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Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**on promoting fairness and transparency for business users of online intermediation**  
**services**

(Text with EEA relevance)

{SEC(2018) 209 final} - {SWD(2018) 138 final} - {SWD(2018) 139 final}

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE PROPOSAL**

#### **• Reasons for and objectives of the proposal**

Online platforms are key enablers of digital trade. At present, more than a million EU enterprises trade through online platforms in order to reach their customers,<sup>1</sup> and it is estimated that around 60% of private consumption and 30% of public consumption of goods and services related to the total digital economy are transacted via online intermediaries.<sup>2</sup> These online intermediation activities usually benefit from important data-driven direct and indirect network effects which tend to result in only a limited number of successful platforms per intermediated segment of the economy. This growing intermediation of transactions through online platforms, combined with strong indirect network effects that can be fuelled by data-driven advantages by the online platforms, lead to an increased dependency of businesses on online platforms as quasi "gatekeepers" to markets and consumers. The asymmetry between the relative market strength of a small number of leading online platforms – not necessarily dominant in the sense of competition law – is exacerbated by the inherently fragmented supply-side consisting of thousands of small merchants. To the extent these exist, a similar dynamic is not observed in relation to online platforms that intermediate business-to-business (B2B) relations, where both of the business users and the online platform tend to constitute large and sophisticated firms that are more readily able to ensure balanced contractual relationships. A Commission study from 2006<sup>3</sup> observed that this awareness of risks was one factor that held back the widespread adoption of B2B e-markets.

The providers of online intermediation services covered by the present initiative include in principle online e-commerce market places, online software application stores and online social media. These different types of online intermediation services all aim to facilitate, through the provision of information society services, the initiating of direct transactions between contractually bound business users and consumers, irrespective of whether the ultimate transactions are executed online or offline. In order to facilitate such direct transactions, these online intermediation services all essentially allow for an online presence of business users that offer goods or services to consumers, without those business users being required, in principle, to operate a standalone website. In addition to allowing for an online presence of business users, online intermediation services frequently facilitate direct communications between individual business users and consumers through an embedded online communications interface. As regards online social media, it is noted that certain providers of this category of online service providers actually incorporate different online intermediation services within one and the same digital environment, all of which can be covered by this initiative. Business pages for example allow consumers to find local businesses and service providers and are an important enabler of business-to-consumer (B2C) transactions. Such business pages are increasingly integrated with a direct booking or purchasing functionality, turning these services into online e-commerce market places.

While offering great potential in terms of efficient access to (cross-border) markets, European businesses cannot fully exploit the potential of the online platform economy due to a number

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<sup>1</sup> [Copenhagen Economics](#), "Online Intermediaries: Impact on the EU economy" 2015.

<sup>2</sup> *Ibid.*

<sup>3</sup> Legal Study on unfair commercial practices within B2B e-markets, ENTR/04/69 of May 2006.

of potentially harmful trading practices and a lack of effective redress mechanisms in the Union. At the same time, online service providers concerned face difficulties operating across the single market due to emerging fragmentation.

The dependence of businesses on certain online services implies that the providers of such online intermediation services have a scope to engage in a number of potentially harmful trading practices which limit business users' sales through them and risk undermining their trust, notably: unexplained changes in terms and conditions without prior notice; the delisting of goods or services and the suspension of accounts without a clear statement of reasons; lack of transparency related to the ranking of goods and services and of the undertakings offering them; unclear conditions for access to, and use of, data collected by providers; and a lack of transparency regarding favouring of providers' own competing services and so-called most-favoured nation (MFN) clauses which restrict undertakings' ability to offer more attractive conditions through other channels than the online intermediation services.

Furthermore, online general search engines can also be important sources of Internet traffic for businesses and can affect the commercial success of corporate website users offering their goods or services online in the internal market. The ranking of websites by the providers of online search engines, including of those websites through which businesses offer their goods and services to consumers, has an important impact on consumer choice and the commercial success of those corporate website users. Thus, even in the absence of a contractual relationship with their corporate website users, online general search engines equally exhibit a dependency-enabled issue, specifically for potentially harmful ranking practices, which may affect business users.

At the same time, the current regulatory framework may not be effective in preventing some of these practices, nor in providing effective redress. Significant emerging regulatory fragmentation in the EU further complicates the regulatory environment. Whilst primarily resulting in impacts for business users, this situation affects all actors in the multi-sided online platform ecosystems, including consumers, which could face a reduced choice of competitive goods and services.

This proposal is complemented by a Commission Decision setting up the group of experts for the Observatory on the Online Platform Economy which is tasked essentially with monitoring opportunities and challenges for the Union in the online platform economy, including issues related to the application of the Regulation which the Commission now proposes.

- **Consistency with existing policy provisions in the policy area**

There is no legislation at Union level addressing the online intermediated business-to-business relations at issue here.

Competition law in the Union targets *inter alia* anticompetitive behaviour by undertakings. The unilateral potentially harmful trading practices covered by this initiative do not necessarily infringe EU competition law under Article 101 or Article 102 TFEU. As a result, competition law at Union or national level may not address all the types of issues covered by this initiative.

Consumer protection law does address a range of potentially harmful trading practices, at EU level notably through the Unfair Commercial Practices Directive 2005/29/EC<sup>4</sup> and the Unfair

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<sup>4</sup> OJ L 149, 11.6.2005, p.22.

Contract Terms Council Directive 93/13/EEC<sup>5</sup>. These Directives require a high level of transparency and 'professional diligence'. However, their scope is limited to B2C transactions. Conversely, the Misleading and Comparative Advertising Directive 2006/114/EC<sup>6</sup> covers certain B2B relations. It aims at protecting traders against misleading advertising and their unfair consequences and lays down the conditions under which comparative advertising is permitted. However, the provisions set forth in the latter instrument are limited to advertising practices and do not generally address the potentially harmful trading practices mentioned above, which occur as part of an existing contractual relationship between online platforms and their business users.

- **Consistency with other Union policies**

The present proposal aims at ensuring a fair, predictable, sustainable and trusted legal environment for business users, corporate website users, providers of online intermediation services and online search engines alike, which will limit the occurrence and the impact of harmful platform-to-business trading practices occurring in certain online activities, thereby safeguarding trust in the online platform economy and preventing further legal fragmentation of the Digital Single Market.

The initiative thus contributes to the goals of the Digital Single Market Strategy by creating a clear, transparent and stable legal environment for online B2C service providers and their business users, to tackle market fragmentation and to allow all players to tap into the new market dynamics under fair and balanced conditions and with an appropriate degree of transparency.

The proposal is also consistent with a number of other Union policies and rules. In particular, it complements the rules of competition and consumer protection law mentioned above, while leaving the application of those rules unaffected.

In addition, particularly where it comes to redress, the proposal should be understood against the background of rules of Union law concerning judicial cooperation in civil matters, such as Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>7</sup>, Regulation (EC) No 593/2008 on the law applicable to contractual obligations<sup>8</sup>, Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations<sup>9</sup> and Directive (EC) 2008/52 on certain aspects of mediation in civil and commercial matters<sup>10</sup>.

The obligation to provide a description of the main ranking parameters complements the requirements for traders under EU consumer protection law. It can be noted in this respect that the Commission has proposed amendments as part of the New Deal for Consumers<sup>11</sup>, containing a requirement to clearly identify for consumers any promoted search results based on payments, as well as a requirement to inform about the main parameters determining ranking on online marketplaces.

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<sup>5</sup> OJ L 95, 21.4.1993, p.29.

<sup>6</sup> OJ L 376, 27.12.2006, p.21.

<sup>7</sup> OJ L 351, 20.12.2012, p.1.

<sup>8</sup> OJ L 177, 4.7.2008, p. 6.

<sup>9</sup> OJ L 199, 31.7.2007, p. 40

<sup>10</sup> OJ L 136, 24.5.2008, p.3.

<sup>11</sup> COM(2018) 185 (final) of 11 April 2018, see <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1523880940100&uri=COM:2018:185:FIN>

Finally, the present proposal is compatible with Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market<sup>12</sup>, which lays down a general framework relating to the provision of information society services in the Union.

The proposed Regulation will leave all of the abovementioned existing acts of Union law unaffected.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

### **• Legal basis**

Given (i) that the initiative constitutes a core part of the Digital Single Market strategy, (ii) the intrinsic cross-border nature of the online services under consideration, and (iii) the emerging fragmentation of the single market through specific national legislation on the issues covered, Article 114 TFEU constitutes the relevant legal basis for this initiative.

The objective of Article 114 TFEU is to approximate provisions in Member States and to ensure that coherent, non-discriminatory rules are applicable throughout the Union. Such an application of common rules throughout the Union addresses and avoids divergences between Member States and ensures legal certainty, thus allowing undertakings and consumers to exploit the benefits of the internal market. As such, this initiative contributes to the establishment and good functioning of the internal market.

### **• Subsidiarity (for non-exclusive competence)**

The intrinsic cross-border nature of the online services at issue implies that the objectives cannot be reached effectively by Member States alone. Leading online intermediation services providers are established in one Member State, but provide access to almost the entire EU population, both from their place of normal residency and while travelling across the Union. Importantly, certain types of online services are at the same time used for commercial communications through having an online presence by 90% of the respondents to the Commission's fact-finding on platform-to-business relations.

Union action therefore constitutes the only way to ensure that common, suitable and effective rules apply to providers of the services concerned and the users of those services regardless of the law and forum identified in terms and conditions. On the specific set of issues described here, the European Council "*underlined the necessity of increased transparency in platforms' practices and uses*"<sup>13</sup> as part of a future oriented regulatory framework for the Union.

### **• Proportionality**

This proposal aims to offer business users and corporate website users trading in the Union an improved business environment. At the same time, the online service providers concerned remain free, in principle, to set the general policies for the provision of their services and are offered the opportunity to shape their voluntary commitments by way of industry codes of conducts within a principles-based legal framework. It therefore seeks to provide an adequate response to the problem identified, whilst safeguarding the innovation capacity of online service providers. In addition, the choice of a Regulation will facilitate the scaling-up of

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<sup>12</sup> OJ L 178, 17.7.2000, p. 1

<sup>13</sup> European Council Conclusions, 19 October 2017, [ST 14 2017 INIT](#).

providers to the benefit of all actors in online intermediated services, as common rules applicable throughout the Union will inherently lower compliance costs and enhance legal certainty in particular for cross-border operations.

The proportionality of the preferred option, as reflected in this proposal, also lies in the combination of comparatively general, principles-based Union rules, with an important scope for industry action and targeted monitoring. This approach is tailored to the fast changing technological and economic environment online. The group of experts for the Observatory on the Online Platform Economy, which will be set up in parallel to this proposal, will follow both the general evolution of the wider online platform economy and the specific issues covered here, informed amongst others by the legal transparency obligations. The approach put in place in this proposed Regulation therefore remains proportionate to the issues identified in online business-to-business relations.

Considering the administrative burden of the various components of the initiative, small enterprises will benefit from a targeted exemption from the obligation to put in place an effective internal complaint-handling system. It should be noted that this particular obligation sets only relatively high-level effectiveness and accessibility criteria, which will leave providers free to implement cost-effective technical solutions resulting in lower than average costs. The targeted exemption will guarantee that where an administrative burden resulting from the initiative cannot be fully excluded, only undertakings that generate sufficient revenue to absorb this are covered.

- **Choice of the instrument**

Limiting Union action to promoting voluntary industry-action and certain accompanying measures is possible but unlikely to be effective, as this would essentially rely on the industry's own incentives and willingness to change the status quo. While both service providers and their business users have an interest in maximising interactions and transactions with consumers on platforms, their short-term interests in tackling issues arising in their business relationships are only imperfectly aligned. Previous experience with the Supply Chain Initiative (SCI) in the food sector also suggests that purely voluntary initiatives are not suited for creating a functioning independent redress mechanism and fairness rules that are attractive and credible for both sides of the market. Despite some progress (elaboration of principles of good practice and setting up of a governance group), agricultural providers – the main supposed beneficiaries of the scheme – did not sign up to the scheme because of confidentiality and enforcement concerns. In the meantime, 21 Member States have already adopted national legislation and initiatives to combat potentially harmful trading practices in the food supply chain.

For this reason, only a legislative instrument can effectively address the problems identified. A Regulation is in addition preferred, as it is directly applicable in Member States, establishes the same level of obligations for private parties, and enables the coherent application of rules in the inherently cross-border online intermediated trade and online search. This will also address and prevent fragmentation of the Digital Single Market.

### 3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

The report of the Fitness Check of Consumer and Marketing law<sup>14</sup> concluded there was a need to consider changes to the Misleading and Comparative Advertising Directive in respect of B2B relations, largely confirming the findings of the 2012 Commission Communication announcing the intention to revise that Directive<sup>15</sup>. The Inception Impact Assessment on a targeted revision of EU consumer law directives however underlined that the findings of the Fitness Check would rather inform this initiative on platform-to-business relations specifically within the Digital Single Market context. This initiative therefore, builds on the findings made during the most recent Fitness Check of Consumer and Marketing law.

- **Stakeholder consultations**

The Commission has consulted broadly on the B2B related issues emerging in the online platforms' ecosystem. First, preceding the Commission Communication on online platforms of May 2016<sup>16</sup>, a wide consultation led to a clearer definition of the problem space and the start of an in-depth fact-finding exercise. Second, a series of workshops and broad consultation through several surveys informed the problem definition and led to preliminary policy options. Finally, in-depth focus groups, workshops, a questionnaire and open presentation to the Member States contributed to the design and testing of policy options. In addition to the consultation tools used, the Commission's services have met or interviewed through bilateral meetings a series of stakeholders.

Business users, particularly micro, small and medium-sized enterprises, generally support legislative action to ensure effective redress options and greater transparency of ranking practices, of MFN (price parity) clauses, and transparency in delisting processes.

Most online service providers concerned that were consulted agree that providing an explanation to a business user upon delisting or take-down of an offer is a reasonable legal obligation, provided their legal obligations to take down illegal content and to cooperate with investigations are respected. Consulted providers argued that they do not see the value added of external dispute resolution because they trust their own internal dispute resolution systems. They do not see in general a problem with implementing notice periods for changes in terms and conditions, however they are not in favour of rigid notice periods. Regarding transparency around rankings and data use, providers tend to agree with relatively high-level disclosure obligations, but warn of "gaming" and manipulation of algorithms with too much transparency. Generally providers are supportive of the idea of monitoring the online platform economy provided that such monitoring happens in full respect of their trade secrets.

Many national experts from Member States' administrations are of the view that addressing issues around terms and conditions is core to all online business-to-business issues. They also consider that the proportionality of a transparency obligation would depend on the precise wording and on the size of the provider. On issues such as notice periods, views diverge depending on the experience at national level, ranging from no need to regulate to mandatory

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<sup>14</sup> For an overview of the REFIT Fitness Check of EU consumer and marketing law see [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59332](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332)

<sup>15</sup> COM (2012) 702 final.

<sup>16</sup> COM (2016) 288 final.

fixed notice terms. Some national experts are also of the view that terms and conditions should be simplified in order to make them transparent and user-friendly for businesses. The consulted national experts support a legal transparency obligation to provide a statement of reasons for delisting. They share the general view that delisting-related requirements should be aligned with illegal content/notice-and-action procedures. A transparency obligation on ranking criteria is overall considered proportionate and legitimate. The experts with more experience on ranking issues are supportive of measures which would solve the problems encountered in a timely manner, although some say that the issue should be left to commercial and competition law. A general preference to (i) opt for a transparency obligation covering ranking practices in general, and (ii) work towards identifying best practices in ranking captures the broad consensus view. On data, non-discrimination and MFN experts cautioned that further reflection was needed. However, there is an overall agreement among experts on the importance of redress. Some concerns exist that internal complaint-handling systems could be burdensome for small and medium-sized enterprises (SMEs). Some national experts are in favour of promoting existing best practices (possibly as part of a self-regulatory measure). Experts representing national authorities overall recognise the interest of the monitoring exercise. They are however, generally opposed to the creation of a new body or European agency for that purpose.

The targeted and co-regulatory nature of this initiative, which is built on transparency and redress measures combined with enhanced monitoring through the group of experts set up in parallel, reflects common grounds in the views of the various groups of stakeholders consulted.

- **Collection and use of expertise**

Several surveys, a public consultation and multiple studies were carried out by the Commission or external contractors between 2015 and 2017. In-house economic research as well as policy design support by the Joint Research Centre further informed the Impact Assessment underlying this initiative. Member States were in addition consulted through an online consultation which fed into a meeting of the e-commerce expert group dedicated to this initiative. Finally, the Commission organised a large number of seminars with academic experts, whose views have contributed to the problem framing and evidence collection strategy.

- **Impact assessment**

This proposal is based on an Impact Assessment. The Regulatory Scrutiny Board first issued a negative opinion with comprehensive comments on this Impact Assessment on 1 December 2017. After a significant revision of the Impact Assessment, the Board subsequently issued a positive opinion with reservations on 22 March 2018. The opinion of the Board, the recommendations and an explanation of how they have been taken into account are included in Annex 1 of the Staff Working Document accompanying this proposal. Annex 4 provides an overview of who would be affected by this proposal and how.

The Commission examined different policy alternatives to achieve the general objective of the present initiative, which is to establish a fair, predictable, sustainable and trusted online business environment, while maintaining and further encouraging an innovation-driven ecosystem around online platforms across the EU. In such a business environment business traders should have the necessary safeguards to prevent harm from unfair trading practices and the ability to seek effective redress where necessary. It should also address and prevent regulatory fragmentation across the EU. Within a preferred co-regulatory design required to



ensure legal certainty and predictability for business users while safeguarding online service providers' innovation potential, four policy options were ultimately retained. All of these policy options foresaw comparatively high-level, principles-based legal transparency and redress obligations to be imposed on providers, but they differed in terms of the breadth of potentially harmful trading practices that they covered. In addition, two out of four retained options extended the application of the legal transparency obligation on ranking to providers of online general search engines, in order to maximise efficiency and to ensure equal treatment. Finally, one of the latter two options contained a single, more far-reaching obligation for providers to give business users the opportunity to ask, in line with the General Data Protection Regulation<sup>17</sup>, for customers' consent to obtain and process their e-mail addresses after the completion of a transaction through the use of the services.

The policy option that foresaw legal transparency obligations on a more limited number of potentially harmful trading practices was judged to be of limited effectiveness. While it would increase legal certainty through legal transparency and redress measures, the risk of direct harm to businesses and of fragmentation would importantly remain since some high-impact trading practices (ranking, data, discrimination, MFNs) were judged unlikely to be sufficiently tackled through self-regulation.

The three other policy options that foresaw legal transparency obligations on the full range of potentially harmful trading practices identified as part of this initiative were all found to be effective. Extending the scope of application of the specific legal transparency obligation on ranking to providers of online general search engines was in this regard judged to achieve the relative greatest degree of effectiveness. The option to include a single, more far-reaching data sharing obligation was at the same time judged to be disproportionate, considering on the one hand the specific objective of maintaining the innovation potential of the online platform economy, and, on the other hand, non-legislative measures that are being presented in parallel to foster fair policies for business-to-business data sharing. Moreover, the retained policy option entails that the legal transparency obligations are accompanied by an enhanced external scrutiny of online platforms' trading practices, which is an important factor to incentivise a fair and predictable environment for business users.

Providing legally binding transparency and redress obligations on the full range of potentially harmful trading practices identified as part of this initiative, including transparency for the issue of ranking in online general search (to which only the collective redress enforcement provision – rather than also the other redress provisions of this proposed Regulation – would apply, to ensure proportionality), is therefore the optimal policy choice. In addition to safeguarding the Single Market potential of the online platform economy, the proposal is estimated to be capable of reversing a dampening effect on the online platform economy resulting from a lack of trust of business users amounting to at least between EUR 0.81 billion and EUR 4.05 billion. It will also have a positive social impact, as the proposed Regulation will lead to an increase in turnover for the growing number of EU undertakings using online intermediation services which, in turn, is expected to yield additional employment opportunities.

Although e-commerce market places, one of various types of providers which are in principle covered by the initiative, can involve the physical delivery of goods supplied by business

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<sup>17</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).

users to consumers, the increased use of this type of service as a result of the proposal is not expected to have a significant detrimental impact on the environment. Compliance costs associated with the proposal are expected to be limited, and to mainly affect providers of online intermediation services and of online search engines. The proposed legal obligation to establish an internal complaint-handling system places the comparatively highest potential burden on providers, with smaller providers being most likely to face some compliance cost. Therefore those small enterprises, as defined in the Commission's SME Recommendation of 2003<sup>18</sup>, are exempted from this specific provision. The proposal is therefore also judged to be proportionate.

- **Regulatory fitness and simplification**

As mentioned above, small enterprises will benefit from a targeted exemption from the obligation to put in place an internal complaint-handling system. The proposal specifically aims at facilitating the sustainable growth of online intermediation services and is designed to be fully technologically-neutral.

- **Fundamental rights**

The Union is committed to high standards of fundamental rights. The specific objective of timely and effective redress for business users contributes to enhancing business users' right to an effective remedy and to a fair trial (Article 47 of the Charter of Fundamental Rights of the European Union) as far as it would involve improved access to the judiciary.

Moreover, the fair, predictable, sustainable and trusted online business environment that this proposal aims to create will contribute to safeguarding an appropriate balance between the respective freedoms to conduct a business of service providers and their business users (Article 16 of the Charter of Fundamental Rights of the European Union). In particular, the transparency measures laid down in the proposed Regulation are a precondition for monitoring whether the fundamental right to conduct a business is not unduly constrained as far as the weaker party in business-to-business relations is concerned.

#### **4. BUDGETARY IMPLICATIONS**

The proposal will not have any implications for the EU budget.

#### **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Monitoring of the evolution of impacts constitutes a key part of the proposed intervention in this domain, as the online platform economy remains a dynamic, fast evolving area of the economy. The monitoring is therefore divided into two strategic parts:

One is entrusted to a dedicated expert group which, jointly with a team of Commission officials, constitutes an EU Observatory on the Online Platform Economy. As set out in the Commission Decision C(2018)2393, the expert group will provide advice on, and expert analysis of, the evolution of the online platform economy in particular related to algorithmic decision-making, access to data, remuneration for material displayed online, transparency and accountability in B2B relations in online advertising, differentiated treatment and restrictions

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<sup>18</sup> Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5/2003, p. 36).

on business users to offer different conditions when using other distribution channels. It will also liaise with other relevant expert groups and centres of excellence set up by the EU and Member States, where appropriate.

The second is the specific monitoring of the evolution of impacts related to the regulatory and self-regulatory components of the proposed Regulation.

The Commission will monitor market indicators for the online platform economy, notably through the EU Observatory on the Online Platform Economy and based on the work of the group of experts. This analysis includes data such as: number and types of businesses trading on online intermediation services, number and type of complaints handled through internal and external redress, number of cases successfully solved, the amount of time needed to resolve the case, the place of establishment, size of the providers trading in the EU, including turnover realised in the EU market as an online intermediary. Within two years from the EU Observatory becoming active, the Commission services will prepare a report based on its activities and taking stock of the state of play, the progress made towards the achievement of the policy objectives and any unresolved issues.

The effectiveness and efficiency of the proposal will be monitored using defined indicators, to inform policy development with regards to the evolution of the potentially harmful trading practices. Consequently, the impact of the intervention will be assessed in the context of an evaluation exercise and that assessment will, where appropriate, feed into the review of the proposed Regulation as specified in the review clause thereof, which is to take place three years after its entry into force and subsequently every three years.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 specifies the subject matter and scope of the proposed Regulation. It explains that it lays down obligations for providers of online intermediation services and, in certain respects, online search engines to provide business users and corporate website users, respectively, with appropriate transparency and to offer them certain redress possibilities. It also explains the geographic scope of the proposed Regulation, which reflects the inherent cross-border nature of the online services at issue, where activities and transactions occurring within the Union can be intermediated by providers not established there.

Article 2 contains the applicable legal definitions.

Article 3 establishes requirements for the clarity, accessibility and modifications of pre-defined, standard terms and conditions used by providers of online intermediation services.

Article 4 establishes requirements for a statement of reasons from a provider of online intermediation services if it suspends or terminates the use by a business user of its intermediation services.

Article 5 establishes requirements for a description of the main parameters determining ranking of business users in search results, including a description where ranking is influenced by the business user giving direct or indirect remuneration to them, in the terms and conditions used by providers of online intermediation services. The Article establishes a similar requirement to provide the main parameters determining ranking for providers of online search engines by means of an easily accessible and publicly available description. It also requires that the description of the main parameters determining ranking should give the business users or corporate website users concerned an adequate understanding of the possible implications of the characteristics of the goods or services offered, the relevance of those characteristics for consumers, as well as of the design characteristics of websites used in the context of online search engines.

Article 6 establishes requirements for a description of any differentiated treatment given to goods and services offered by the provider of online intermediation services itself, or by business users which it controls, in the terms and conditions used by providers of online intermediation services.

Article 7 establishes a requirement to include a description of the access to personal data or other data which business users or consumers provide to online intermediation services or which are generated through those services, in the standard terms and conditions used by providers of online intermediation services.

Article 8 establishes a requirement to provide and publish a description of the grounds for restricting the ability for business users to offer different conditions to consumers for obtaining goods or services through means other than the online intermediation services, in the terms and conditions used by providers of online intermediation services.

Article 9 establishes a requirement for a provider of online intermediation services to provide for an internal system for handling complaints of business users together with requirements relating to the handling of such complaints, including obligations to duly consider complaints swiftly and effectively and communicate the outcome clearly and unambiguously to the business user. It also establishes the requirement to include certain information on the internal complaint-handling system in the terms and conditions. In addition, it establishes an obligation on providers of online intermediation services to publish reports on the number of complaints lodged, the subject matter of the complaints, the time period needed to process the complaints and the decision taken on the complaints.

Article 10 establishes a requirement for providers of online intermediation services to list in their terms and conditions one or more mediators with which the provider is willing to engage to reach an agreement out of court on a dispute, for instance where an issue has not been resolved by the internal complaint handling system (established under Article 9). In addition, it establishes certain requirements for the mediators, including impartiality, accessibility, competency and resources as well as an obligation for the providers of online intermediation services to engage in mediation in good faith. The requirements in the Article are without prejudice to the right of either party to initiate judicial proceedings.

Article 11 establishes a requirement for the Commission to encourage providers of online intermediation services to individually or jointly set up one or more independent mediator organisations to facilitate the settlement, out of court, of disputes that arise in the course of online intermediation services, particularly given their cross-border nature.

Article 12 establishes a right for judicial proceedings to be brought by representative organisations, associations or public bodies to stop or prohibit any non-compliance by providers of online intermediation services with the requirements contained in the Regulation. In addition, it requires representative organisations and associations to meet certain requirements such as having a non-profit making character, establishment as a legal entity under the law of the relevant Member State, and pursue objectives that are in the collective interests of the business users they represent.

Article 13 establishes a requirement for the Commission to encourage providers of online intermediation services as well as of online search engines, and organisations and associations representing them, to draw up codes of conduct.

Article 14 establishes a requirement for the Commission to regularly evaluate the Regulation, for the first time three years after the date the Regulation enters into force.

Article 15 establishes the date the Regulation shall apply six months from the date of publication.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on promoting fairness and transparency for business users of online intermediation services**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Having regard to the opinion of the Committee of the Regions<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Online intermediation services are key enablers of entrepreneurship, trade and innovation, which can also improve consumer welfare and which are increasingly used by both the private and public sectors. They offer access to new markets and commercial opportunities allowing undertakings to exploit the benefits of the internal market. They also allow consumers in the Union to exploit those benefits, in particular by increasing their choice of goods and services offered online.
- (2) Online intermediation services can be crucial for the commercial success of undertakings who use such services to reach consumers. The growing intermediation of transactions through online intermediation services, fuelled by strong data-driven indirect network effects, lead to an increased dependence of such business users, including micro, small and medium-sized enterprises, on those services in order for them to reach consumers. Given that increasing dependence, the providers of those services often have superior bargaining power, which enables them to effectively behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their businesses users and, indirectly, also of consumers in the Union.
- (3) Similarly, online search engines can be important sources of Internet traffic for undertakings which offer goods or services to consumers through websites and can therefore significantly affect the commercial success of such corporate website users offering their goods or services online in the internal market. In this regard, the ranking of websites by providers of online search engines, including of those websites through which corporate website users offer their goods and services to consumers, has an important impact on consumer choice and the commercial success of those corporate website users. Even in the absence of a contractual relationship with corporate website users, providers of online search engines can therefore effectively behave unilaterally in a way that

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

can be unfair and that can be harmful to the legitimate interests of corporate website users and, indirectly, also of consumers in the Union.

- (4) The dependence of business users on online intermediation services also leads to a situation in which business users often have limited possibilities to seek redress where unilateral actions of the providers of those services lead to a dispute. In many cases, those providers do not offer accessible and effective internal complaint-handling systems. Existing alternative out-of-court dispute settlement mechanisms can also be ineffective for a variety of reasons, including a lack of specialised mediators and business users' fear of retaliation.
- (5) Online intermediation services and online search engines, as well as the commercial transactions facilitated by those services, have an intrinsic cross-border potential and are of particular importance for the proper functioning of the Union's internal market in today's economy. The potentially unfair and harmful trading practices of certain providers of those services in respect of business users and corporate website users hamper the full realisation of that potential and negatively affect the proper functioning of the internal market. In addition, the full realisation of that potential is hampered, and the proper functioning of the internal market is negatively affected, by diverging laws of certain Member States which, with a varying degree of effectiveness, regulate those services, while other Member States are considering adopting such laws.
- (6) A uniform and targeted set of mandatory rules should therefore be established at Union level to ensure a fair, predictable, sustainable and trusted online business environment within the internal market by ensuring, in particular, that the business users of online intermediation services are afforded appropriate transparency as well as effective redress possibilities throughout the Union. Those rules should also provide for appropriate transparency as regards the ranking of corporate website users in the search results generated by online search engines. At the same, those rules should be such as to safeguard the important innovation potential of the wider online platform economy.
- (7) Since online intermediation services and online search engines typically have a global dimension, this Regulation should apply to providers of those services regardless of whether they are established in a Member State or outside the Union, provided that two cumulative conditions are met. Firstly, the business users or corporate website users should be established in the Union. Secondly, the business users or corporate website users should, through the provision of those services, offer their goods or services to consumers located in the Union at least for part of the transaction. Such consumers should be located in the Union, but do not need to have their place of residence in the Union nor have the nationality of any Member State. Accordingly, this Regulation should not apply where the business users or corporate websites users are not established in the Union or where they are established in the Union but where they use online intermediation services or online search engines to offer goods or services exclusively to consumers located outside the Union or to persons who are not consumers.
- (8) A wide variety of business-to-consumer commercial relations are intermediated online by providers operating multi-sided services that are essentially based on the same ecosystem-building business model. In order to capture the relevant services, online intermediation services should be defined in a precise and technologically-neutral manner. In particular, the services should consist of information society services, which are characterised by the fact that they aim to facilitate the initiating of direct transactions between business users and consumers, irrespective of whether the transactions are ultimately concluded either online, on the online portal of the provider of the online intermediation services in question or that of the business user, or offline. In addition, the services should be provided on the basis of contractual relationships both between the providers and business users and between the providers and the consumers. Such a contractual relationship should be deemed to exist where both parties concerned express their intention to be bound in an unequivocal and verifiable manner, without an express written agreement necessarily being required.

- (9) Examples of online intermediation services covered by this Regulation should consequently include online e-commerce market places, including collaborative ones on which business users are active, online software applications services and online social media services. However, this Regulation should not apply to online advertising serving tools or online advertising exchanges which are not provided with the aim of facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers. This Regulation should also not apply to online payment services, since they do not themselves meet the applicable requirements but are rather inherently auxiliary to the transaction for the supply of goods and services to the consumers concerned.
- (10) In line with the relevant case-law of the Court of Justice of the European Union and in light of the fact that the dependent position of business users has been observed principally in respect of online intermediation services that serve as a gateway to consumers in the form of natural persons, the notion of consumer used to delineate the scope of this Regulation is to be understood as referring solely to natural persons, where they are acting for purposes which are outside their trade, business, craft or profession.
- (11) For reasons of consistency, the definition of online search engine used in this Regulation should be aligned with the definition used in Directive (EU) 2016/1148 of the European Parliament and of the Council<sup>3</sup>.
- (12) In order to effectively protect business users where needed, this Regulation should apply where the terms and conditions of a contractual relationship, regardless of their name or form, are not individually negotiated by the parties to them. Whether or not terms and conditions were individually negotiated should be determined on the basis of an overall assessment, whereby the fact that certain provisions thereof may have been individually negotiated is, in itself, not decisive.
- (13) To ensure that the general terms and conditions of a contractual relationship 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, those terms and conditions should be drafted in clear and unambiguous language which is easily understood by an average business user. Terms and conditions should not be considered to have been drafted in clear and unambiguous 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.
- (14) Ensuring transparency in the general terms and conditions can be essential to promoting sustainable business relationships and to preventing unfair behaviour to the detriment of business users. Providers of online intermediation services should therefore also ensure that the terms and conditions are easily available at all stages of the contractual relationship, including to prospective business users at the pre-contractual phase, and that any modifications to those terms are notified to business users within a set notice period which is reasonable and proportionate in light of the specific circumstances and which is at least 15 days. 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 modification without respecting the notice period stems from a legal obligation incumbent on the service provider under Union or national law.
- (15) In order to protect business users it should be possible for a competent court to establish that non-compliant terms and conditions are not binding on the business user concerned, with effects *ex nunc*. Any such finding by a court should however only concern the specific provisions of the terms and conditions which are not compliant. The remaining provisions should remain valid and enforceable,

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<sup>3</sup> Directive (EU) 2016/1148 of the European Parliament and of the Council concerning measures for a high common level of security of network and information systems across the Union (OJ L 194, 19.7.2016, p. 1).

in as far as they can be severed from the non-compliant provisions. Sudden modifications to existing terms and conditions may significantly disrupt business users' operations. In order to limit such negative effects on business users, and to discourage such behaviour, modifications made in contravention of the obligation to provide a set notice period, should therefore be null and void, that is, deemed to have never existed with effects *erga omnes* and *ex tunc*.

- (16) A provider of online intermediation services can have legitimate reasons to decide to suspend or terminate the provision of its services, in whole or in part, to a given business user, including by delisting individual goods or services of a given business user or effectively removing search results. However, given that such decisions can significantly affect the interests of the business user concerned, they should be properly informed of the reasons thereof. The statement of reasons should allow business users to ascertain whether there is scope to challenge the decision, thereby improving the possibilities for business users to seek effective redress where necessary. In addition, requiring a statement of reasons should help to prevent or remedy any unintended removal of online content provided by business users which the provider incorrectly considers to be illegal content, in line with Commission Recommendation (EU) No 2018/334<sup>4</sup>. The statement of reasons should identify the objective ground or grounds for the decision, based on the grounds that the provider had set out in advance in its terms and conditions, and refer in a proportionate manner to the relevant specific circumstances that led to that decision.
- (17) The ranking of goods and services by the providers of online intermediation services has an important impact on consumer choice and, consequently, on the commercial success of the business users offering those goods and services to consumers. Providers of online intermediation services should therefore outline the main parameters determining ranking beforehand, 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. The notion of main parameter should be understood to refer to any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking. The description of the main parameters determining ranking should also include an explanation of any possibility for business users to actively influence ranking against remuneration, as well as of the relative effects thereof. This description should provide business users with an adequate understanding of how the ranking mechanism takes account of the characteristics of the actual goods or services offered by the business user, and their relevance to the consumers of the specific online intermediation services.
- (18) Similarly, the ranking of websites by the providers of online search engines, notably of those websites through which undertakings offer goods and services to consumers, has an important impact on consumer choice and the commercial success of corporate website users. Providers of online search engines should therefore provide a description of the main parameters determining the ranking of all indexed websites, including those of corporate website users as well as other websites. In addition to the characteristics of the goods and services and their relevance for consumers, this description should in the case of online search engines also allow corporate website users to obtain an adequate understanding of whether, and if so how and to what extent, certain design characteristics of the website used, such as their optimisation for display on mobile telecommunications devices, is taken into account. In the absence of a contractual relationship between providers of online search engines and corporate website users, that description should be available to the public in an obvious and easily accessible location on the relevant online search engine. To ensure predictability for corporate website users, the description should also be kept up to date, including the possibility that any changes to the main parameters should be made easily

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<sup>4</sup> Commission Recommendation (EU) No 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online (OJ L 63, 6.3.2018, p. 50).



identifiable. Whilst the providers are under no circumstances required to disclose any trade secrets as defined in Directive (EU) 2016/943 of the European Parliament and of the Council<sup>5</sup> when complying with this requirement to disclose the main ranking parameters, the description given should at least be based on actual data on the relevance of the ranking parameters used.

- (19) Where a provider of online intermediation services itself offers certain goods or services to consumers through its own online intermediation services, or does so through a business user which it controls, that provider may compete directly with other business users of its online intermediation services which are not controlled by the provider. In such situations, in particular, it is important that the provider of online intermediation services acts in a transparent manner and provides a description of any differentiated treatment, whether through legal, commercial or technical means, that it might give in respect of goods or services it offers itself compared to those offered by business users. 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.
- (20) The ability to access and use data, including personal data, can enable important value creation in the online platform economy. Accordingly, it is important that providers of online intermediation services 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, in order to enable business users to understand whether they can use the data to enhance value creation, including by possibly retaining third-party data services. Processing of personal data should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council.<sup>6</sup>
- (21) Providers of online intermediation services might in certain cases restrict in the terms and conditions the ability of business users to offer goods or services to consumers under more favourable conditions through other means than through those online intermediation services. In those cases, the providers concerned should set out the grounds for doing so, in particular with reference to the main economic, commercial or legal considerations for the restrictions. This transparency obligation should however not be understood as affecting the assessment of the legality of such restrictions under other acts of Union law or the law of Member States in accordance with Union law, including in the areas of competition and unfair commercial practices, and the application of such laws.
- (22) In order to enable business users, including those whose use of the relevant online intermediation services might have been suspended or terminated, to have access to immediate, suitable and effective redress possibilities, providers of online intermediation services should provide for an internal complaint-handling system. That internal complaint-handling system should be aimed at ensuring that a significant proportion of complaints can be solved bilaterally by the provider of the online intermediation services and the relevant business user. In addition, ensuring that providers of online intermediation services publish information on the functioning and effectiveness of their internal complaint-handling system should help business users to understand the 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.

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<sup>5</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L 157, 15.6.2016, p. 1).

<sup>6</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevant) (OJ L 119, 4.5.2016, p. 1).

- (23) The requirements of this Regulation regarding the internal complaint-handling systems aim at allowing providers of online intermediation services a reasonable degree of flexibility when operating those systems and addressing individual complaints, so as to minimise any administrative burden. In addition, the internal complaint-handling systems should allow providers of online intermediation services to address, where necessary, in a proportionate manner any use in bad faith which certain business users might seek to make of those systems. In cases other than any alleged non-compliance with the legal obligations of this Regulation, the internal complaint-handling systems should moreover not be open to complaints involving only negligible negative effects on the business user concerned. In light of the costs of setting up and operating such systems, it is appropriate to exempt from those obligations any providers of online intermediation services which constitute small enterprises, in line with the relevant provisions of Commission Recommendation 2003/361/EC<sup>7</sup>.
- (24) Mediation can offer providers of online intermediation services and their business users a means to resolve disputes in a satisfactory manner, without having to use judicial proceedings which can be lengthy and costly. Therefore, providers of online intermediation services should facilitate mediation by, in particular, identifying mediators with which they are willing to engage. Mediators which provide their services from a location outside the Union should only be identified where it is guaranteed that the use of those services does not in any way deprive the business users concerned of any legal protection offered to them under Union law or the law of the Member States, including the requirements of this Regulation and the applicable law regarding protection of personal data and trade secrets. In order to be accessible, fair, and as swift, efficient and effective as possible, those mediators should meet certain set criteria.
- (25) Providers of online intermediation services should bear a reasonable proportion of the total costs of the mediation, taking into account all relevant elements of the case at hand. To that aim, the mediator should suggest which proportion is reasonable in the individual case. However, that proportion should never be less than half of those costs.
- (26) In order to facilitate the settlement of disputes relating to the provision of online intermediation services using mediation in the Union, the Commission should encourage the setting up of specialised mediation organisations, which are currently lacking. The involvement of mediators having specialist knowledge of online intermediation services and online search engines as well as of the specific industry sectors within which those services are provided should add to the confidence both parties have in the mediation process and should increase the likelihood of that process leading to a swift, just and satisfactory outcome.
- (27) Various factors, such as limited financial means, a fear of retaliation and exclusive choice of law and forum provisions in terms and conditions, can limit the effectiveness of existing judicial redress possibilities, particularly those which require business users or corporate website users to act individually and identifiably. To ensure the effective application of this Regulation, organisations, associations representing business users or corporate website users, as well as certain public bodies set-up in Member States, should be granted the possibility to take action before national courts. Such action before national courts should aim to stop or prohibit infringements of the rules set out in this Regulation and to prevent future damage that could undermine sustainable business relationships in the online platform economy. In order to ensure that such organisations or associations exercise that right effectively and in an appropriate manner, they should meet certain criteria. Considering the particular status of the relevant public bodies in Member States where such bodies have been set up, it should only be required that those have been specifically charged, in accordance with the relevant

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<sup>7</sup> Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p36).

rules of national law, with bringing such actions either in the collective interest of the parties concerned or in the general interest, without there being a need to apply those criteria to such public bodies. Any such actions should in no way affect the rights of the business users and corporate website users to take judicial action on an individual basis.

- (28) Codes of conduct, drawn up either by the service providers concerned or by organisations or associations representing them, can contribute to the proper application of this Regulation and should therefore be encouraged. When drawing up such codes of conduct, in consultation with all relevant stakeholders, account should be taken of the specific features of the sectors concerned as well as of the specific characteristics of micro, small and medium-sized enterprises.
- (29) The Commission should periodically evaluate this Regulation, in particular with a view to determining the need for amendments in light of relevant technological or commercial developments.
- (30) When providing the information required under this Regulation, account should be taken as much as possible of the particular needs of persons with disabilities, in line with the objectives of the United Nations Convention on the Rights of Persons with Disabilities<sup>8</sup>.
- (31) As the objective of this Regulation, namely to ensure a fair, predictable, sustainable and trusted online business environment within the internal market, cannot be sufficiently achieved by the Member States, but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (32) It is appropriate to clarify that this Regulation should not affect the application of the relevant rules of Union law applicable in the areas of judicial cooperation in civil matters, competition, consumer protection, electronic commerce and financial services.
- (33) This Regulation seeks to ensure full respect for the right to an effective remedy and to a fair trial and promote the application of the freedom to provide a business, laid down in Article 47 and Article 16 of the Charter of Fundamental Rights of the European Union respectively.

HAVE ADOPTED THIS REGULATION:

### *Article 1*

#### **Subject-matter and scope**

1. This Regulation lays 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 and effective redress possibilities.
2. This Regulation shall apply to online intermediation services and online search engines provided, or offered to be provided, to business users and corporate website users, respectively, that have their place of establishment or residence in the Union and that, through online intermediation services or online search engines, offer goods or services to consumers located in the Union, irrespective of the place of establishment or residence of the providers of those services.

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<sup>8</sup> United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), available at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

## Article 2

### Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (1) 'business user' means any natural or legal person which through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession;
- (2) 'online intermediation services' means services which meet all of the following requirements:
  - (a) they constitute information society services within the meaning of Article 1(1)(b) of Directive (EU) No 2015/1535 of the European Parliament and of the Council<sup>9</sup>;
  - (b) they 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;
  - (c) they are provided to business users on the basis of contractual relationships between, on the one hand, the provider of those services and, on the other hand, both those business users and the consumers to which those business users offer goods or services;
- (3) 'provider of online intermediation services' means any natural or legal person which provides, or which offers to provide, online intermediation services to business users;
- (4) 'consumer' means any natural person who is acting for purposes which are outside his or her trade, business, craft or profession;
- (5) 'online search engine' means a digital service that allows users to perform searches of, in principle, all websites or websites in a particular language on the basis of a query on any subject in the form of a keyword, phrase or other input, and returns links in which information related to the requested content can be found;
- (6) 'provider of online search engine' means any natural or legal person which provides, or which offers to provide, online search engines to consumers;
- (7) 'corporate website user' means any natural or legal person which uses websites to offer goods or services to consumers for purposes relating to its trade, business, craft or profession;
- (8) 'ranking' means the relative prominence given to the goods or services offered to consumers by business users through online intermediation services, or to websites indexed for consumers by online search engines, as presented, organised or communicated to those consumers by the providers of online intermediation services or by providers of online search engines, respectively, irrespective of the technological means used for such presentation, organisation or communication;
- (9) 'control' means ownership of, or the ability to exercise decisive influence over, an undertaking, within the meaning of Article 3(2) of Council Regulation (EC) 139/2004<sup>10</sup>;
- (10) 'terms and conditions' means all terms, conditions, clauses and other information, irrespective of their name or form, which govern the contractual relationship between the provider of online intermediation services and their business users and are unilaterally determined by the provider of online intermediation services.

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<sup>9</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

<sup>10</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

### *Article 3*

#### **Terms and conditions**

1. Providers of online intermediation services shall ensure that their terms and conditions:
  - (a) are drafted in clear and unambiguous language;
  - (b) are easily available for business users at all stages of their commercial relationship with the provider of online intermediation services, including in the pre-contractual stage;
  - (c) set out the objective grounds for decisions to suspend or terminate, in whole or in part, the provision of their online intermediation services to business users.
2. Terms and conditions, or specific provisions thereof, which do not comply with the requirements of paragraph 1 shall not be binding on the business user concerned where such non-compliance is established by a competent court.
3. Providers of online intermediation services shall notify to the business users concerned any envisaged modification of their terms and conditions.

The envisaged modifications shall not be implemented before the expiry of a notice period which is reasonable and proportionate to the nature and extent of the envisaged modifications and to their consequences for the business user concerned. That notice period shall be at least 15 days from the date on which the provider of online intermediation services notifies the business users concerned about the envisaged modifications.

The business user concerned may, either by means of a written statement or a clear affirmative action, waive the notice period referred to in the second subparagraph.
4. Modifications to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of paragraph 3 shall be null and void.
5. Paragraph 3 shall not apply where a provider of online intermediation services is subject to a legal obligation which requires it to modify its terms and conditions in a manner which does not allow it to respect the notice period referred to in the second subparagraph of paragraph 3.

### *Article 4*

#### **Suspension and termination**

1. Where a provider of online intermediation services decides to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, it shall provide the business user concerned, without undue delay, with a statement of reasons for that decision.
2. The statement of reasons referred to in paragraph 1 shall contain a reference to the specific facts or circumstances that led to the decision of the provider of online intermediation services, as well as a reference to the applicable objective ground or grounds for that decision referred to in Article 3(1)(c).

## *Article 5*

### **Ranking**

1. Providers of online intermediation services shall set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters.

Where those main parameters include the possibility to influence ranking against any direct or indirect remuneration paid by business users to the provider of online intermediation services concerned, that provider of online intermediation services shall also include in its terms and conditions a description of those possibilities and of the effects of such remuneration on ranking.

2. Providers of online search engines shall set out for corporate website users the main parameters determining ranking, by providing an easily and publicly available description, drafted in clear and unambiguous language on the online search engines of those providers. They shall keep that description up to date.
3. The descriptions referred to in paragraphs 1 and 2 shall be sufficient to enable the business users or corporate website users to obtain an adequate understanding of whether, and if so how and to what extent, the ranking mechanism takes account of the following:
  - (a) the characteristics of the goods and services offered to consumers through the online intermediation services or the online search engine;
  - (b) the relevance of those characteristics for those consumers;
  - (c) as regards online search engines, the design characteristics of the website used by corporate website users.
4. Providers of online intermediation services and providers of online search engines shall, when complying with the requirements of this Article, not be required to disclose any trade secrets as defined in Article 2(1) of Directive (EU) 2016/943.

## *Article 6*

### **Differentiated treatment**

1. Providers of online intermediation services shall include in their terms and conditions a description of any differentiated treatment which they give, or may give, in relation to, on the one hand, goods or services offered to consumers through those online intermediation services by either that provider itself or any business users which that provider controls and, on the other hand, other business users.
2. The description referred to in paragraph 1 shall cover at least, where applicable, any differentiated treatment through specific measures taken by, or the behaviour of, the provider of the online intermediation services relating to any of the following:
  - (a) access that the provider, or that the business users which that provider controls, may have to any personal data or other data, or both, which business users or consumers provide for the use of the online intermediation services concerned or which are generated through the provision of those services;
  - (b) ranking;
  - (c) any direct or indirect remuneration charged for the use of the online intermediation services concerned;

- (d) access to, or conditions for use of, services that are directly connected or ancillary to the online intermediation services concerned.

#### *Article 7*

##### **Access to data**

1. Providers of online intermediation services shall include in their terms and conditions a description of the technical and contractual access, or absence thereof, of business users to any personal data or other data, or both, which business users or consumers provide for the use of the online intermediation services concerned or which are generated through the provision of those services.
2. Through the description referred to in paragraph 1, providers of online intermediation services shall adequately inform business users at least of the following:
  - (a) whether the provider of online intermediation services has access to personal data or other data, or both, which business users or consumers provide for the use of those services or which are generated through the provision of those services, and if so, to which categories of such data and under what conditions;
  - (b) whether a business user has access to personal data or other data, or both, provided by that business user in connection to his or her use of the online intermediation services concerned or generated through the provision of those services to that business user and the consumers of his or her goods or services, and if so, to which categories of such data and under what conditions;
  - (c) whether, in addition to point (b), a business user has access to personal data or other data, or both, including in aggregated form, provided by or generated through the provision of the online intermediation services to all of the business users and consumers thereof, and if so, to which categories of such data and under what conditions.

#### *Article 8*

##### **Restrictions to offer different conditions through other means**

1. Where, in the provision of their services, providers of online intermediation services restrict the ability of business users to offer the same goods and services to consumers under different conditions through other means than through those services, they shall include grounds for that restriction in their terms and conditions and make those grounds easily available to the public. Those grounds shall include the main economic, commercial or legal considerations for those restrictions.
2. The obligation set out in paragraph 1 shall not affect any prohibitions or limitations in respect of the imposition of such restrictions that result from the application of other Union rules or from national rules that are in accordance with Union law and to which the providers of the online intermediation services are subject.

## Article 9

### Internal complaint-handling system

1. Providers of online intermediation services shall provide for an internal system for handling the complaints of business users.

That internal complaint-handling system shall be easily accessible for business users. It shall allow them to lodge complaints directly with the provider concerned regarding any of the following issues:

- (a) alleged non-compliance by that provider with any legal obligations laid down in this Regulation which negatively affects the complainant;
  - (b) technological issues which relate directly to the provision of online intermediation services, and which negatively affect the complainant in a non-negligible manner;
  - (c) measures taken by, or behaviour of, that provider which relate directly to the provision of the online intermediation services, and which negatively affect the complainant in a non-negligible manner.
2. As part of their internal complaint-handling system, providers of online intermediation services shall:
  - (a) duly consider complaints lodged and the follow-up which they may need to give to the complaint in order to adequately address the issue raised, in a manner which is proportionate to the importance and complexity of that issue;
  - (b) process complaints swiftly and effectively, taking into account the importance and complexity of the issue raised;
  - (c) communicate to the complainant the outcome of the internal complaint-handling process, in an individualised manner and drafted in clear and unambiguous language.
3. Providers of online intermediation services shall include in their terms and conditions all relevant information relating to the access to and functioning of their internal complaint-handling system.
4. Providers of online intermediation services shall annually establish and make easily available to the public information on the functioning and effectiveness of their internal complaint-handling system. That information shall include the total number of complaints lodged, the subject-matter of the complaints, the time period needed to process the complaints and the decision taken on the complaints.
5. The provisions of this Article shall not apply to providers of online intermediation services that are small enterprises within the meaning of Article 2 (2) of the Annex to Recommendation 2003/361/EC<sup>11</sup>.

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<sup>11</sup> Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5/2003, p. 36).



## *Article 10*

### **Mediation**

1. Providers of online intermediation services shall identify in their terms and conditions one 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 between the provider and the business user arising in relation to the provision of the online intermediation services concerned, including complaints that could not be resolved by means of the internal complaint-handling system referred to in Article 9.

Providers of online intermediation services may only identify mediators providing their mediation services from a location outside the Union where it is ensured that the business users concerned are not effectively deprived of the benefit of any legal safeguards laid down in Union law or the law of the Member States as a consequence of the mediators providing those services from outside the Union.

2. The mediators referred to in paragraph 1 shall meet the following requirements:
  - (a) they are impartial and independent;
  - (b) their mediation services are affordable for an average business user of the online intermediation services concerned;
  - (c) they are capable of providing their mediation services in the language of the terms and conditions which govern the contractual relationship between the provider of online intermediation services and the business user concerned;
  - (d) they are easily accessible either physically in the place of establishment or residence of the business user, or remotely using communication technologies;
  - (e) they are capable of providing their mediation services without undue delay;
  - (f) they have a sufficient understanding of general business-to-business commercial relations, allowing them to contribute effectively to the attempt to settle the disputes.
3. Providers of online intermediation services shall engage in good faith in any attempt to reach an agreement through the mediation of any of the mediators which they identified in accordance with paragraph 1, with a view to reaching an agreement on the settlement of the dispute.
4. Providers of online intermediation services shall bear a reasonable proportion of the total costs of mediation in each individual case. A reasonable proportion of those total costs shall be determined, on the basis of a suggestion by the mediator, by taking into account all relevant elements of the case at hand, in particular the relative merits of the claims of the parties to the dispute, the conduct of the parties, as well as the size and financial strength of the parties relative to one another. However, providers of online intermediation services shall in any case bear at least half of the total cost.
5. Any attempt to reach an agreement through mediation on the settlement of a dispute in accordance with this Article shall not affect the rights of the providers of the online intermediation services and of the business users concerned to initiate judicial proceedings at any time during or after the mediation process.

## *Article 11*

### **Specialised mediators**

The Commission shall encourage providers of online intermediation services as well as organisations and associations representing them to individually or jointly set up one or more organisations providing mediation services which meet the requirements specified in Article 10(2), for the specific purpose of facilitating the out-of-court settlement of disputes with business users arising in relation to the provision of those services, taking particular account of the cross-border nature of online intermediation services.

## *Article 12*

### **Judicial proceedings by representative organisations or associations and by public bodies**

1. Organisations and associations that have a legitimate interest in representing business users or in representing corporate website users, as well as public bodies set up in Member States, shall have the right to take action before national courts in the Union, in accordance with the rules of the law of the Member State where the action is brought, to stop or prohibit any non-compliance by providers of online intermediation services or by providers of online search engines with the relevant requirements laid down in this Regulation.
2. Organisations or associations shall have the right referred to in paragraph 1 only where, at the time of bringing the action, they meet all of the following requirements:
  - (a) they are properly constituted according to the law of a Member State;
  - (b) they pursue objectives that are in the collective interest of the group of business users or corporate website users that they represent;
  - (c) they are of a non-profit making character.

In Member States where such public bodies have been set up, those public bodies shall have the right referred to in paragraph 1, where they are charged with defending the collective interests of business users or corporate website users or with ensuring compliance with the requirements laid down in this Regulation, in accordance with the national law of the Member State concerned.

3. The right referred to in paragraph 1 shall be without prejudice to the rights of business users and corporate website users to individually take action before competent national courts, in accordance with the rules of the law of the Member State where the action is brought, to address any non-compliance by providers of online intermediation services with the relevant requirements laid down in this Regulation.

## *Article 13*

### **Codes of conduct**

1. The Commission shall encourage the drawing up of codes of conduct by providers of online intermediation services and by organisations and associations representing them, intended to contribute to the proper application of this Regulation, taking account of the specific features of the various sectors in which online intermediation services are provided, as well as of the specific characteristics of micro, small and medium-sized enterprises.
2. The Commission shall encourage the drawing up of codes of conduct by providers of online search engines and by organisations and associations representing them, intended to contribute to the proper application of Article 5(2) and (3).

#### *Article 14*

##### **Review**

1. By [*date: three years after the date of entry into force*], and subsequently every three years, the Commission shall evaluate this Regulation and report to the European Parliament, the Council and the European Economic and Social Committee.
2. The first evaluation of this Regulation shall be carried out, in particular, with a view to assessing the compliance with, and impact on the online platform economy of, the obligations laid down in Articles 5, 6, 7 and 8, and whether additional rules, including regarding enforcement, may be required to ensure a fair, predictable, sustainable and trusted online business environment within the internal market.
3. Member States shall provide any relevant information that the Commission may require for the purposes of drawing up the report referred to in paragraph 1.
4. In carrying out the evaluation of this Regulation, the Commission shall take into account the opinions and reports presented to it by the group of experts for the Observatory on the Online Platform Economy established in accordance with the Commission Decision C(2018)2393. It shall also take into account the content and functioning of any codes of conduct referred to in Article 13, where appropriate.

#### *Article 15*

##### **Entry into force and application**

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.
2. It shall apply from [*date: six months following the day of its publication*].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*