

EU Plans to Regulate Online Platforms and Search Engines

New proposed EC Regulation would impose transparency obligations vis-à-vis business users and introduces collective redress.

Background

Businesses increasingly use online platforms and search engines to reach consumers. The European Commission believes that situations of dependency enable online platforms and search engines to engage in unfair practices. Today, the EC published a new proposed Regulation on “promoting fairness and transparency for business users of online intermediation services and online search engines in the Digital Single Market.” The Regulation aims to create a fair and predictable online environment for businesses by setting obligations for online platforms and search engines to provide business users with appropriate transparency and to offer effective redress possibilities. The consequences of a violation of the Regulation will depend on national law. They could include prohibitive injunctions, mandatory injunctions, or damages. The proposed Regulation also confers on representative organizations and public bodies the right to take collective actions before national courts to stop or prohibit any non-compliance.

The proposed Regulation will now have to be discussed and approved by the European Parliament and the Council before it can enter into force. The different stakeholders will thus have more opportunities to express their views in the coming months.

Scope

The proposed Regulation applies to online platforms that facilitate the initiation of direct transactions between contractually bound business users and consumers (providers of online intermediary services) such as online e-commerce market places, online software application stores, and online social media. The scope of the proposal was extended to also cover search engines, although the obligations applicable to search engines are limited to ranking transparency. The proposed Regulation also applies to providers of online intermediation services and search engines based outside the EU if they are used by businesses or consumers based in the EU.

Content

The proposed Regulation covers the following areas:

- **Terms and conditions**

Providers of online intermediation services will be obliged to ensure that their terms and conditions: (i) are clear and unambiguous, (ii) are easily available during all stages of the commercial relationship (including before the conclusion of the contract), and (iii) set out objective grounds for decisions to suspend or terminate their relationship with business users. Terms and conditions that do not comply with these requirements will not be binding on business users. Anticipated changes to terms and conditions must be notified in advance. The implementation of any change must follow a reasonable and proportionate notice period, which shall be at least 15 days from the date of notification of the changes concerned. Changes will be null and void if they do not comply with these requirements.

- **Grounds for suspension or termination of services**

Providers of online intermediation services must provide business users with a statement of reasons for any decision to suspend or terminate the provision of services. This must set out objective grounds and be individualized.

- **Ranking**

Providers of online intermediation services and search engines must include in their terms and conditions a description of the main parameters determining ranking. This must include a description of the options to influence ranking in exchange for any direct or indirect remuneration. This description must allow business users to understand how and to what extent the relevant ranking mechanism takes account of the characteristics and relevance of the goods and services for consumers, including, as regards search engines, the design of the websites. The proposal clarifies, however, that providers and search engines are not required to disclose any trade secrets.

- **Differentiated treatment — vertically integrated online platforms**

Providers of online intermediation services must include in their terms and conditions a description of any differentiated treatment that they give or may give when they are involved themselves, or through firms that they control, in the sale of goods or services to consumers. This shall include details regarding access to data, ranking, remuneration, and access to services that are directly connected or ancillary.

- **Access to data**

Providers of online intermediation services must include in their terms and conditions a description of the technical and contractual access of business users to any personal or other data. The terms and conditions must specify, in particular, whether the provider has access to such data, whether business users have access to their own data, and whether business users have access to data from other business users and consumers.

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

If providers of online intermediation services restrict the ability of users to offer different conditions to consumers, they shall include in their terms and conditions the economic, commercial, or legal grounds for doing so.

- **Internal complaint handling system**

Providers of online intermediation services that employ more than 50 persons must establish and operate an internal system for handling complaints from business users. Providers must process each complaint swiftly and effectively, and communicate the outcome of any complaint process in individualized, clear, and unambiguous language. All relevant information regarding that internal complaint handling system must be set out in the providers' terms and conditions.

- **Mediation**

Providers of online intermediation services should provide quick out-of-court dispute resolution mechanisms, which include an agreement to pay at least half of the total costs of mediation. The terms and conditions should identify one or more mediators.

- **Judicial collective proceedings by representative organizations**

Representative organizations and public bodies will have the right to take actions before national courts to stop or prohibit any non-compliance by providers of online intermediation services and search engines with the requirements of the proposed Regulation. This right to collective actions mirrors the proposal that the European Commission adopted on April 11 for a directive "on representative actions for the protection of the collective interests of consumers" to replace Directive 2009/22/EC on injunctions. (For more information, please see [this previous Latham & Watkins Client Alert.](#))

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Lars Kjølbje

lars.kjolbye@lw.com
+32.2.788.6252
Brussels

Elisabetta Righini

elisabetta.righini@lw.com
+32.2.788.6238
Brussels

John Wileur

john.wileur@lw.com
+32.2.788.6235
Brussels

Peter Citron

peter.citron@lw.com
+32.2.7886117
Brussels

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