

European Union’s Regulation on Online Intermediation Services and Search Engines

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European Union’s (“EU”) proposal for regulation on online intermediation services and search engines (“Regulation”) is expected to be published shortly on the Official Journal of the European Union and become effective twelve months following its date of publication.

The purpose of the Regulation is set out as contributing to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities.

A. Definitions

The Regulation defines online intermediation services as *information society services which allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded and which are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers* (Article 2/2 of the Regulation).

Online search engine is defined as *a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found* (Article 2/5 of the Regulation).

B. Scope and Jurisdiction of the Regulation

Pursuant to Article 1/1 of the Regulation, the Regulation applies to online intermediation services and online search engines provided, or offered to be provided, to business users and corporate website users (i) that have their place of establishment or residence in the EU and (ii) that, through those online intermediation services or online search engines, offer goods or services to consumers located in the EU, irrespective of the place of establishment or residence of the providers of those services and irrespective of the law otherwise applicable.

In other words, the Regulation would apply to providers of online intermediation and online search engine services regardless of whether they are established in a Member State or outside the EU, provided that these two cumulative conditions are met: (i) the business users or corporate website users should be established in the EU and (ii) the business users or corporate website users should, through the provision of those services, offer their goods or services to consumers located in the EU at least for part of the transaction. As per the Recital, in order to determine whether business users or corporate website users are offering goods or services to consumers located in the EU, it would be necessary to confirm whether it is apparent that the business users or corporate website users *direct their activities* to consumers located in EU.

The Regulation shall not apply to online payment services or to online advertising tools or online advertising exchanges, which are not provided with the aim of the facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers (Article 1/2 of the Regulation).

The Regulation also does not apply to peer-to-peer online intermediation services without the presence of business users, pure business-to-business online intermediation services which are not offered to consumers (Paragraph 11 of the Recital).

The preamble of the Regulation indicates that it is without prejudice to EU law, in particular EU law applicable in the areas of judicial cooperation in civil matters, competition, data protection, trade secrets protection, consumer protection, electronic commerce and financial service.

C. Obligations Set Out by the Regulation

The Regulation imposes a number of obligations for online intermediation services and online search engines. Below are the obligations set out by the Regulation under two separate headings for (i) online intermediation services and (ii) online search engines.

1. Online Intermediation Services

Terms and Conditions

- To ensure that the general terms and conditions enable business users to determine the commercial conditions for the use, termination and suspension of online intermediation services, and to achieve predictability regarding their business relationship, providers of online intermediation services (“Intermediaries”) should draft terms and conditions in plain and intelligible language. Terms and conditions should not be considered to have been drafted in

plain and intelligible language where they are vague, unspecific or lack detail on important commercial issues and thus fail to give business users a reasonable degree of predictability on the most important aspects of the contractual relationship (Article 3 of the Regulation).

- Intermediaries should ensure, towards their business users, the transparency of any additional distribution channels and potential affiliate programs that they might use to market those goods or services (Article 3/1(d) of the Regulation).

- Intermediaries should within their terms and conditions include general, or more detailed, information if they so wish, regarding the overall effects, if any, of those terms and conditions on the ownership and control of intellectual property rights of the business user. Such information could, inter alia, include information such as the general usage of logos, trademarks or brand names (Article 3/1(e) of the Regulation).

- Intermediaries should also ensure that the terms and conditions are easily available at all stages of the commercial relationship, including to prospective business users at the pre-contractual phase, and that any changes to those terms are notified on a durable medium to business users concerned. Notification shall be made within a set notice period which is reasonable and proportionate in light of the specific circumstances and which is at least 15 days (Article 3/2 of the Regulation).

That notice period should not apply where, and to the extent that, it is waived in an unambiguous manner by the business user concerned or where, and to the extent that, the need to implement the change without respecting the notice period stems from a legal or regulatory obligation incumbent on the service provider under EU or national law. However, proposed editorial changes should not be covered by the term ‘change’ in as far as they do not alter the content or meaning of terms and conditions.

Identity of the Business Users

- Intermediaries shall ensure that the identity of the business user providing the goods or services on the online intermediation services is clearly visible (Article 3/5 of the Regulation).

However, this provision should not be understood as a right for business users to unilaterally determine the presentation of their offering or presence on the relevant online intermediation services (Paragraph 21 of the Recital).

Restriction, Suspension, Termination

- Intermediaries should provide, prior to or at the time of the restriction or suspension taking effect, with a statement of reasons for that decision on a durable medium. Intermediaries should also allow an opportunity for business users to clarify the facts that led to that decision in the framework of the internal complaint-handling process, which will help the business user, where this is possible, to re-establish compliance.

In addition, where the Intermediary revokes the decision to restrict, suspend or terminate, for example because the decision was made in error or the infringement of terms and conditions that led to this decision was not committed in bad faith and has been remedied in a satisfactory manner, the Intermediary should reinstate the business user concerned without undue delay, including providing the business user with any access to personal or other data, or both, available prior to the decision (Article 4 of the Regulation).

- The termination of the whole of the online intermediation services and the related deletion of data provided for the use of, or generated through, the provision of online intermediation services represent a loss of essential information which could have a significant impact on business users and could also impair their ability to properly exercise other rights granted to them by this Regulation. Therefore, the Intermediary should provide the business user concerned with a statement of reasons on a durable medium, at least 30 days before the termination of the provision of the whole of its online intermediation services enters into effect (Article 4/2 of the Regulation).

In order to ensure proportionality, Intermediaries should, where reasonable and technically feasible, delist only individual goods or services of a business user. Termination of the whole of the online intermediation services constitutes the most severe measure (Paragraph 23 of the Recital).

- Business users should be offered clarity as to the conditions under which their contractual relationship with Intermediaries can be terminated. Intermediaries should ensure that the conditions for termination are always proportionate and can be exercised without undue difficulty.

Business users should be fully informed of any access that Intermediaries maintain, after the expiry of the contract, to the information that business users provide or generate in the context of their use of online intermediation services (Paragraph 32 of the Recital).

Rankings

- Intermediaries should outline the main parameters determining ranking, in order to improve predictability for business users, to allow them to better understand the functioning of the ranking mechanism and to enable them to compare the ranking practices of various providers (Article 5/1 of the Regulation).
- The description of the main parameters determining ranking should include an explanation of any possibility for business users to actively influence ranking against remuneration, as well as an explanation of the relative effects thereof. Remuneration could refer to payments made with the main or sole aim to improve ranking, as well as indirect remuneration in the form of the acceptance by a business user of additional obligations of any kind which may have this as its practical effect, such as the use of services that are ancillary or of any premium features (Article 5/2 of the Regulation).
- Intermediaries should not be required to disclose the detailed functioning of their ranking mechanisms, including algorithms (Article 5/6 of the Regulation). Consideration of the commercial interests of Intermediaries should never lead to a refusal to disclose the main parameters determining ranking (Paragraph 27 of the Recital).

Ancillary Goods and Services

- Intermediaries offering goods or services to consumers that are ancillary to a good or service sold by a business user, using their online intermediation services, should set out in their terms and conditions a description of the type of ancillary goods and services being offered (Article 6 of the Regulation).

This description should in all circumstances include whether and under what conditions a business user is allowed to offer its own ancillary good or service in addition to the primary good or service that it is offering through the online intermediation services (Paragraph 29 of the Recital).

Differentiated Treatment

- Where Intermediaries themselves offer certain goods or services to consumers through their own online intermediation services, or do so through a business user which they control, they should act in a transparent manner and provide an appropriate description of, and set out the considerations for any differentiated treatment, whether through legal, commercial or technical

means, such as functionalities involving operating systems that they might give in respect of goods or services they offer themselves compared to those offered by business users (Article 7 of the Regulation).

To ensure proportionality, this obligation should apply at the level of the overall online intermediation services, rather than at the level of individual goods or services offered through those services (Paragraph 31 of the Recital).

Data Obligations

- Intermediaries should provide business users with a clear description of the scope, nature and conditions of their access to and use of certain categories of data. The description should be proportionate and might refer to general access conditions, rather than an exhaustive identification of actual data, or categories of data. However, identification of and specific access conditions to certain types of actual data that might be highly relevant to the business users could also be included in the description. Altogether, the description should enable business users to understand whether they can use the data to enhance value creation, including by possibly retaining third-party data services (Paragraph 33 of the Recital, Article 9 of the Regulation).

- Business users should in particular be made aware of any sharing of data with third parties that occurs for purposes which are not necessary for the proper functioning of the online intermediation services; for example where Intermediary monetizes data under commercial considerations. To allow business users to fully exercise available rights to influence such data sharing, Intermediaries should also be explicit about possibilities to opt out from the data sharing where they exist under their contractual relationship with the business user (Paragraph 34 of the Recital, Article 9 of the Regulation).

Competition and Unfair Commercial Practices

Without prejudice to national and EU laws in the areas of competition and unfair commercial practices, and the application of such laws, Intermediaries should set out the grounds for restricting the ability of business users to offer goods or services to consumers under more favorable conditions through other means than through those online intermediation services, in particular with reference to the main economic, commercial or legal considerations for the restrictions (Article 10 of the Regulation).

Internal Complaint-Handling System

- Intermediaries should provide an internal complaint-handling system which is easily accessible and free of charge for business users. Internal complaint-handling system should be based on principles of transparency and equal treatment applied to equivalent situations (Article 11/1 of the Regulation).

The internal complaint-handling system should aim to ensure that a significant proportion of complaints can be solved bilaterally by the Intermediary and the relevant business user in a reasonable period of time. Any attempt to reach an agreement through the internal complaint handling-process shall not affect the rights of providers of online intermediation services or business users to initiate judicial proceedings at any time during or after the internal complaint-handling process (Paragraph 37 of the Recital).

- Intermediaries should publish and, at least annually, verify information on the functioning and effectiveness of their internal complaint-handling system to help business users to understand the main types of issues that can arise in the context of the provision of different online intermediation services and the possibility of reaching a quick and effective bilateral resolution and where significant changes are needed, they shall update that information (Article 11/4 of the Regulation).

Mediation

- As per Article 12 of the Regulation, Intermediaries shall identify in their terms and conditions two (2) or more mediators with which they are willing to engage to attempt to reach an agreement with business users on the settlement, out of court, of any disputes in relation to the provision of the online intermediation services. Intermediaries shall bear a reasonable proportion of the total costs of mediation in each individual case.

2. Online Search Engines

Rankings

- As per Article 5 of the Regulation, search engines should provide description regarding the main parameters which individually or collectively determine the ranking of all indexed websites, the relative importance of those main parameters, and keep such description in plain language.

These descriptions should take into account (i) characteristics of the goods and services provided, (ii) relevance of those characteristics for the consumers and (iii) design characteristics of the website used by corporate website users. However, search engines are not obliged to disclose algorithms or any information manipulating search results within this scope.

Differentiated Treatment

- Search engines should set out a description of any differentiated treatment in relation to goods or services offered to consumers through the relevant search engines, or a corporate website user which they control. This description should contain information regarding any differentiated treatment applied whether through legal, commercial or technical means in respect of goods or services offered (Article 7 of the Regulation).

In conclusion, the Regulation imposes significant new obligations on Intermediaries and search engine operators, particularly for their B2B transactions.

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