easier to monitor and they can be held accountable more easily. However, some argue that, by requiring platform transparency, the regulation does not adequately address the initial complaints on platform dominance made by small businesses during the EC investigation. This is partly due to the fine line the regulation straddles seeking to ensure both fairness and competition. As previously mentioned, the regulation does not take any steps towards changing or limiting platform activity, which may explain some of the disappointment SMEs feel towards it. Sebastiano Toffaletti, Secretary-General at European Digital SME Alliance, says “large platforms will easily interpret the transparency clause in their favour since the law is only asking for an explanation. Thus, there is no enforcement to give chances to SMEs”.¹¹⁴ However, the regulation can be perceived within a larger context, as only an initial step that precedes further regulation such as the Digital Service Act and Digital Market Act. Both were proposed towards the end of 2020 and offer more forceful solutions, to curb anti-competitive gatekeeper behaviour.¹¹⁵

“We initially referred to the P2B regulation as a transparency regulation and not strictly as a platform-to-business regulation, as it mainly includes issues of transparency. Issues such as the need to establish a classification, the parameters used to classify professional users of a platform, and other rules or novel requirements such as the need to inform and provide reasons if an intermediary decides to suspend or cancel services for a professional user.”

Claudia Morgado Martí - IP and IT lawyer, Cuatrecasas

“The regulation’s main focus is to promote transparency as a mechanism to repair information asymmetry. However, excessive reliance on transparency raises the question whether transparency is an effective mechanism for dispute resolution, prevention and protection of interests. Nonetheless, it sketches out an initial set of standards of good practices for a platform economy that will set a global precedent.”

**Teresa Rodriguez de las Heras Ballell - Professor of Commercial Law,
Universidad Carlos III Madrid**

¹¹⁴ SME Connect 2018

¹¹⁵ European Commission 2020e

Knowing the rules of the game

As mentioned earlier, the regulation focuses on transparency to guarantee that both parties understand the contractual terms of their relationship. By knowing the rules of the game, SMEs can decide whether to contract a platform's services and if they do, they can decide how best to optimise these services.

One significant concern, discussed in the first part of the report, is the dominance of certain platforms and the growing dependencies that smaller businesses develop. Does knowing the rules of the game prove to be enough to address this dependency? It arguably reduces opacity and enables business users to plan their activity, strategically design their business models, and understand how they compete with other business users and how consumers perceive them. In this, the regulation tries to adopt an impartial view of fairness. It recognises that "many terms and conditions that may appear unfair from the perspective of one party, are actually central to the functioning of the platform and therefore create significant value and efficiencies for the system as a whole".¹¹⁶

Network effects are central to the platform business model in that a successful platform builds strong network effects to provide more value to its professional users. Some argue that it is in the platform's best interest to act transparently, as their professional users are clients. In ensuring a 15 day notice period or clear and concise terms and conditions, the regulation incentivises best practices of platforms that are already taking care of their professional users.

"For example, if the ranking algorithm classifies on the cheapest product, you already know that this is the rule of the game and that you will be ranked lower if your product is more expensive. So, to some extent, knowing the rules allows you to optimise the use of these tools."

Claudia Morgado Martí - IP and IT lawyer, Cuatrecasas

"SMEs should be mindful of these new rights when contracting with online platform operators and in the event that difficulties arise."

**Francine Cunningham - Director of Regulatory and Public Affairs
Bird & Bird LLP**

¹¹⁶Flórez Duncan 2020

Seeking justice

How does the P2B regulation seek to promote best practices without hindering the efficiencies of the platform? One of the regulation's objectives is to strengthen the bargaining power of professional users. Here, the regulation carefully considers the financially vulnerable position SMEs may find themselves in, but more importantly, the disadvantageous position, or at least, the vulnerable position, that arises from them being locked-into the service. In that regard, business users might be reluctant to litigate where the dependency is high at the risk of losing their customer base.

Given that the cost and length of litigation may pose a barrier to SMEs holding platforms accountable, the regulation requires platforms to facilitate mediation and also bear a reasonable proportion of its total costs. There are numerous possible factors that could dissuade businesses seeking redress (financial, complexity, lack of resources or expertise, retaliation on behalf of platforms). The regulation allows for the possibility of industry or business associations, such as SME or developer associations or alliances, to take action to compel compliance.

"Similarly, some member states could designate a public body to enforce compliance. Developers and other SMEs could, for example, claim that certain terms were void against them because they were not plain and intelligible or seek damages for breach of the regulation."

**Dr. Kuan Hon - Director of Privacy, Security and Information Law,
Fieldfisher LLP**

"The P2B regulation promotes complaint-handling mechanisms, and opts for incentivising mediation, but it does not show a firm and conclusive bet for pure online dispute resolution (ODR) in the solving of disputes between the business users and the platform operator and as a primary dispute resolution mechanism for conflicts between users. Furthermore, the P2B regulation is cautious in opting for automated ODR."

**Teresa Rodriguez de las Heras Ballell - Professor of Commercial Law,
Universidad Carlos III Madrid**

Impact on platforms

Predominantly, the perception is that the P2B regulation reinforces the best practices of platforms. It is important to note that not all platforms are gatekeepers, and many cannot afford to lose their professional client base. As stated previously, professional users as clients, as well as consumers, will ultimately benefit should platforms ensure their terms and conditions are clear, rankings are transparent, and they have effective complaint handling and redress mechanisms in place.

Nonetheless, there is a possible risk in requiring platforms to adhere to this regulation, which prompts the following questions: Could the regulation be a barrier to entry? Could the regulation entrench pre-existing larger platforms? We have yet to see the possible impact that smaller platforms face for not complying with the transparency requirements. Industry reports that transparency requirements as such are not significantly costly. On the contrary, transparency here entails a mere description of the policies followed by the platform.

Additionally, transparency poses a possible risk. Although there is no requirement for platforms to disclose the workings of their algorithms, they do need to explain how criteria should be revealed and in what level of detail.¹¹⁷ There are certain disadvantages platforms face when being transparent. For example, if forced to reveal in great detail, elements that constitute a valued asset or back their competitive advantage, business users or competitors could use the information to their advantage. Also, excessive transparency could lead to business users manipulating classification criteria to achieve better positioning.

At the same time, there is no denying that for many online platforms, success stems in part from the quality of the algorithms that underpin the platform operations. Forcing online platforms to reveal their trade secrets could also adversely affect innovation incentives. In fact, platforms may feel discouraged from investing in innovation and opportunistic user behaviours could develop.

“Tighter requirements for platforms could hamper the activity of small platforms, thus encouraging their demise and reducing free competition.”

Ane Alonso Murga - IP and IT lawyer, Cuatrecasas

“There is an inevitable conflict between disclosing classification criteria to prevent users and consumers from being misled and the protection of industrial secrets and the risk of users manipulating the criteria to achieve better positioning.”

**Teresa Rodriguez de las Heras Ballell - Professor of Commercial Law,
Universidad Carlos III Madrid**

¹¹⁷ European Commission 2020b

Impact on SMEs

Overall, the general consensus is that the P2B regulation is positive for SMEs as they do not need to act or comply with any new requirements. They also benefit from the new duties imposed upon platforms. However, as touched upon previously, this is partly because the regulation aims to promote desired behaviours, without posing a burden on competition and innovation. Enforcement measures fall to individual EU member states. For example, some might enable fines for breaches of the regulation while others could empower business users affected by a breach to sue for compensation, etc. Consequently, it is important to stress that a supervision mechanism to ensure compliance is relevant. Fines are a disincentive to infringe, but they do not compensate users affected by the breach of regulation. In that regard, users only benefit from the compliance of the regulation.

The regulation places obligations on platforms and offers guarantees or rights to professional users such as SMEs. So, provided platforms comply with the regulation, its impact will be positive for SMEs and users who conduct business through the internet.

Nonetheless, reducing platform bargaining power puts the onus on SMEs themselves to hold platforms accountable to the stipulated transparency requirements, unless enforcement authorities are entrusted with that oversight.

“The impact in practice may also depend on what action SMEs or SME representative associations are willing to take against platforms that do not comply with the requirements of this regulation.”

**Dr. Kuan Hon - Director of Privacy, Security and Information Law,
Fieldfisher LLP**

“Nevertheless, the final regulation is rather ‘light touch’ and does not go as far as some SMEs would have hoped. Operating systems are out of the scope of the new rules and algorithms are still largely out of the firing line, despite the general transparency requirements. The final regulation also did not include the ‘blacklist’ of unfair trading practices that some Members of the European Parliament had pushed for during the negotiations.”

**Francine Cunningham - Director of Regulatory and Public Affairs,
Bird & Bird LLP**

5

Recommendations

The recommendations below are the fruit of two working group sessions that took place in November 2020. These sessions included nine Spain-based experts from law, academia and the private and public sectors. After identifying and discussing the challenges and opportunities that the P2B regulation poses for platforms and SMEs, the experts identified three main areas of concern:

- **How to help SMEs in Spain understand the opportunities and legal context of the regulation?**
- **How to ensure all platforms (not gatekeepers) are not negatively impacted by the regulation?**
- **How to guarantee legal certainty given the recent implementation of the regulation?**

Intending to formulate recommendations to help both platforms and SMEs maximise the opportunities that the regulation has to offer, the working group identified four lines of action that policymakers, SME associations, digitisation agencies and chambers of commerce in Spain must consider. Given that one of the regulation's main objectives is to address the global dimension of platforms, the working group ideated four recommendations to compliment the harmonisation effect the regulation seeks to have:

1

Address the SME knowledge gap of the new regulation

2

Externalise the complaint mechanisms for platforms

3

Create general guidelines (auto-evaluation and compliance)

4

Enable and create more competencies for the Observatory of the Online Platform Economy (OPE)



Figure 8: Industry and legal experts based in Spain worked together to develop the report's recommendations. Image source: Digital Future Society

Address the SME knowledge gap of the new regulation

As mentioned earlier in this report, SMEs throughout Europe and particularly in Spain, are slow to digitise their businesses. One of the main barriers to digital transformation is recognising the opportunities that digital technologies have to offer. The barrier is nuanced: small businesses, on the one hand, do not see the immediate benefit of investing in technologies because they cannot afford to experiment while, on the other hand, if they do adopt a digitalising position, they lack the strategic vision to take advantage of the benefits.

The mobility restrictions induced by the Covid-19 pandemic, have forced small businesses to reconsider their attitudes towards digital transformation, and those who have adapted to the new situation have found a way to use digital tools to stay relevant to their client base.

Spain's digital strategy, which is a central government blueprint aimed at accelerating the digitalisation of the Spanish economy and society, recognises the "vulnerable" position of SMEs and highlights their need for digitisation as a priority.¹¹⁸ This is due to the fundamental role SMEs play in the economy. Calling for multi-stakeholder participation, the strategy details the need for public and private actors to identify and address the barriers, so that SMEs think digitally and enact organisational change.

As platform use is key to the digitisation of SMEs, it is important SMEs recognise the "rights" that the regulation guarantees, while also making note of the growing dependence on platforms for success. Especially considering that the effectiveness of the regulation depends on SMEs being proactive and holding platforms accountable to the transparency requirements.

For SMEs to meet this challenge, they must be aware of the regulation, the motivations behind it and the mechanisms they can recur when seeking legal redress. Partly due to the newness of the regulation, there are few resources available relating to the regulation on a national level, and it is mostly legal experts in the field who are producing and consuming the information that does exist.

In the same spirit as Spain's digital strategy which offers a multi-stakeholder approach, policymakers, SME associations, digitisation agencies, chambers of commerce in Spain, and platforms should raise awareness of the regulation, by integrating it into already existing educational/informative material. As keeping professional users informed of new legislation that may affect them is common practice among platforms, awareness campaigns could draw special attention to how best to divulge this type of educational material including the use of example cases, seminars and debates.

¹¹⁸ Government of Spain 2020

Externalise the complaint mechanism for platforms

The P2B regulation, as mentioned earlier, requires platforms to provide adequate avenues for dispute resolution. This involves setting up internal complaint mechanisms for platforms with more than 50 staff members and more than 10 million EUR turnover. In addition, platforms must also provide external mediation.

Regarding smaller platforms, the regulation creators have also considered the potential negative impact the rules could have. In fact, they are aligned with the proposed DSA and DMA, in seeking to “support the scaling up of smaller platforms and SMEs.”^{119, 120} In practice, most of the regulation’s requirements are not too cumbersome as they essentially entail transparency, and all platforms, including small ones, could easily afford compliance. Even so, the regulation does contemplate possible barriers for smaller platforms such as the need to implement complaint-handling mechanisms and mediation. An example of how the regulation handles this, is that smaller platforms are exempt from establishing internal redress mechanisms. This is how the regulation allows and supports the emergence of new players in the market.

However, the working group considered whether all platforms will be in a position to comply with all regulation requirements. Although the requirements account for platform size, the need to implement complaint-handling mechanisms and mediation requires additional resources, costs, time, and expertise. Some platforms, such as mid-sized platforms, might not be able to meet these new requirements. A possible risk is that the regulation poses a barrier for entry to those considered to be medium-sized enterprises, therefore reducing competition and suffocating innovation.

Among all duties, the need to implement complaint-handling mechanisms and mediation differs from other transparency-based obligations and might create a gap between incumbents (big platforms) and entrants.

What happens to those entrants the regulation classes as medium-sized enterprises, yet remain small? For them, the exception does not apply. In such cases, the possibility of externalising the complaint system is fundamental: third-party organisations can provide this service.

Therefore, the working group recommends offering third-party organisations the authority to perform this obligation on behalf of platforms. These third-party organisations include World Intellectual Property Organisation (WIPO), chambers of commerce, and legal firms providing platforms with conflict resolution support. This would free the platform from having to create its own processes in order to comply with the regulation’s rules.

¹¹⁹ Those with less than 50 staff members and less than 10 million EUR turnover

¹²⁰ European Commission 2020e

Create general guidelines (auto-evaluation and compliance)

The P2B regulation, as emphasised throughout the report, requires platforms to reinforce transparency with terms and conditions, especially highlighting the advantages that they enjoy, to help business users make informed decisions.

In a similar vein to the recommendation above, the working group further explored how transparency obligations might pose a potential burden on smaller platforms. Although transparency obligations are deemed low-cost, the working group recommends creating a set of guidelines to help platforms meet the regulation's requirements.

A new supervisory entity would need to control compliance and resolve platform doubts. The guidelines could work through an auto-evaluation exercise for those platforms that are smaller, and the entity could promote compliance services offered by consultancies and legal firms.

The set of guidelines and the self-regulatory process draws inspiration from Copy Advice, "a service provided by self-regulatory organisations to advertisers and agencies on the compliance of an advertisement with self-regulatory rules and the applicable national laws".¹²¹ Copy Advice reduces the risk of complaints as the supervisory organisation and helps anyone who would like to run an ad to ensure that their ad complies with "highest standards of practice". In a similar vein, the P2B guidelines could be emitted by a self-regulatory service, which would be available for all European member states. Additionally, the guidelines could help platforms conduct an auto-evaluation exercise to ensure they are compliant. Should the auto-evaluation service not be sufficient, the same entity could serve as a bridge and put those platforms in contact with consultancies and legal firms.

Enable and create more competencies for the Observatory on the Online Platform Economy (OPE)

The report's first chapter briefly mentions the OPE as part of the Digital Services Act package. The OPE's aim is to identify gaps in the P2B regulation and spot new problems within the platform economy. However, with more competencies, the OPE could oversee compliance, monitor implementation of the regulation in different jurisdictions, and promote better interpretation of ambiguous or confusing parts of the regulation.

¹²¹ EASA Alliance 2020

Given that the OPE is set to monitor the evolution of the platform economy, it seems natural and logical for this institution to also monitor platform-to-business relations and the consequent impact of the regulation. Nonetheless, with a broader remit, it would be important to guarantee that the OPE is independent, represents different legal systems and contains adequate expertise, diversity, etc.

One of the main risks the working group identified, was the fragmentation of the regulation, considering it is still in its incipient stage and implementation is the national responsibility of EU member states. Much like the guidelines or Q&A, that the EU Commission has published to help platforms and SMEs interpret the regulation, OPE-produced guidelines could help establish uniform interpretation criteria for the regulation in all countries, and also by sector (in the form of examples).

This requires granting the OPE competencies so it can publish guidelines and recommendations along with the creation of a group of experts – similar to the Article 29 Working Party (Art. 29 WP).

The Working Party which was created in 1995 through the Data Protection Directive, was an advisory body made up from representatives from data protection authorities from each member state, along with the European Data Protection Supervisor. Its main objective was to provide expert advice to member states regarding data protection.¹²²

If the OPE were granted competencies and created a group of experts, as the aforementioned Art. 29 WP, it could advise member states and promote the application of the P2B regulation and other rules in the DPA in all state members. The first group of OPE expert members are academics and researchers, with no stakeholder representatives (such as industry representatives, public administrations or SME associations). The working group recommends that the composition of the next group, to be nominated in 2021, includes representatives of key stakeholders (SME associations, platforms from different sectors, public sector administrations, academics/investigators).¹²³

¹²² European Commission 1997

¹²³ Observatory on the Online Platform Economy 2020

Conclusion

The platform-to-business (P2B) regulation is pioneering as it is the first to treat the unique global role that online platforms play in the business world. As part of the European digital strategy, it shows promise in creating a fair, transparent and predictable environment for professional users of online platforms, regardless the size or position of the platform.

To standardise best practices, the regulation has been tactically designed to repair asymmetry and economic dependency, while also carefully trying to avoid hindering platform growth and innovation. By promoting platform transparency and providing SMEs with mechanisms to seek legal redress and, therefore, hold platforms accountable, the regulation aims to shape platform behaviour for the years to come.

Large platforms enjoy a growing dominance over SMEs and play a critical role in their success. This could make the regulation appear toothless, by only providing platforms with transparency-enhancing duties. Conflicting views aside, it is also possible to see the regulation as an opportunity to assess how the platform economy reacts to a legislative intervention, especially considering that it will take years before lawmakers enact the Digital Service Act (DSA) and Digital Markets Act (DMA). It is likely that the DSA and DMA will only take on a more ambitious stance towards gatekeepers, going beyond transparency with specific requirements. This might deter the anti-competitive behaviour that professional users have been complaining about. Implemented in July 2020, other urgent matters affecting SME survival, including a global pandemic, have eclipsed the P2B regulation. It is too soon to evaluate the impact, which mostly depends on whether there will be adequate promotion measures taken to increase awareness of the regulation. Another, more important, barrier is the digital divide affecting SMEs, which must be tackled in parallel, so they reap the benefits of a regulation that seeks to protect their interest.

The report has highlighted how SMEs in Spain and Europe have the opportunity to exercise great potential when harnessing the network effects and data power of online platforms. Now, especially as they face the repercussions of Covid-19, the urgency of digitising their business models becomes less of an option and more a matter of survival. SMEs need significant support to address the main barriers preventing them from doing so. This is not only due to a lack of financial resources, but an overall need for a driving digital strategy that understands what investments and human capital are necessary to reap the benefits that digital technologies have to offer.

2020 has proven to be a critical year for the European Commission's stance on the platform economy. The P2B regulation, later followed by the DSA and DMA mark the first steps towards a global trend. The US and China will soon follow Europe in addressing gatekeepers' dominance of the market. Here, the challenge for legislators is how to effectively address the asymmetry between small business users and platforms in an increasingly globalised market. The fragmentation of laws regulating online platforms should not pose a barrier to new entrants, or allow other, larger platforms, to escape unfriendly legislation in favour of looser requirements.

Until further definition of the DSA and DMA, member states have a regulation at their disposal that provides a framework for a fair and transparent platform economy, which guarantees its professional users more legal certainty and predictability. Ultimately, the effectiveness of the P2B regulation falls to SMEs, SME associations and the public sector to ensure expectations are met, and to safeguard small business interests.

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