



EUROPEAN COMMISSION'S NEW GUIDELINES ON RANKING TRANSPARENCY PURSUANT TO REGULATION (EU) 2019/1150 ON PROMOTING FAIRNESS AND TRANSPARENCY FOR P2B RELATIONSHIPS

Since the [Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services](#) (the “**Regulation**”) was published on 11 July 2019 in the Official Journal of the European Union, the industry has been waiting for the [Guidelines](#) announced in Recital 28 and Article 5.7 of the Regulation regarding the application of the ranking transparency requirements of Article 5.

The Regulation, which started to apply on 12 July 2020, is part of the EU’s Digital Single Market Strategy and aims to create a more predictable, fair and transparent digital environment for businesses and providers that use online platforms and search engines. It sets out important obligations for businesses that provide these information society services (including integrated and “conglomerate-type” services), as well as a warning about the need to recognize and preserve the vast innovative potential of the platform economy and its benefits for healthy competition between companies and a greater scope of decision-making for consumers.

In particular, Articles 5.1 and 2 of the Regulation require online intermediation service providers and search engine providers to set out the main parameters that determine the ranking and the reasons for the relative importance of those main parameters as opposed to other parameters.

The definition of ranking is set out in Article 2, section 8 of the Regulation as “the relative prominence given to the goods or services offered through online intermediation services, or the relevance given to search results by online search engines, as presented, organised or communicated 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”.

As mentioned, the Guidelines (which were announced by the Regulation itself) were long-awaited not only so as to interpret the obligations deriving from the Regulation but also to assess the extent of the margin established by the Commission for platforms to legitimately protect their trade secrets, in view of the fact that the Regulation itself sets out that these intermediation service providers must not be obligated to reveal in detail how their ranking mechanisms work, including their algorithms.

The Commission has finally published a comprehensive and detailed set of Guidelines that sheds light for platforms but also requires significant efforts from them in order to adapt their processes and terms and

conditions. Moreover, it points out important aspects relating to the protection of platforms' algorithms and trade secrets.

Despite the above, the Guidelines specifically mention that they are not binding for providers of these types of services and that it is the platforms' sole responsibility to guarantee compliance with the Regulation. Ultimately, only the Court of Justice of the European Union has the authority to interpret the Regulation's requirements.

Below we summarize briefly the main provisions set out in the Guidelines.

1. GENERAL PRINCIPLES

To achieve the objective behind this measure, namely, **improving predictability** for users and helping them improve the presentation of their goods and services, the Guidelines first establish a set of general considerations:

- (i) When providing information regarding the ranking parameter, service providers should take into account the nature, technical ability and needs of **"average" users** of their services.
- (ii) The analysis and measures adopted by providers to comply with the transparency obligations regarding rankings must be **individually determined** for each of the different services that each provider can offer, doing so with a **technologically neutral** approach. Thus, the Guidelines must not be applied automatically but rather taking into account the specific features and circumstances of each particular case. Furthermore, if providers offer their services through different devices and the same main parameters are not applied, separate explanations are required.
- (iii) The description of the main parameters and the reasons for their relative importance as opposed to other parameters must provide real added value, and, consequently, go beyond simply listing the main parameters. At least a **second layer** of explanatory information must be provided, based on real data on the importance of the ranking parameters used. Nonetheless, the Guidelines also state that such descriptions should not overwhelm users with overly lengthy or complicated descriptions, or references to parameters other than the main ones, since doing so could produce harmful effects on consumers.
- (iv) Finally, the Guidelines mention that there are certain **limits** regarding the ranking transparency requirements. As mentioned, most of them relate to possible negative effects on consumers, but providers also have several safeguards for their "commercial interests". For example, the limits deriving from the Trade Secrets Directive (despite it specifically setting out that providers cannot refuse to disclose main parameters by arguing that they have never been revealed in the past or that the information in question is commercially sensitive) or in cases where action is necessary to address bad-faith manipulation of rankings by third parties.

2. STEPS TO COMPLY WITH THE RANKING TRANSPARENCY OBLIGATIONS

(a) Assessment of the main parameters that determine the ranking

Firstly, the Guidelines establish that providers must carry out a case-by-case assessment of the parameters that determine the "ranking" of content. Annex A of the Guidelines offers examples of types of ranking parameters, which include page-loading speed, consumer reviews or the "mobile-friendliness" of a website.

(b) Identifying the main parameters

Subsequently, providers must identify, within the list of parameters, the “**main parameters**” of the ranking. Given that services can make use of a large number of parameters, the Regulation requires that, in the information provided to users, providers list only those parameters that are most relevant for the ranking. In this regard, Recital 24 establishes that said main parameters may be general criteria, as well as processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking.

For online intermediation services, the Regulation describes the main parameters as being those parameters determining ranking and, for online search engines, those parameters that are most significant in determining ranking.

In order to determine the main parameters, the Guidelines set out several criteria or **company-internal reflections** that may prove useful, namely, (a) the initial reasons for developing the algorithm; (b) in line with (a), what the provider considers to be the top type of result on its service; (c) what serves the best interests of the consumers of its service (e.g. it may prove useful to consider why certain filters are offered to consumers instead of others); (d) referring to the more unexpected elements that may influence the ranking (e.g. factors that a user may consider to be irrelevant as they are unrelated to the quality of the goods or services they offer); and (e) last, but not least, what would be most useful for the users to know in order to improve predictability and the presentation of their goods and services.

Likewise, the Guidelines refer to a series of considerations when **specific criteria or adjustment mechanisms** apply to the ranking such as, for example, personalisation, consumer search behaviour and intent, the user’s history, default settings, sorting & filtering mechanisms, cross-platform presence, external factors such as star ratings or industry awards, randomisation, the effect of machine learning, measures taken to avoid third-party bad-faith manipulation of ranking results, user reviews, or providers’ measures against illegal content.

In particular, pursuant to Article 5 of the Regulation, specific mention must be made of instances where one of the main parameters is the possibility for users to influence **ranking by means of remuneration** (direct or indirect). If this the case, both this possibility as well as its effects must be described. The term “remuneration” must be understood in a broad sense. To this end, the Guidelines establish that (in line with Recital 25 of the Regulation) on the one hand, direct remuneration will exist whenever payments are made with the main or sole aim of improving ranking and, on the other hand, indirect remuneration exists whenever a business user accepts additional obligations of any kind that may lead to an improved ranking.

Finally, it goes without saying that the “main parameters” must be a true reflection of what determines ranking under the mechanism in question. For this reason, the Guidelines point out that it is irrelevant whether or not the parameters are factors that can be influenced by users.

(c) Describing the main parameters

Once the main parameters that determine the classification are identified, the provider must work on the description that it will facilitate to users. Aside from indicating the main parameters, as per the

Regulation, a sufficient description must be provided to enable business users to obtain an adequate understanding of whether – and if so, how and to what extent – the ranking mechanism takes into account (a) the characteristics of the goods and services offered to consumers through the online intermediation service or the online search engine; (b) the importance of those characteristics for those consumers; and (c) as regards online search engines, the design characteristics of websites used by corporate website users.

According to the Guidelines, the aim of this description is for users to obtain an adequate understanding of how the ranking functions and thus be able to compete on a more level playing field when deciding their sales strategies.

The Guidelines set out that, besides describing the **main parameters**, the foregoing implies including a description of the reasons for the **relative importance of those main parameters as opposed to other parameters**.

With regard to the description of the relative importance of the main parameters over other parameters, the Guidelines do not require an exact weighting of each parameter but do at least establish the duty to reflect the inherently dynamic nature of the ranking. In this regard, the Guidelines, for example, establish that temporary changes that may be foreseeable and regular (e.g. sales promotions or the influence of the weather) could accordingly be described in a general manner without necessarily triggering a need to adapt the description of the ranking each time the temporary change kicks in provided the necessary transparency is obtained with that static description.

As mentioned, the Guidelines anticipate that providers must describe the parameters with a **level of detail** that the provider considers necessary and appropriate, indicating as limits that the description must not be so overwhelming nor so brief as to confuse the users and, in any case, must use plain and intelligible language bearing in mind the audience.

In order to comply with the obligation to describe the main parameters clearly, it is also considered best practice to include a high-level description of the company-internal process conducted by the provider concerned that led it to conclude what the "main" parameters are. Providers may also include explanations based on how a company-internal strategy may affect what consumers see in the service.

Finally, the Guidelines also make a specific reference to the level of detail when the main parameters used include the possibility of influencing ranking by means of remuneration. The Guidelines recommend accompanying a description of the "paid ranking" options and of their impact with an explanation of the business rationale behind that option and its potential impact. Where applicable, the description of paid ranking options could cross-reference the descriptions of this section with the necessary descriptions in the event any differentiated treatment is being applied (pursuant to Article 7 of the Regulation).

(d) Location of the description of the main parameters

The Guidelines set out different proposals regarding where the description of the main parameters that determine the ranking should be located and how it should be laid out.

In the case of online intermediation services, the Regulation establishes that the main parameters must be easily accessible and be referred to in the terms and conditions – this concept includes all clauses that regulate the contractual relationship between the service provider and the users, established unilaterally by the provider, and which must also be available during the pre-contractual phase. According to the Guidelines, business users may decide where and how they will provide the information to the users. The description of the main parameters does not necessarily need to be centralized; the terms and conditions can include hyperlinks taking the user to the description, and/or include the descriptions in Q&A sections, tutorials, etc. provided that the information in all the different materials is consistent and is not so spread out over different tools or media that the information in question is no longer easily available or plain and intelligible. To this end, and without prejudice to the foregoing, the Guidelines suggest establishing a single touchpoint (e.g. in a user “dashboard”) that could reference or centralise all the relevant informational tools available to explain ranking transparency; alternatively, the information could be duplicated across different informational tools.

The Regulation requires that the description of the main parameters offered by the providers of online search engines be public and easily accessible. In accordance with the Guidelines, and always within the limits of Article 5.2 of the Regulation, online search engine providers must assess and decide whether they will provide the description and if so where and how they will do so. To this end, they may take into consideration the behaviour of users when accessing and using the service and its characteristics (e.g. obtaining results in one click, using voice assistants) or the methods used in the service to attract users’ attention to specific features (e.g. the use of icons, tabs or banners) in order to set out the description. The description should be placed in an easily accessible location without requiring users to log in or register to be able to read it.

(e) Changes and notifications of proposed changes to the main parameters

The description of the main parameters must be kept up to date, as required by Article 5 of the Regulation. In fact, this obligation must be referred to in the terms and conditions. The Guidelines establish that providers must analyse periodically, by means of their own systems and as often as they consider appropriate, whether the description of the main parameters is up to date. If, after the assessment, changes must be made to the description, providers of online intermediation service must notify these changes in advance, in line with Article 3 of the Regulation (online search engines are only required to publish the new description).

According to the Guidelines, the fact that changes in the main parameters are only temporary does not necessarily mean that the description must not be changed. For example, if the standard ranking methods are modified due to specific promotional events and prominence is given to parameters such as speed of delivery or price, this will affect the main parameters and the description must be adapted. The Guidelines consider it good practice to indicate as “periodic” features those factors of the ranking mechanism that are temporary.

If providers use experiments, they need to consider on a case-by-case basis how this affects the ranking on their services and, in particular, whether it requires a change to the description of the main ranking parameters. To this end, providers must take into consideration factors such as the frequency and impact of the experiments, as well as the size of the test audience or of the geographic region

affected by the testing. In cases where the experiments are “live” (in the terms of the Guidelines, meaning that “test audiences” cannot necessarily be distinguished from the “rest” of the user base), providers may have to assess whether or not their experiment is conducted in a genuinely isolated testing environment, and if this is not the case, providers may have to consider (a) whether the experiment itself has an impact on ranking and if so, whether the parameter being tested is a “main parameter” that needs to be described; and (b) whether and when the full roll-out of the experiment will mean the parameter being tested will change their ranking mechanism and be a “main parameter” that needs to be described.

CONCLUSION

The implementation of these Guidelines will require significant adaptation efforts by online intermediation service providers and online search engine providers, including, but not limited to, having a thorough understanding of the main parameters that play a role in the functioning of the ranking algorithms, being able to identify the “main parameters” and communicating the reasons for the relative importance of those main parameters as opposed to others. Furthermore, it will be necessary to adapt terms and conditions and to work on tools that allow for this information to be provided with the clarity and simplicity required, and to review, update and notify when adaptations or modifications of the description of said parameters are necessary.

CONTACT LAWYERS



Núria Porxas
+34934165124
nuria.porxas@uria.com



Carme Sanz
+34934165100
carme.sanz@uria.com



Maria Conejero
+34934165100
maria.conejero@uria.com

BARCELONA
BILBAO
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