

Proposal for a new EU Regulation

Online Platforms and Search Engines



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Key objectives and elements of the proposal

The European Commission (Commission) has published a proposal for a new Regulation to govern certain key aspects of the relationship between business users and online intermediation service providers (online platforms) and online search engines.

The stated overarching objective of the Regulation is to establish a fair, trusting and innovation-driven ecosystem around online platforms in the EU, in which business traders have the necessary safeguards to prevent harm from unfair trading practices, and which limits regulatory fragmentation across the EU.

The Commission's proposal has been introduced against a backdrop of political concern in Europe that business users may become increasingly dependent on online platforms and search engines and that consequently there may be an imbalance in negotiation power and potentially harmful trading practices. The Commission also states that it is mindful of the need to safeguard the innovation potential of online platforms and search engines, allowing them to grow the flourish in the Union.

The Commission has opted for a principles-based framework, which is on the lighter end of the regulatory spectrum than some of the ideas it had been considering earlier. As foreshadowed in our [annual review of key trends in global antitrust](#), the Commission could potentially have gone further and designated an enforcement agency with powers to impose penalties on businesses for non-compliance. The less interventionist approach has prevailed, but the European Parliament may have a different view and the proposal's review clause may be used to create a more burdensome regime in the future.

This proposal will now be discussed with the European Parliament and Member States and may change as the ongoing debate continues.

The proposal has three constituent elements which we will explore in detail in this briefing



Who is concerned by the Regulation?

The Regulation applies to the relationship between business users and online intermediation services providers and online search engines. It targets certain trade practices which the proposal regards as unfair.

Notably, the ambit of the proposed Regulation is very wide. It would apply to online intermediation services providers and online search engines established anywhere in the world and when those services or search engines are provided or offered to be provided to

business users established in the EU and offering goods or services to consumers located in the EU. Online intermediation services should involve a contractual relationship both between the platform and the business user and between the platform and the consumer.

Includes

- Online e-commerce market places
- Online software application stores
- Online social media
- Online collaborative economy platforms in which business users are active

Does not include

- Online advertising serving tools
- Online advertising exchanges
- Online payment services





General obligations

One of the key objectives of the proposed Regulation is to grant businesses more predictability in their relationships with online platforms and in the use of online search engines. Therefore, the proposal would require online platforms and online search engines to make additional detailed information available to users.

Terms and conditions

The proposed Regulation includes the following requirements for T&Cs used by providers of online intermediation services:

- Be clear and easily accessible
- Outline objective grounds for suspension or termination decisions
- Describe the main parameters determining ranking in search results and reasons for the relative importance of main parameters as opposed to other parameters
- Describe any differentiated treatment given to goods and services offered to consumers by the provider of online intermediation services or by business users they control
- Describe the access to personal and other data provided or generated by business users or consumers
- Outline the grounds for any restrictions by online intermediation services on the ability of business users to offer different conditions to consumers through other means Note: such restrictions must be legally permissible and the admissible use of such restrictions is highly fact specific
- Include relevant information regarding access and functioning of the internal complaint-handling system
- Identify mediators with which they are willing to engage for dispute resolution

Online intermediation services shall give at least 15 days' notice for any envisaged modifications to T&Cs

Information made available to the public

The Regulation requires certain information be made available to the public:

Online search engines:

- Describe the main parameters determining ranking in search results

Online intermediation services:

- Any grounds for restrictions by online intermediation services on the ability of business users to offer different conditions to consumers through other means
- Issue annual reports on the functioning and effectiveness of their internal complaints system





Ranking

One of the cornerstones of the proposal is the set of duties on ranking, ie, relative prominence given to goods or services offered to consumers by business users through online platforms or websites indexed for consumers by online search engines. These are the only rules in the proposal that apply to general search engines, as the Commission recognises how critical rankings in those search results are for the success of businesses.

Objectives of rules on ranking

- Address the relevance of ranking for businesses
- Create predictability for businesses
- Increase transparency and predictability for businesses
- Allow comparability with other online platforms

Level of disclosure

- 'Main parameters': (i) general criteria and processes applied to the selection and ranking of results; (ii) specific signals incorporated in algorithms; and (iii) other adjustment or demotion mechanisms
- Should at least be based on actual data on the relevance of the ranking parameters used
- Online platforms are not required to disclose trade secrets





Transparency

Ranking

It is notable that the proposals for ranking rules are similar to some of the remedies imposed by the Commission in its antitrust investigation of Google shopping. Further debate can be expected on the extent to which it is appropriate to impose such far-reaching obligations on all types of online platforms, regardless of any finding of significant market power or dominance.



Online intermediation services

Providers of online intermediation services must describe the following in their terms and conditions:

- Main parameters determining ranking and reasons for the relative importance of those main parameters as opposed to others
- How remuneration affects ranking
- How and to what extent the characteristics of the products or services and their relevance for consumers are taken into account



Online search engines

Providers of online search engines must make a public statement covering the following:

- Up to date description of main parameters determining ranking, in clear and unambiguous language (changes need to be easily identifiable)
- How and to what extent the characteristics of the products or services and their relevance for consumers are taken into account
- How and to what extent the design characteristics of the website are taken into account (eg, optimisation for display on mobile devices)

**No providers
are required
to disclose any
trade secrets**



Complaint handling

The objective of these rules is to ensure that business users have access to immediate and effective redress, especially in case of delisting or suspension decisions. The Commission considers this set of obligations to be the most burdensome of the entire proposal. The proposal sets out a complete package of measures, from access to the complaint handling processes to how online platforms should proceed once a complaint has been filed, all the way to reporting on how those processes are working.



Businesses should be able to lodge complaints regarding:

- Non-compliance with the Regulation;
- Technological issues related directly to online intermediation services provided by the platform and which have a non-negligible negative impact on business users; and/or
- Measures taken by, or behaviour of the online platform related directly to its online intermediation services and which have a non-negligible negative impact on business users.



Online platforms must:

- Give due consideration of each complaint and take steps to adequately address the issue raised, taking into account the importance and complexity of that issue (there is flexibility to exclude frivolous matters and prevent business users from abusing the system);
- Process each complaint swiftly and effectively, taking into account the importance and complexity of the issue raised; and
- Communicate the outcome to the complainant through an individual communication with clear and unambiguous language.



Complaint handling

These rules are likely to create an additional administrative burden on online platforms and online search engines who will need adequate resources to handle complaints in line with the proposed Regulation.



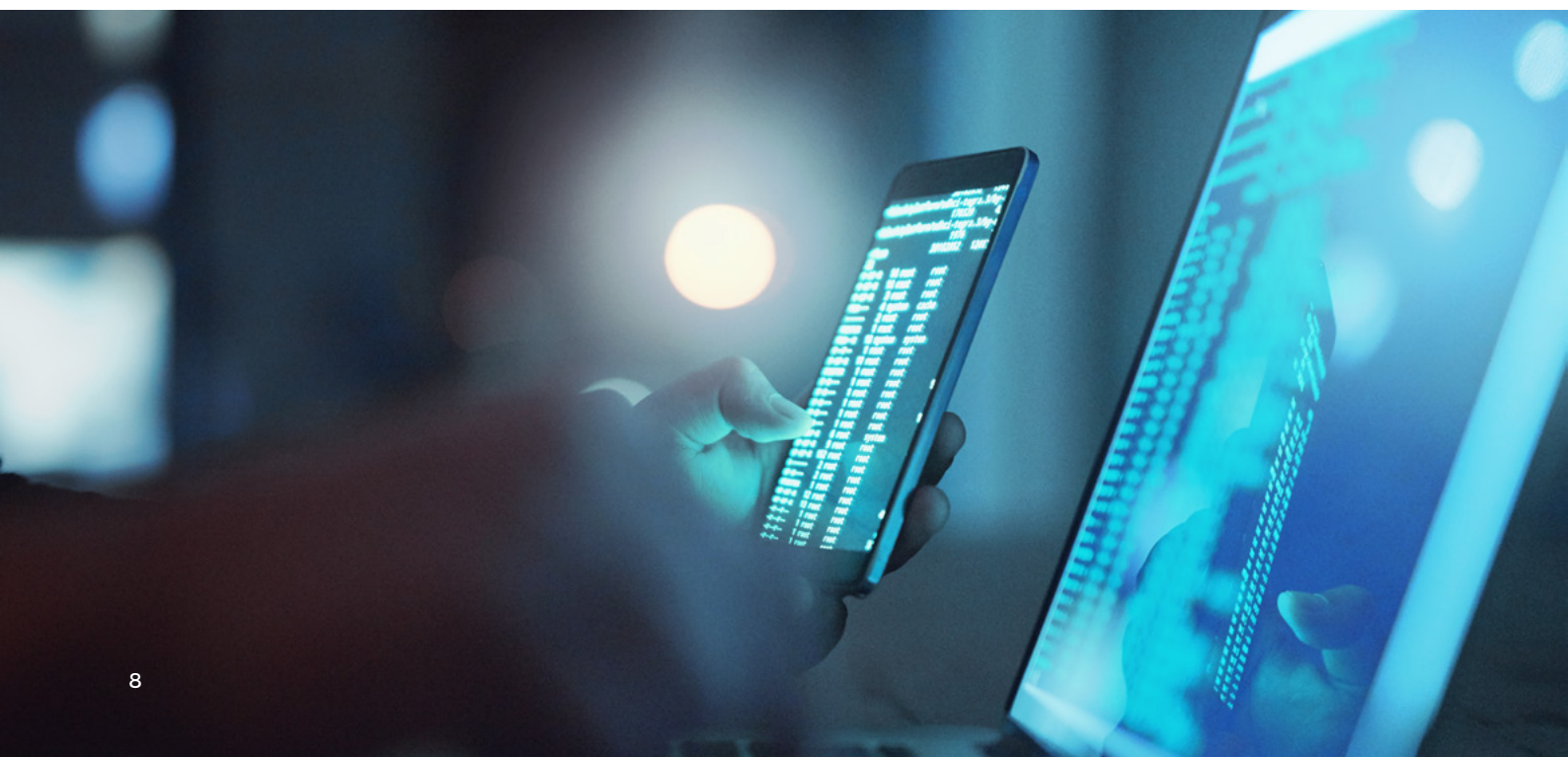
Online platforms must:

- Disclose in their terms and conditions all relevant information relating to the access to and functioning of their complaint-handling system; and
- Report annually to the public on how their internal complaint-handling system is working and how effective it is, including publishing information on (i) the total number of complaints lodged; (ii) the subject-matter of the complaints; (iii) how long it took to process the complaints; and (iv) the outcome of the complaints.



These obligations do not apply to smaller players:

- Platforms that employ fewer than 50 persons **and** that had an annual turnover or balance sheet total of less than €10m in the preceding financial year





Dispute resolution

The Commission wants to ensure that business users have effective mechanisms to challenge non-compliance with the Regulation.



There are two elements to this objective:

- Creating mechanisms to resolve disputes quickly, without having to resort to court, but without affecting the right of either side to initiate judicial proceedings. The industry is encouraged to voluntarily set up independent dispute settlement systems; and
- Allowing organisations, associations or public bodies to bring proceedings before national courts on behalf of business users in case of non-compliance with the Regulation (in case individual business users have fear of retaliation), without prejudice to the right of individual users to bring judicial actions.

The right to bring actions on behalf of business users has the potential to increase exposure to litigation for online platforms and online search engines. It will also be of interest to litigation funders. It is up for debate whether it is desirable to introduce a litigation culture in relation to these matters in Europe.



Dispute resolution

Mediation

Quality requirements for mediators

- Impartiality and independence;
- Affordability of services for the average business user of the services concerned;
- Ability to work in the language of the T&Cs;
- Easy access to their services either physically (ie, where the business user is located) or remotely;
- Ability to provide services without undue delay; and
- Sufficient understanding of B2B commercial relations to contribute effectively to the attempt to settle the dispute.

Obligations of online platforms

- Engage in good faith in any mediation attempt with a view to reaching an agreement on the settlement of the dispute.
- Bear a reasonable proportion of the total costs of mediation in each individual case taking into account all elements of the case (merits of the claim, parties' conduct and relative size and financial strength of the parties) and as suggested by the mediator; in any case, they will have to bear at least half the costs.

Access to Courts

- Online platforms and business users can initiate judicial proceedings at any time during or after the mediation process.

Action on behalf of business users

Who can bring an action?

- Organisations, associations and independent public bodies with a legitimate interest in representing or a duty to represent business users or corporate website users
- Organisations or associations must be:
 - Non-profit;
 - Properly constituted under the law of a Member State; and
 - Pursue objectives that are in the collective interest of the group of business users or corporate website users that they represent.

What can be the scope of the action?

- Stop or prohibit any non-compliance by online platforms or online search engines with the requirements of the Regulation

Where and how can an action be brought?

- Before any national court in the Union;
- In accordance with the rules of the law of the Member State where the action is brought



In the words of Mariya Gabriel, Commissioner for the Digital Economy and Society, 'ensuring that platforms and search engines treat other businesses fairly is critical including for promoting trust in online platform environment in the EU'.

Given the very dynamic nature of online platforms market, ongoing monitoring of how the market develops and of the impact of the proposed Regulation will be vital to guarantee that the legal framework remains fit for purpose and contributes to achieving that goal.

These obligations are not the end of the story...

- The Commission will encourage providers of online intermediation services – and those representing them – to draw up Codes of Conduct to contribute to the proper application of the Regulation
- The proposed Regulation includes a review clause, enabling the Commission to evaluate the Regulation every three years after it enters into force. The Commission will be able to propose any changes to the policy deemed necessary and potentially impose more stringent rules
- An EU Observatory of the Digital Platform Economy will monitor the evolution of the online platforms environment. The observatory's activities will help inform the review of the policy, thus ensuring that policy accompanies the pace of change in this very dynamic area
- A report will be prepared by the Commission within two years from establishment of the observatory 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



Key challenges and risks for online platforms and online search engines

The Commission chose to create a principles based framework and did not opt to set up an enforcement agency with the power to impose fines, as advocated by some interest groups. Other industry participants have called for a general obligation upon online platforms and search engines to behave in a fair, reasonable, objective and non-discriminatory manner, as well as to provide better access to data and can be expected to continue to advocate for this as the proposal is debated further. The currently proposed Regulation could create relevant challenges and risks for online platforms and online search engines.

1

Transparency on ranking will put the spotlight on the inner workings of online platforms and search engines and may lead to pressure for changes in light of users' commercial objectives

2

Facilitating complaints and alternative dispute resolution mechanisms seems likely to create a more litigious environment and incentivise business users to try to extract commercial advantages

3

The harmonisation may have a chilling effect on innovation and may lead to more standardisation across the industry (eg, transparency on ranking to allow comparability)

4

Antitrust enforcement will not be affected by the Regulation. Quite the contrary, the proposal provides indications as to possible areas for future investigations

5

Failure to engage on voluntary codes of conduct and repeated non-compliance may lead the Commission to introduce tougher enforcement powers

What happens now?

The proposal will now be scrutinised by the Member States and the European Parliament (the 'co-legislators'), who will introduce amendments to the text. Given the timing of the next European elections (May 2019), the European Parliament's review will need to be completed by March next year as the MEPs will then go into their election campaigns.

This may ultimately delay the review of the proposal. However, the initial indications are that a number of Member States support the objective of regulating online platforms and search engines more closely in Europe and will try to adopt the Regulation before the election.



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