

## New EU legislation aims at balancing relationships between online platforms and businesses

While we hear daily about personal data violations or investigations of tech giants and debates are heated in regards to the potential new tax instruments applicable to their business models, a recently adopted EU Regulation<sup>1</sup> (hereinafter “Regulation”) seems to be drawing much less attention, although its impact on the digital economy may be substantial.

The Regulation is arguably the first legislative piece of its kind in the world and establishes transparency, fairness and “effective redress” for business users of providers of online intermediation services and search engines (hereinafter “Online platforms”). Considering that Online platforms act as gateways for thousands of businesses and millions of consumers who therefore are largely dependent on such platforms, the Regulation provides for measures to tackle the imbalance of power typically existing in these commercial relationships. Online platforms must be compliant with the new rules by 12 July 2020.

### Scope

The Regulation covers online intermediation services and online search engines that: i) provide/offer their services to businesses established in the EU, and ii) offer goods or services to consumers located in the EU. The Online platforms concerned include *inter alia* third-party e-commerce market places (e.g., Amazon Marketplace), app stores (e.g., Apple App Store), social media for business (e.g., Facebook pages set for business purposes), price comparison tools (e.g., Google Shopping), as well as online search engines (e.g., Google Search). Outside of the scope of the Regulation remain online advertising, online payment services, peer-to-peer online intermediation services or pure B2B online intermediation services which are not offered to consumers.

The Regulation spells out several types of new requirements depending on the services concerned.

### Requirements applying to both providers of online intermediation services and search engines

Ranking. It is generally known that ranking is a critical issue for online visibility and sales which can make or break businesses. Thus, Online platforms are required to set the main parameters determining ranking (e.g., location data, fast performance, etc.) and explain their relative importance. They must also include an explanation of any possibility for businesses to influence the ranking against direct or indirect remuneration. As we see it, outlining those parameters beforehand should improve predictability for business users and enable them to compare the ranking practices of different providers. Further guidelines on the matter should be adopted by the European Commission and we expect these would facilitate better understanding and compliance with these obligations.

Differentiated treatment. The Regulation requires that Online platforms act transparently and disclose any differentiated treatment (whether through legal, commercial or technical means) they grant to their own products compared to those of other businesses (e.g., an online market place that hosts third party goods but also sells goods itself).

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<sup>1</sup> 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

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## Requirements applying only to providers of online intermediation services

Terms and conditions. The Regulation aims to provide greater legal certainty and clarity with respect to the rules governing the relationship with providers of online intermediation services and limit potentially harmful trading practices, as well as sudden and unexpected changes in the terms and conditions. Thus, intermediaries are expected to draft their terms and conditions in plain and intelligible language and make them easily available to business users, including in the pre-contractual stage of the commercial relationship. Further, they must communicate any changes thereto well in advance.

Restriction, suspension and termination. Intermediaries can have legitimate reasons to decide to restrict, suspend or terminate the provision of their services to a given business user, including by delisting or restricting individual listings of their goods or services, “dimming” or effectively removing search results. However, given that such decisions can significantly affect the interests of the respective business user, a statement of reasons for that decision must be provided prior to or at the time of the restriction or suspension taking effect.

Ancillary goods and services. The terms and conditions of online intermediation services must describe whether ancillary goods and services are offered by the platform or by third parties and if so, under what conditions business users of the platform may offer such products of their own. Examples of such ancillary goods/services include an upgrade or a customization tool linked to a specific product or repair services for a specific good.

“Most-favoured-nation” clauses. Basically, if an intermediary restricts a business’s ability to offer the same goods and services to consumers under different conditions elsewhere, it must include the grounds for this restriction in its terms and conditions. This transparency obligation should however not be understood as affecting the assessment of the legality of such restrictions under other EU acts or national law, including in the areas of competition and unfair commercial practices, and the application of such laws.

Dispute resolution. Intermediaries are required to establish an internal complaint-handling system that is easily accessible and free to use. They must also use mediation as a means to resolve disputes out of court. The Regulation further establishes that collective proceedings may be brought by representative organizations and by public bodies.

## Enforcement

The Regulation does not provide for enforcement mechanisms or sanctions in case of breaches of its requirements. The adequate and effective enforcement of the Regulation is to be ensured by each Member State, which will have to implement “proportionate and dissuasive” measures applicable to infringements. Potential claims for damages related to a breach under the Regulation also remain within the framework of each Member State’s national legislation without special provisions at the level of the Regulation.

## Looking forward

There is less than a year for Online platforms to comply with the new requirements and for business users to become aware of the new rules. While enforcement will depend on the rules and authorities of individual states, the Regulation is an important legislative development which would hopefully result in a fairer and more predictable business environment.