POSITION PAPER

SMEunited's position paper on Digital Services Act (DSA) and New Competition Tool (NCT)

General remarks

SMEunited welcomes the opportunity to comment on the Commission's consultations on the future Digital Services Act (DSA) and the New Competition Tool (NCT). Improving the functioning of the European Digital Single Market (DSM) is vital in order to enhance the capacity of the European companies, especially SMEs, to keep pace with the digital transition and to operate in an economic environment based on a level playing field and fair competition rules.

We support the aim of ensuring a fair trading environment and increasing the innovation potential across online platform ecosystems, as this will support the growth and capacity of small businesses.

However, we would welcome any clarification from the Commission on the interplay between the two instruments in order to have legal clarity on the applicable rules and we ask the Commission to avoid overlapping measures in line with the principles of better regulation. It is also important to ensuring consistency and coherence with other policies such as the on-going process of revising competition law provisions, in particular adapting them to a digital environment, the Commission's data strategy or further regulation being considered in the area of Artificial Intelligence (AI).

1. Digital Services Act Package

SMEunited does see a need for a Digital Services Act and considers its general objectives well founded. The DSM requires strengthening of the rules in terms of competition and innovation and this can be achieved in part by modernising and harmonising the rules that underpin the DSM. Further regulatory fragmentation should be avoided. More effort is needed to improve SMEs' participation in the digital trade in the internal market and beyond.

We see the need for new regulatory measures, due to the range of the challenges faced by SMEs, especially with regards to increasing market barriers due to the fragmented regulatory

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landscape and market dominance of a few large digital players, and the inability of the outdated regulatory framework based on the e-Commerce Directive[1] to address them.

In the context of the e-Commerce Directive, the country of origin principle is a fundamental principle of the European single market and it has proved to be an essential pivot for cross-border provision of information society services. It should continue to be the guiding principle in the revision of the e-Commerce Directive. At the same time, it should be ensured that provisions to protect the public interest (e.g.: compliance with administrative, tax and duty requirements) are permissible and enforceable at Member State level.

The liability provisions of the e-Commerce Directive have proven to be successful. They should in any case be retained in the way they have been interpreted by the European Court of Justice (ECJ) case law. At most, clarifications with regards to certain phenomena and providers might be appropriate, as might be the addition of a further type of liability.

The Single Market rules should apply equally to all digital service providers regardless of their origin of establishment[2]. Any proposed new EU measure should preserve the cohesion of the Single Market. All new obligations and sanctions imposed on digital services and online platforms should be proportionate to the scale of potential risks posed by a service and should take into account the size, turnover and scope of the provider in question, so as not to hamper innovative digital SMEs competing against bigger and more established companies that are better placed to overcome regulatory burdens.

When overhauling the regulatory framework for digital services, it is necessary to dismiss old rules that are no longer relevant. The updated framework should be fit for purpose and as light and streamlined as possible, decreasing the cost of doing business for law-abiding SMEs inside the Single Market. The twin goals of (1) a harmonised and level playing field on one hand and (2) decreased administrative burdens on the other, in many ways depend on the effective governance of the revamped regulatory framework that will be proposed.

The gaps between the Member States in terms of implementation and oversight of the common DSM rules are still large and require a more vigilant enforcement from the Commission and closer cooperation between the Member States, by enhancing the cooperation between national authorities and establishing best practices.

This divergence in capacity between the Member States needs to be taken into consideration when setting the goals and ambitions for the new EU legislation for digital services.

[1] Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').
[2] One of the most relevant issues for retailers, especially SMEs, with regard to on-line sales, is that of compliance with national and European regulations even by non-EU retailers.

Moreover, we call on the Commission to include, in its forthcoming proposal for a DSA, *ex ante* interoperability requirements for large platforms in digital services markets characterised by significant network effects, in order to ensure real choice and fairness.

Interoperability can be defined as "a characteristic of a product or system, whose interfaces are completely understood, to work with other products or systems, present or future, in either implementation or access, without any restrictions"[3].

Business users would benefit from interoperability as this would bring them more choice, increase efficiencies and lead to lower costs due to higher competition and a wider choice of suppliers. The broader choice would allow them to obtain equipment, services and systems that are more adapted to their specific needs.

For SMEs, the anti-competitive barriers created by the lock-in of established userbases into specific service providers due to network effects or closed proprietary solutions, can be reduced by interoperability. New, innovative solutions can be brought to the market and interoperability is key to Europe's competitiveness in the digital transformation.

[3] Definition taken from the French speaking Libre Software Users' Association (https://aful.org/gdt/interop).

1.1 Revision of Platform to Business Regulation and ex ante rules for platforms

SMEunited stresses the importance of fair contractual conditions between online platforms and the companies offering their services and products on those platforms. Fairness in this context means much more than (sufficient) transparency of the terms and conditions and the ranking criteria[4], but also mutually equivalent possibilities of safeguarding one's interests. In particular, this principle must also apply to a possible differentiated treatment of goods and/or services offered by the platforms themselves or by companies under their control.

As far as the Commission's roadmap "Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union's internal market (Ex Ante Regulation)" is concerned, SMEunited believes that scenario 3b could be the most appropriate. SMEunited would support the adoption of a new and flexible ex ante regulatory framework for large online platforms acting as gatekeepers through the prohibition or restriction of certain unfair trading practices (among others taking over competitors and acquiring start-ups) by large online platforms or adoption of tailor-made remedies addressed to large online platforms acting as gatekeepers on a case-by-case basis where necessary and justified.

We call on the Commission to diligently define the criteria and conditions by which large online platforms are acting as gatekeepers, in order to establish a catalogue of clear obligations and prohibited practices, create legal certainty and thus prevent harmful practices and power imbalances allowing new and innovative SMEs to enter the market.

It should be differentiated between large online platforms with a gatekeeper role and online platforms with limited network effects and a limited number of users based on justifiable standards, so as not to hinder the innovation of small platforms.

Contractual terms and conditions in the context of general contracts with online operators are hardly available in the national language of the business users. This limits commercial users' full understanding of their actual obligations and rights, when subscribing services contracts with platforms. Platforms should therefore be obliged to translate their contractual terms and conditions in the national language of the adhering business users.

We would welcome a new framework that complements the horizontally applicable

[4] Even when the change in positioning is due to unfavourable comments or complaints from a consumer, the online intermediary, before making any changes to the ranking, should first of all transmit the contents of these communications to the commercial operator concerned, in order to listen his considerations and then evaluate a possible shift in the ranking.

provisions of the Platform-to-Business Regulation[5] (P2B). We also ask the Commission to take the opportunity to revise certain provisions of the P2B Regulation:

- Provide greater clarity on what constitutes 'clear' and 'unambiguous' language;
- Extend the modification notice period for terms and conditions from 15 to 30 days;
- Define limits beyond which the intermediaries cannot put into place arbitrary or unexplained decisions to restrict, terminate or suspend brokerage services by the platform / search engine, based exclusively on the contractual power of the online providers, that neglect the rights of business users to receive a correct service which guarantees consumers' freedom of choice;
- Greater clarity, fairness and respect for the rules defining the parameters adopted by platforms to establish the positioning of business users on the web page. These parameters should be attached to the contract and kept up to date. The results presented to potential customers should not be influenced by reasons unrelated to the interest of the buyer;
- A "portability clause" to be inserted in P2B contracts should be foreseen, allowing business users to preserve their online reputation level when migrating to other online service providers, so as not to disperse credit and information assets built up over time, also to the advantage of the consumers when searching for the most competitive retailers online;
- Any operator active through an online marketplace should be allowed to offer his goods or services at more favourable prices through other channels. No retribution by the platform should be admitted, as otherwise online service providers might abuse their dominant position to determine the pricing policy of their adhering business users;
- Online platforms should be required to offer their users the opportunity to resolve any disputes with internal complaint management systems, to be monitored by the supervisory authorities in charge[6]. For smaller platforms run by SMEs a whole complaints' management system could be however too much of a burden to set up;
- Strengthening Articles 9-12 on dispute resolution, possibly via language similar to that used in Articles 4-6 of the EU Directive on Unfair Trading Practices[7] in B2B relationships in the Food Supply Chain, as small businesses are generally reluctant to launch a complaint against their provider of online intermediary services from fear of retaliatory measures;
- The creation of mediation bodies by the online brokerage services and their representative organisations would be necessary, involving mediators with specific

[5] Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services.

[6] This has been already foreseen by Regulation (EU) 2019/1150, but the latter provision will only apply to larger platforms. This obligation does not apply to platform with less than fifty employees and with an annual turnover lower than 10 million euros.

[7] Directive (EU) 2019/633 of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

knowledge both on platforms functioning, and on the relevant market sector. Further support for commercial users, in similar cases, should come under the form of an obligation for international platforms to provide a professional translation and interpreting service free of charge for individual business users who request for it;

- Review of the codes of conduct, ensuring they are effective and contribute concretely to a fairer and predictable framework for small businesses trading on online platforms.

We support the adoption of a horizontal framework that allows regulators to collect information from large online platforms acting as gatekeepers. We would welcome further transparency from large online platforms and expect that the data provided will allow for greater clarity into the interplay between online platforms, their customers, and their business users.

The focus on data gathering can contribute towards data being more open, portable, or interoperable between different platforms, as this could help enable more effective competition in digital markets. It is necessary that the data obtained from platform activities is not exclusively available to the respective platform. This would result in the platform being able to analyse and use the data exclusively in order to develop its own competing offers and thereby gaining a competitive advantage over those using the platform as a procurement, communication and sales channel[8].

The success of such measures would depend on the careful definition of the trading practices to be prohibited or remedied via regulation and thorough a careful analysis as to the potential spill-over effects on platform business users from regulatory action. It will also largely depend on 1) the regular review and if necessary revision and adaptation of the regulation as well as regular case-by case analysis of platforms, as digital markets are fast moving and do not self-correct by themselves, 2) an effective, timely and simple enforcement of the rules. Throughout the process, we count on the Commission's commitment to its 'think small first' principle and the "SME test"[9].

[8] For a comprehensive view on SMEunited position on access to data, see position paper: https://smeunited.eu/admin/storage/smeunited/smeunited-position-paper-access-to-data-final.pdf.

[9] Commission services are required to develop an impact assessment (IA) when a proposed initiative is likely to have a significant economic, environmental or social impact. Impact on SMEs should be assessed following the "SME test" in the Toolbox and must be included in the final IA report.

1.2 SELF-EMPLOYED OFFERING SERVICES THROUGH PLATFORMS

In the last years we have seen an increasing number of self-employed individuals offering services through online platforms that can either match supply and demand and platforms acting as contractors that offer tasks to be fulfilled, such as bikers, drivers, etc.

Self-employed are not "workers" and therefore labour law designed for workers does not apply to them. The main difference between workers and self-employed is that by definition self-employed do not have an employment relationship. It is for Member States to define the different work statuses, including to differentiate between the notion of workers/self-employed. Indeed depending on the Member State the status of platform workers varies according to the type of work and platforms.

It is highly necessary that self-employed can benefit from basic and adequate social protection, including pension rights, at an affordable price. SMEunited repeats its full support to access to basic social protection at an affordable cost for all self-employed.

The issue of bogus self-employed varies a lot according to countries and sectors. Bogus self-employed are acting on the market as self-employed, but the relationship with their counterpart has the same characteristics as that of an employee. Therefore, if a person is recognised as bogus self-employed, the contract should be requalified and he/she should enjoy the rights and obligations of a worker as defined by national labour law and practices; this should also apply to platforms.

Self-employed have a B2B or B2C relationship with clients. They get paid by customers for products or services they provide. Codes of conduct and trading terms in B2B relations (elaborated at European level) could provide for fair competition between enterprises of all sizes.

Taking into account the reality of new forms of work, and in order to better defend self-employed trading with platforms, there is a need to improve the P2B relationship, avoiding unfair terms and conditions. The P2B regulation provides obligations on platforms for more transparency and fairness in terms and conditions towards the business users – big and small enterprises as well as self-employed of the platform. This includes information on ranking, providing an internal complaint handling system, information on delisting, etc. The regulation goes in the right direction, however still requires more guarantees on fairness for small businesses and self-employed, by ensuring fairness in B2B contract terms and by improving the P2B regulation terms.

2. NEW COMPETITION TOOL (NCT)

In case of unfair and thus anti-competitive behaviour by platforms, in particular the denial of fair data access, effective ex-ante instruments should be available in competition law to remedy such situation.

In particular, easy and effective remedies must be available to all SMEs. To this end, SMEs using online platforms must be able to obtain a quick and unbureaucratic overview of their rights as users of these platforms and of the applicable transparency provisions. Otherwise, legal uncertainty may prevent SMEs from lodging a complaint.

The complaint possibilities in competition law are currently not sufficient to effectively address the unfair behaviour of some online platforms. First, the complaint procedures are lengthy and merely on an ex post complaint basis and too costly, especially for small companies. Second, it is usually unclear to the companies concerned whether such a complaint would have any chance of success at all, as it is often difficult for them to determine whether the online platform which behaves unfairly abuses of a dominant position in the market. A targeted revision of competition law should therefore ensure that in the case of unfair or anticompetitive behaviour by large "gatekeeper" platforms an effective instrument is available to demand a change in behaviour of the platform in a quick and unbureaucratic manner, irrespective of their market share. To that end, clear criteria need to be set in order to determine whether a major online platform has become a gatekeeper for other providers due to their scale and reach. Because once an online platform acquires a gatekeeper position, it can foreclose markets and impede innovation from other players or new entrants, especially in downstream markets, which are dependent on the same platform for access to customers. The NCT should help to keep markets open and prevent such gatekeeper platforms from entering into anti-competitive practices, particularly but not exclusively, if these platforms are dominant[10].

As far as the European Commission's roadmap on the NCT is concerned, SMEunited believes that the Commission should carry-out market investigations, even in the absence of dominance by a single player. SMEunited therefore favours option 3 - "A market structure-based competition tool with a horizontal scope" - which would allow the Commission to impose behavioural and, where appropriate, structural remedies to improve the functioning of markets independently from the finding of an infringement of Article 101 or 102 TFEU.

Finally, any new and existing tools need to be consistently enforced also towards players not established in the EU but operating in the single market. In addition, new measures should be evidence based and should analyse in depth existing shortcomings of EU competition rules.

[10] In the automotive aftermarket, challenges to preserve competition timely and adequately are apparent and foreclosure from the abilities to compete effectively is already a major topic.