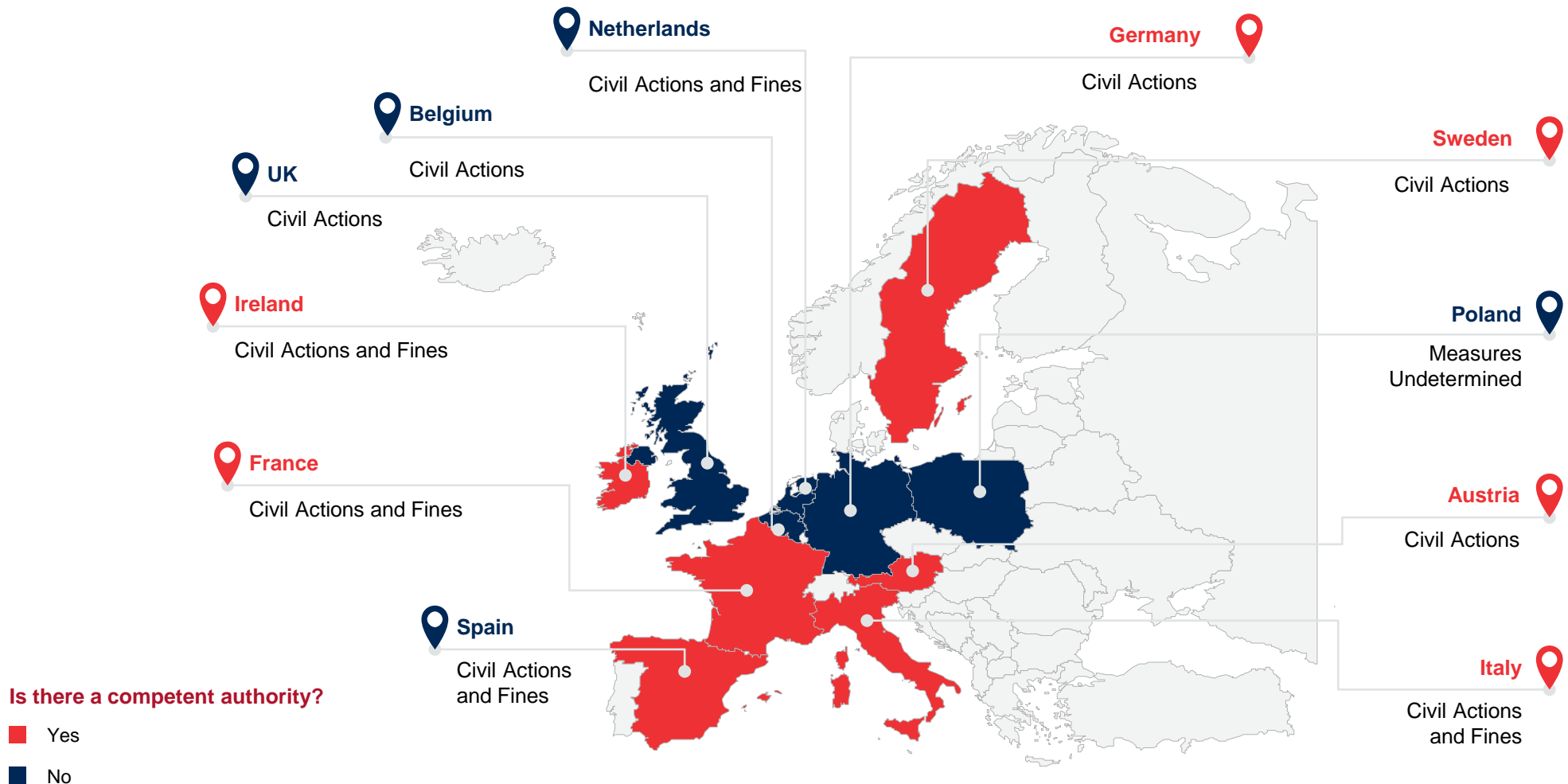


## P2B - competent authority and available enforcement measures



## P2B - EU enforcement guidance

Just over two years since the coming in to force of the Platform to Business Regulation ("**P2B**"), we take another look at developments in relation to enforcement action in key EU Member States and the UK. The past year has seen a notable increase in activity in Italy in particular, as well as several instances of enforcement in France and Germany. We also understand that competent authorities in several EU Member States are working on guidance in relation to P2B.

Countries	Has a competent authority been appointed to enforce P2B?	What enforcement measures will there be? Has there been any enforcement action to date?	Has there been any guidance or comment from the government or competent authority in relation to P2B?
Austria	Yes. The Austrian Federal Competition Authority, the Austrian Federal Economic Chamber and Austrian Association for Protection against Unfair Competition have all been appointed to take action for breaches of P2B before competent national courts.	It's likely that action before the courts (cease-and-desist claims, damages) will be the only possible enforcement measure.  We are not aware of any enforcement of P2B in Austria to date.	The Austrian Federal Economic Chamber and the Austrian Federal Competition Authority have issued guidance with short summaries of P2B to help businesses understand P2B; see <a href="#">here</a> , <a href="#">here</a> (available in German only) and <a href="#">here</a> (available in English).
Belgium	The enforcement of P2B has been allocated to a special unit within the Economic Inspection department of the Ministry of Economic Affairs.  The general policy note relating to the regulation of the economic sector in Belgium from 29 October 2021 (see <a href="#">here</a> ) states that, in 2022, this specialised "B2B" unit would focus on the enforcement of P2B.  If the violation of P2B also qualifies as a violation of other aspects of economic law, then the Economic Inspection department and the Belgian Competition Authority also have enforcement powers to remedy violations.	It is yet to be seen how the "B2B" unit will remedy violations of P2B. It is likely that its enforcement of P2B will be in line with the usual enforcement practice of the Economic Inspection department of the Ministry of Economic Affairs, which can range from RFIs to formal warnings and monetary settlements.  This regulatory enforcement will overlap with judicial enforcement through the courts (e.g. the court can rule on an application for cessation of an activity that is not compliant with P2B).  In addition, as mentioned, where the violation of P2B also qualifies as a violation of other aspects of economic law, then the Economic Inspection department and the Belgian Competition Authority also have enforcement powers to remedy such violations.  We are not aware of any enforcement of P2B in Belgium to date.	The federal Ministry of Economic Affairs has specifically referred to the European Commission's guidelines on its web page that describes P2B (see <a href="#">here</a> , in French).  Also, we understand from the general policy note relating to the regulation of the economic sector in Belgium from 29 October 2021 that enforcement of P2B will be on the agenda for 2022 as the "B2B" unit is now specifically appointed to remedy violations of P2B.

## P2B - EU enforcement guidance

Countries	Has a competent authority been appointed to enforce P2B?	What enforcement measures will there be? Has there been any enforcement action to date?	Has there been any guidance or comment from the government or competent authority in relation to P2B?
France	No specific authority has been appointed to enforce P2B. The General Directorate for Competition Policy, Consumer Affairs and Fraud Control (" <b>DGCCRF</b> ") is therefore entitled to bring public proceedings against companies that do not comply with P2B. Breaches of P2B may also be pursued before the French courts.	<p>The French Commercial Code ("<b>FCC</b>") requires a provider of online intermediation services ("<b>OISP</b>") to comply with P2B obligations. In case of a breach, the OISP must remedy the damage caused.</p> <p>In case of a violation, an action may be brought before the competent civil or commercial court, either by an interested party, by the public prosecutor's office, by the Minister of the Economy or by the DGCCRF.</p> <p>Any interested party may ask the court to order the cessation of the breach and seek compensation for damage suffered. The affected business user can also request unlawful clauses or contracts to be declared null and void and demand the return of undue benefits.</p> <p>The Minister of the Economy or the public prosecutor's office may (a) ask the court to order the cessation of the practices; (b) request the nullification of unlawful clauses or contracts; (c) demand restitution of the undue benefits obtained; or (d) request the imposition of a civil fine, the amount of which may not exceed the highest of: (i) 5 million euros; (ii) three times the amount of any undue benefits received or obtained; or (iii) 5% of the revenue, excluding taxes, generated in France by the relevant OISP during the last fiscal year.</p> <p>The court must also order the publication of the decision.</p>	No. However, we understand from informal discussions with the Italian competent authority, AGCOM, that the DGCCRF is drafting guidance.

## P2B - EU enforcement guidance

Countries	Has a competent authority been appointed to enforce P2B?	What enforcement measures will there be? Has there been any enforcement action to date?	Has there been any guidance or comment from the government or competent authority in relation to P2B?
France		<p>In addition, the DGCCRF may require any OISP, upon reasonable notice, to comply with the provisions of P2B. The DGCCRF can also require an OISP to cease any action or to remove any clause that is contrary to P2B.</p> <p>Where the OISP has not complied, the DGCCRF may in certain circumstances impose an administrative fine, the amount of which may not exceed EUR 15,000.</p> <p>In certain circumstances, the DGCCRF may also impose a daily penalty not exceeding 0.1% of the worldwide turnover (excluding taxes) earned during the last financial year. In the event of total or partial failure to comply, or late compliance, the DGCCRF shall impose the fine, and may publish the injunction measure on its website or other media at the expense of the infringing OISP.</p> <p>In April 2022, the DGCCRF ordered a major platform to remove various clauses that it found to be unbalanced contrary to the requirements of the French Commercial Code, as well as infringements of P2B. Having been found to be in breach of this injunction, the platform was been required to pay a penalty of 90,000 euros per day of delay.</p> <p>We are not aware of any other enforcement of P2B in France to date.</p>	

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Germany	No. There has been no formal appointment of a competent authority to date.	<p>Breaches of P2B will be treated as breaches of unfair competition law which can be enforced by certain organisations (e.g., competitors, consumer protection agencies, etc.) using cease-and-desist and/or damages claims.</p> <p>There has not been any enforcement action by authorities to date. The Federal Ministry of Trade and Industry stated in this regard that enforcement by the state authorities is not envisaged in Germany; rather, enforcement is to take place through civil law mechanisms.</p> <p>Court decisions on enforcement to date mainly relate to the blocking of accounts, e.g. (a) a successful preliminary injunction by a seller on an online marketplace to unblock and allow the use of the seller's account again after the marketplace blocked the account because of an alleged violation of its terms of use; and (b) two judgments upholding the marketplace's decisions to block seller accounts.</p>	The Federal Ministry of Trade and Industry has stated that P2B will not be enforced by state authorities.
Italy	Yes. Law No. 178/2020, issued on 30 December 2020 (" <b>P2B Law</b> "), appoints the Italian Communications Regulatory Authority (Autorità per le garanzie nelle comunicazioni - " <b>AGCOM</b> ") to enforce P2B. The P2B Law also specifies that, notwithstanding AGCOM's enforcement powers, the Italian Competition Authority (" <b>ICA</b> ") remains competent in cases of unfair commercial practices.	<p>AGCOM may issue sanctions between 2% and 5% of the turnover of the company generated in the previous fiscal year.</p> <p>In addition, in respect of unfair commercial practices, the Italian Consumer Protection Code protects not only consumers but also so-called "micro-enterprises", i.e., entities, companies or associations that have (i) less than ten employees; and (ii) an annual turnover or a total annual balance sheet not exceeding EUR 2,000,000. Accordingly, if there is a breach of P2B to the detriment of micro-enterprises, this may also be viewed as an unfair commercial practice. The ICA may issue an administrative fine ranging from EUR 5,000 to EUR 5,000,000. In addition, the ICA may also order the publication of its decision at the costs of the infringing company.</p>	<p>Yes. On 1 June 2022, AGCOM published its Resolution no. 156/22/CONS, containing a draft set of guidelines on the interpretation and application of P2B ("<b>Guidelines</b>"), opening them to public consultation. All interested OISPs had the option to (a) submit comments and suggestions on the Guidelines; and (b) ask to present their comments to AGCOM at a hearing.</p> <p>We are aware that many OISPs have attended hearings to present their comments to AGCOM.</p> <p>AGCOM will now evaluate all of the inputs received and will likely issue the final guidelines towards the end of 2022.</p>

## P2B - EU enforcement guidance

Countries	Has a competent authority been appointed to enforce P2B?	What enforcement measures will there be? Has there been any enforcement action to date?	Has there been any guidance or comment from the government or competent authority in relation to P2B?
Italy	<p>The P2B Law also imposes two new requirements on providers of online intermediation services and online search engines (as defined in P2B):</p> <ol style="list-style-type: none"> <li><b>Registration:</b> OISPs targeting Italy must register with the Registry of Communication Operators ("ROC"), which is managed by AGCOM (as per AGCOM Resolution 200/21/CONS, available <a href="#">here</a> in Italian only).</li> <li><b>Annual contribution:</b> OISPs targeting Italy must pay to AGCOM an annual contribution equal to a percentage of the revenues generated from the provision of their services in Italy. In 2022, as well as in 2021, this percentage was equal to 0.15%, but in any subsequent year(s) AGCOM will be free to increase this percentage to up to 0.2%. The contribution is to cover the administrative costs incurred by AGCOM for the exercise of its new "regulatory, supervisory, dispute settlement and sanctioning functions" (as per AGCOM Resolution 379/21/CONS, available <a href="#">here</a> in Italian only).</li> </ol> <p>In addition to that, as a consequence of being registered with the ROC, OISPs targeting Italy will have to file with AGCOM on an annual basis the so-called System Economic Information ("IES", in Italian), which is a communication concerning the revenues generated by the company in the previous year. This is typically due by 31 July each year. On 21 May 2021 AGCOM published Resolution 161/21/CONS (available <a href="#">here</a>, in Italian only), extending the obligation to file the IES to OISPs.</p>	<p>Business users may also pursue civil actions for breaches of P2B before the Italian courts.</p> <p>We are aware that AGCOM is taking enforcement action against some OISPs to ensure compliance with P2B. In our experience, however, AGCOM's approach so far is to appeal to the OISPs to comply with their instructions, rather than to issue sanctions for non-compliance.</p> <p>In addition, AGCOM has issued a number of requests for information to major OISPs so as to assess whether they were effectively complying with P2B and the measures they have adopted in this respect.</p>	<p>Italy seems to be the first country that has decided to publish this type of guidance, but according to informal indications from AGCOM, France and Ireland should follow. As mentioned below, the Dutch competent authority, the ACM, has announced that it is also working on P2B guidance.</p> <p>The Italian version of the Guidelines can be found <a href="#">here</a>.</p>

## P2B - EU enforcement guidance

Countries	Has a competent authority been appointed to enforce P2B?	What enforcement measures will there be? Has there been any enforcement action to date?	Has there been any guidance or comment from the government or competent authority in relation to P2B?
Ireland	<p>Yes. The Irish government has supported implementation of P2B through the introduction of a <a href="#">statutory instrument</a> (the "Irish SI") with an effective date of 12 July 2020. The Irish SI appoints the Competition and Consumer Protection Commission ("CCPC") as the designated public body for the purposes of Article 14(5)(b) P2B.</p>	<p>The Irish SI provides that where an OISP or a provider of an online search engine is found in breach of P2B, it will be liable on summary conviction to a class A fine (up to EUR 5,000) or to a term of imprisonment not exceeding 12 months, or both. The Irish SI also updates the Consumer Protection Act 2007 (as amended), so that enforcement actions can be taken by the CCPC under the Consumer Protection Act framework.</p> <p>It is unknown, at this stage, how proactive the CCPC will be in terms of enforcing the Irish SI. There has been no recorded or reported enforcement actions to date. However, we are aware that the CCPC has contacted certain OISPs in relation to their compliance with P2B. The Irish SI provides that the CCPC will maintain a register of unlawful acts that have been subject to court orders (Regulation 5) in accordance with Article 14(2) P2B.</p>	<p>Yes. On 20 November 2020, the CCPC published non-binding guidance on their website entitled "Platform to Business Regulation (P2B) – what online platforms need to know". The article detailed the entities to which P2B applies, why it was introduced, obligations under P2B and the CCPC's role in enforcement. See <a href="#">here</a>.</p> <p>The CCPC has created a specific page on its website with additional details about P2B (see <a href="#">here</a>). The webpage includes: links to relevant guidance from the EU Commission, an online form for businesses to contact the CCPC with any complaints and a register of unlawful acts that have been subject to court orders (as of September 2022 there are no court orders listed).</p> <p>We further understand from informal discussions with the Italian competent authority, AGCOM, that the CCPC is drafting guidance on P2B.</p>
Netherlands	<p>Not yet. However, a Dutch draft P2B bill ("<a href="#">Dutch Bill</a>") was published for consultation on 26 May 2021, pursuant to which the Dutch Authority for Consumers and Markets ("<a href="#">ACM</a>") will be appointed to enforce P2B in the Netherlands. The ACM is the Dutch regulator responsible for oversight of competition, telecom/post and consumer protection laws.</p> <p>Note that this bill is not yet final. The Dutch Bill must first be presented to the Council of State for advice, after which it must go through the legislative process in the House of Representatives and the Senate.</p>	<p>Under the Dutch Bill, the ACM is granted the power to impose binding compliance orders, orders subject to a penalty, and administrative fines (up to EUR 870,000 or 1% of turnover of the violator, which may be increased by 100% in case of a repeat offender).</p> <p>In addition to enforcement powers of the ACM, there is the possibility for affected business users to invoke P2B directly before the civil courts, including by collective action.</p> <p>In 2021, the ACM undertook a field study to assess how OISPs deal with P2B and whether there is a need for regulatory guidance. As a result, in May 2022, ACM communicated that OISPs need more clarity on P2B compliance, and announced that it is working on P2B guidance.</p>	<p>The Dutch government published a Q&amp;A factsheet on their website about the scope and consequences of P2B in the Netherlands (available in Dutch only <a href="#">here</a>) and two more general items about the aims of P2B (available in Dutch only <a href="#">here</a> and <a href="#">here</a>).</p> <p>Also, in February 2020, the Ministry of Economic Affairs and Climate Policy sent an explanatory letter about P2B to the Dutch House of Representatives (available in Dutch only <a href="#">here</a>), elaborating on the scope, transparency requirements and dispute resolution procedures.</p> <p>The ACM has not yet published any regulatory guidance on P2B. However, triggered by the introduction of P2B (amongst other things), the ACM questioned the future viability of enforcement tools against online platforms in a broader sense. This is a matter of discussion within the Dutch government. As explained, P2B guidance from ACM is expected.</p> <p>The explanatory memorandum to the Dutch Bill provides for legislative guidance as to the implementation and enforcement of P2B in the Netherlands (available in Dutch only, <a href="#">here</a>).</p>



## P2B - EU enforcement guidance

Countries	Has a competent authority been appointed to enforce P2B?	What enforcement measures will there be? Has there been any enforcement action to date?	Has there been any guidance or comment from the government or competent authority in relation to P2B?
Poland	No.	As yet, there are no draft bills and there is no information about expected legislative work.  We are not aware of any enforcement of P2B in Poland to date.	No.
Spain	Yes. The Spanish Parliament passed a piece of legislation on November 12th, 2021 amending the Spanish e-commerce Act (" <b>LSSI</b> "), which includes provisions aimed at supplementing P2B. Supervisory and sanctioning competence in respect of P2B is allocated to (i) the Ministry of Economic Affairs and Digital Transformation; and (ii) the Secretary of State for Digitalization and Artificial Intelligence.  In addition, non-compliance with P2B could imply infringements of other regulations and therefore other sanctions, e.g. in the field of data protection, in which case the Spanish data protection authority would be responsible for the imposition of sanctions for the commission of the relevant infringements.	The various violations of P2B will be subject to the sanctioning regime of the LSSI, which categorises such violations as minor or serious. In practice, this means that violations of P2B in Spain could lead to a penalty of up to EUR 150,000.  In addition, business users can pursue civil actions for breaches of P2B before the Spanish courts.  We are not aware of any enforcement of P2B in Spain to date.	No.
Sweden	Yes. The National Board of Trade ( <i>Kommerskollegium</i> ) has been appointed to enforce P2B in Sweden, and the Patent and Market Court (Patent- och marknadsdomstolen) will process cases relating to P2B.	The National Board of Trade may enforce P2B by: (i) supporting and informing businesses of the provisions of P2B and providing practical support for the application of P2B; and (ii) initiating consultations with businesses that the Board deems to be in breach of P2B.  Qualifying organisations may take action before the Patent and Market Court to stop or prohibit any non-compliance. Such orders may be combined with a fine.  We are not aware of any enforcement of P2B in Sweden to date.	No.



## P2B - EU enforcement guidance

Countries	Has a competent authority been appointed to enforce P2B?	What enforcement measures will there be? Has there been any enforcement action to date?	Has there been any guidance or comment from the government or competent authority in relation to P2B?
UK	No. The UK government has published a <a href="#">statutory instrument</a> (" <a href="#">Brexit SI</a> ") setting out how P2B will apply after the end of the Brexit transition period (" <a href="#">UK P2B</a> "). The Brexit SI removes the references to "public bodies" in Article 14(1) UK P2B, which suggests that the UK government does not intend to appoint a competent authority to enforce UK P2B.	<p>Since it appears that the UK government does not intend to appoint a competent authority to enforce UK P2B, it is likely that enforcement will be limited to actions brought before the courts by business users and qualifying organisations (if and when they are designated). The UK government has enacted a <a href="#">statutory instrument</a> setting out how this will work ("<a href="#">Enforcement SI</a>"). In particular, business users may bring a claim for loss or damage in court in relation to breaches by OISPs of Articles 3, 4 and 8 UK P2B. Qualifying organisations may seek "an appropriate remedy" (defined as an injunction or "any other appropriate remedy or relief") for breaches by OISPs of Articles 3(1), 5, 6, 7, 9, 10, 11 and 12 UK P2B. The court may grant any such remedy even where there is no evidence of proof of actual loss or damage or intention or negligence on the part of the OISP.</p> <p>The Brexit SI also amends the territorial scope of UK P2B. References in Article 1(2) P2B to the "Union" are substituted with references to the "United Kingdom". This means that business users established outside of the UK selling to UK consumers will not be protected by UK P2B. On the other hand, UK platforms that are used by EU-based business users selling to EU consumers will still be protected by P2B (as it applies in the EU).</p> <p>We are not aware of any enforcement of UK P2B to date.</p>	No.

If you would like to discuss P2B compliance, please don't hesitate to contact us.



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