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New obligations for B2B2C platforms: European Regulation on promoting fairness and transparency

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Contents

Introduction 3
Scope of application 5
Key changes 6
Conclusion 10
Contact lawyers 11

Introduction

Today, 11 July 2019, the Official Journal of the European Union has published the new Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services (the "**Regulation**").

The Regulation, which will enter into force 20 days after its publication, will apply directly in all Member States 12 months after it is published in the Official Journal of the European Union. As a regulation, it does not need to be transposed into national law. The 12-month period between the Regulation's entry into force and its initial application reflects how much online-intermediation service providers and search engines will have to adapt to comply with the Regulation.

The Regulation forms part of the EU's Strategy for a Digital Single Market. According to its Explanatory Memorandum, the increasing intermediation of the transactions of online services – and their network effects – have resulted in increased dependence by business users on online service providers and, in some cases, search-engine providers. This has led to more practices that are harmful to the legitimate interests of business users (i.e. individuals who perform a commercial activity or legal entities that offer goods and services to consumers through online-intermediation services).

In this scenario, the Regulation aims to create a more predictable, fair and transparent digital environment for businesses and traders that use online platforms and search engines. To that end, the Regulation establishes important obligations for businesses that offer information-society services, while emphasising the need to acknowledge and preserve the great innovative potential of the platform economy and its benefits to healthy competition and consumer decision-making power.

The Regulation claims to be the first to regulate this matter. While it is true that, at an EU level, regulatory development against unfair practices between business users has been less significant, it is equally true that some unilateral behaviour and commercial practices that are dealt with in the Regulation have already been tackled, more or less directly, at a national level by some Member States. Spain has done so, for instance, through Law 7/1998 of 13 April on general terms and conditions and, more specifically, through Law 3/1991 of 10 January on unfair competition, by means of different categories of infringement, in particular, regarding acts of unfair competition by abuse of economically-dependent

situations, which has been extensively interpreted by Spanish case law. In any event, the Regulation states that it applies without prejudice to EU law and national legislation prohibiting and penalising unilateral behaviour or acts of unfair commercial, to the extent that the aspects in question are not covered by the Regulation.

Scope of application

The Regulation applies to

(i) online-intermediation service providers – *e.g.* marketplaces, online-software services and online social networks – ("**ISPs**"); and
(ii) search-engine providers ("**SEPs**"),

regardless of their location or residency and of which legislation applies ...

…that provide or offer their services to

(i) business users; and
(ii) corporate-website users, respectively,

which are established or domiciled in the EU and that, through online-intermediation services or search engines, offer goods and services to consumers located in the EU.

Thus, in line with Regulation (EU) 2016/679 on general data protection ("**GDPR**"), the Regulation's scope of application does not depend on the location of the service provider but rather on where the recipient of the services is located. It therefore also applies to ISPs and SEPs established outside the EU that offer and perform their services to business users and corporate-website users, provided that the business users and the corporate-website users offer goods and services to EU consumers.

* The following fall outside the scope of application of the Regulation: (i) online-payment services; (ii) online-advertising tools; and (iii) online-advertising exchange platforms that promote direct transactions and do not entail a contractual relationship with consumers.

Key changes

Most of the Regulation's provisions stem from practices or issues detected in the framework of P2B and B2B2C relationships developed in the EU. The following section sets out the situations which the Regulation tries to resolve and the obligations established in the Regulation to that end.

1. Lack of transparency and unexpected changes to terms and conditions

The Regulation establishes specific obligations to ensure that ISPs (i) provide terms and conditions that are clear and accessible and (ii) communicate, sufficiently in advance, any changes to the general terms and conditions.

- The general conditions of the ISPs must
  - use straightforward and comprehensible language,
  - be available for business users at all stages of the contractual relationship,
  - state the reasons for suspension, termination or service-restriction decisions,
  - include information regarding additional distribution channels and potential associated programs through which the ISPs may commercialise goods and services offered by the business users, and
  - include information regarding how ownership and control of the intellectual-property rights of business users are affected.
- Except in exceptional cases, every modification of the general terms and conditions must be notified a minimum of 15 days in advance. Longer notice periods apply when business users need to make technical or commercial adjustments to comply with the modifications. During this term, the user can waive the notice period or terminate the agreement.
- General terms and conditions that do not comply with the above are considered null.

2. Lack of transparency on the reasons for the suspension or termination of services

- ISPs that decide to terminate, restrict or suspend their services for a specific business must inform the business of the reasons for the decision in a durable medium. How much notice needs to be provided depends on whether a specific good or service or the whole intermediation service is affected.
- The business user must be given the opportunity to clarify the facts and circumstances that triggered the restriction, suspension or termination through an internal-complaint procedure.

3. Lack of transparency in rankings

- ISPs' general terms and conditions that use ranking mechanisms (relative prominence given to goods or services or relevance given to search results as the service providers present, organise or communicate them) must set out the main parameters for determining the ranking and the reasons why parameters have a higher prominence than others (including the possibility of influencing the ISP through direct or indirect remuneration). SEPs must also explain the most relevant parameters used for ranking purposes and the relative prominence of the parameters.
- This obligation causes a clash between the legal interest protected and the legitimate right of service providers to preserve their algorithms and other ranking tools as trade secrets.
- While the Regulation warns that this clash does not justify service providers' refusal to disclose the main parameters used to determine rankings, it clarifies that service providers need not disclose the algorithms and entrusts the Commission with the preparation of interpretative guidelines that assist service providers on the new ranking obligations established in the Regulation.

4. Ancillary goods and services and individual treatment

- If ancillary goods and services are offered – including financial products – to consumers through online-intermediation services, the general terms and conditions of ISPs must include a description of the type of ancillary goods and services offered by them or a third party. ISPs must also clarify whether, and under what conditions, business users are allowed to offer their own ancillary goods and services in addition to the good or service they already offer through the online-intermediation services.

- The general terms and conditions of ISPs and SEPs must also include a description of any individual treatment they give, or might give, to goods or services offered to consumers through the online-intermediation services or to those of other business users or websites under their control, as well as to those of other business users or company websites.

5. Lack of transparency in personal-data policies

Without prejudice to the application of the GDPR and Directives (EU) 2016/680 and 2002/58/EC on privacy protection in data processing by public authorities and electronic communications, respectively, the terms and conditions of ISPs must include specific information regarding technical and contractual access, or lack of access, by business users to any personal data or other data, or both, which business users or consumers provide to use the online-intermediation services or which are generated through the provision of the services.

6. Restrictions on offering different conditions by other means (*most-favoured-nation clauses*)

If ISPs restrict the ability of business users to offer the same goods and services to consumers under different conditions by other means than through those services, their terms and conditions must state the reasons for that restriction and make them available to the public.

7. Troubleshooting

The Regulation provides three new mechanisms for solving problems and disputes between ISPs/SEPs and business users:

Internal complaint-handling system

ISPs – except small companies according to the Annex to Recommendation 2003/361/EC – must establish an internal system to handle complaints by business users. This mechanism must be free of charge and ensure that problems are handled within a reasonable timeframe and in accordance with the principles of transparency, equal treatment and proportionality.

Mediation

- The general terms and conditions of ISPs must also designate two or more mediators with whom they are willing to cooperate to attempt to reach agreements with business users in settling disputes between providers and business users and who must fulfil specific conditions. Mediation is voluntary and ISPs must bear a reasonable proportion of the cost of mediation.
- The Commission will encourage ISPs to set up specialised organisations that provide mediation services that facilitate the out-of-court settlement of disputes.

Legal standing of representative organisations or associations

Legal proceedings against an ISP or SEP may be brought at any time during – or before or after – the mediation process. Representative organisations or associations that have a legitimate interest in representing business users or corporate-website users, as well as the public authorities of Member States, will have standing to take legal action before the competent national court in the EU to stop or prohibit any breach of the Regulation.

8. Lack of supervision of conflicts occurring within the scope of the Regulation

The Commission will assess the Regulation every three years, for which it will use information provided by Member States and the opinions and reports filed by the group of experts of the Observatory on the Online Platform Economy set up by Commission Decision C(2018)2393.

9. Enforcement

The Regulation delegates to Member States the power to create rules that set out the measures that apply to infringements of the Regulation. The measures must be effective, proportionate and dissuasive.

Conclusion

ISPs and SEPs will have to significantly adapt their service-provision processes to comply with the Regulation. This includes revising and adapting the conditions of their providers of underlying services to the intermediation business; designing and implementing new procedures and steps in the contracting process, and its supporting documentation; reviewing the personal-data-processing registry and the aggregated information generated by the business and the terms of use; drafting the resulting terms and conditions of service and new privacy policies; and setting up internal mechanisms to resolve disputes in accordance with the above.

These actions must be carried out, in any event, on a case-by-case basis, taking into account the specific business model and the recipients of the goods and services of the business users, in order to be able to effectively meet the needs of the platform while striking a balance between the different areas of law involved, namely: intellectual property and unfair competition, general terms and conditions and consumers, data protection and privacy, anti-trust and procedural law (out-of-court dispute resolution).

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