ONLINE PLATFORMS

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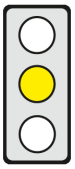
KEY ISSUES

Objective of the Regulation: Transparency obligations are to be introduced for online platform and search engine operators as well as possibilities for redress for online traders.

Affected parties: Online platform and search engine operators, online traders and their representative bodies.



Pro: (1) The transparency obligations enable traders to assess competing offers from platform operators when the latter are themselves active on their platform.

(2) The right to bring proceedings before national courts ensures that a claim is possible in the EU even if an operator specifies a place of jurisdiction outside the EU.

Contra: (1) Instead of generally applicable transparency and notification obligations, case-by-case examination of whether a platform is exploiting user dependence should continue.

(2) The rule under which platform operators always have to set out the "objective grounds" for terminating their services, in the terms and conditions, is unlawful. It may lead to forced contracts.

The most important passages in the text are indicated by a line in the margin.

CONTENT

Title

Proposal COM(2018) 238 of 26 April 2018 for a **Regulation** of the European Parliament and of the Council **on promoting fairness and transparency for business users of online intermediation services**

Brief Summary

Note: Unless otherwise indicated, Article numbers and page numbers refer to the proposal for a Regulation COM(2018) 238.

► **Context and objectives**

– Operators of online platforms (hereinafter: platform operators), who act as intermediaries between
  - traders, hoteliers, software developers or other enterprises (hereinafter collectively: traders) on the one hand and
  - consumers, on the other, facilitate transactions between these two groups, particularly across borders [Explanatory Memorandum, p. 1 et seq.].

– As there is only a limited number of established platforms in the various market segments, traders are "dependent" on platform operators [Recital 2]. Due to this "dependence"
  - platform operators may use "potentially unfair and harmful trading practices" [Recital 2 and SWD(2018) 138, Part 1, p. 10] and
  - traders "often" have limited possibilities to seek redress before their national courts in the event of a dispute with platform operators [Recital 4 and 27].

– Where consumers are shown several products one after another on a website, they generally choose products that are positioned higher up the list [SWD(2018) 138, Part 1, p. 13]. Traders wishing to sell their goods online are therefore "dependent" on how platform and search-engine operators determine the order in which the products being searched by consumers are shown (hereinafter: ranking) [Explanatory Memorandum, p. 2].

– As a result of this dependence, platform and search-engine operators have scope to act unfairly and thus harm the "legitimate interests" of traders [Recital 3].

– The Commission wants to curtail "potentially harmful trading practices" with transparency requirements for platform operators and some search-engine operators and introduce "effective" possibilities for redress [Recital 6 and Art. 1 (1)].

► **Scope**

– The Regulation applies to platform operators, irrespective of their place of establishment, where [Art. 2 (2), Art. 1 (2)]
  - traders that offer their products on the platform,
    - have their place of establishment or residence in the EU and
    - offer their products to consumers who are located in the EU and
  - the platform operator enables transactions between the two on the basis of a contractual relationship with the trader and with the consumer (so-called B2C transactions); a "contractual relationship" exists as soon as an intention to be bound is indicated, such as where a consumer conducts a search on a platform [Recital 8].

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– This therefore covers [SWD(2018) 138, Part 1, p. 6-7] online market-places (e.g. Amazon and Expedia), app stores for software (e.g. Google Play) and social online networks (e.g. Facebook trading sites).
– Some provisions of the Regulation also apply to search engines with which no contractual relationships exist [Recital 3].

► **General Transparency and Notification Obligations**
– Where a platform operator terminates or suspends cooperation with traders, this must be
  - based on "objective grounds" contained in the General Terms and Conditions (GTCs) [Art. 4 (2) and Art. 3 (1) (c)] and
  - justified immediately by reference to specific facts [Art. 4 (1) and (2)].
– The platform operator's GTCs, as applicable to contractual relations with traders, must be drafted in clear and unambiguous language and be easily available at all times [Art. 3 (1) (a)].
– Any clause of the GTCs ceases to be valid in future if a court establishes a breach of these provisions [Art. 3 (2)].
– Traders must be notified of changes to the GTCs at least 15 days in advance [Art. 3 (3)]. Failure to comply with this time limit renders the changes null and void [Art. 3 (4)]. Traders may waive the need to comply with the time limit by way of clear affirmative action [Art. 3 (3), para. 3].

► **Special Transparency and Notification Obligations**
– Platform operators must set out the relevant parameters for ranking in clear and unambiguous language in their GTCs [Art. 5 (1) and (2)]. They do not have to disclose any business secrets [Art. 5 (4)].
– In their GTCs, platform operators must set out whether and how they provide traders with the personal and non-personal data of traders and consumers [Art. 7 (1) and (2)]. This applies to data which
  - traders and consumers make available to the platform operator and/or
  - the platform operator generates from use of the platform.
– Where a platform operator imposes restrictions on traders regarding the sale of their products outside the platform, such as by prohibiting them from offering a product more cheaply on another platform or on its own website, the operator must include the commercial "or" legal grounds for this in its GTCs [Art. 8 (1)].
– Where a platform operator itself, or a trader that is under the operator's control, offers products on the platform and these offers are treated differently – e.g. they receive preferential treatment regarding ranking, payments to the platform operator or access to data – this must be included in the operator's GTCs [Art. 6 (1)].

► **Possibilities for resolving problems and disputes – complaint-handling system**
– Platform operators must set up easily accessible systems for dealing with complaints from traders, particularly complaints regarding [Art. 9 (1) and (3)]
  - "non-negligible" behaviour of the platform operator which negatively affects the trader [9 (1) (c)],
  - breaches of this Regulation which negatively affect the trader [9 Abs. 1 lit. a].
– Platform operators must, in particular,
  - process complaints "swiftly and effectively" [Art. 9 (2) (a) and (b)] and
  - annually assess the "performance" of the system indicating the subject-matter of the complaints in a public report [Art. 9 (4)].
– Exempt from this are companies with fewer than 50 employees and a turnover of max. € 10 million ("small enterprises") [Art. 9. (5) in conjunction with Art. 2 (2) of Directive 2003/361/EC].

► **Possibilities for dispute resolution – mediation and representative actions**
– Platform operators must [Art. 10]
  - "identify" one or more professionally qualified mediators in their GTCs and
  - consent to mediation in all disputes regarding their services.
– A reasonable proportion, at least half, of the costs of mediation must be borne by the platform operator [Art 10 (5)].
– Mediation does not prevent the trader from bringing a claim against the platform operator [Art. 10 (5)].
– Proceedings can be brought against platform operators in national courts in the EU in order to stop or prohibit any non-compliance with this Regulation [Art. 12 (1)]. The following are entitled to bring an action:
  - representative organisations such as professional associations, which are pursuing objectives that are in the collective interest of traders and are not for profit [Art. 12 (2) (b) and (c)],
  - public bodies "charged by the Member State", under the law, to represent traders.

► **Duties of search engine operators**
– Search engine operators must
  - set out the relevant parameters for rankings on an easily available website in "clear and unambiguous" language [Art. 5 (1) and (2)],
  - set out the extent to which the design of a website, such as its optimisation for use on mobile devices, influences ranking [Art. 5 (3) (c)].

– In so doing, they do not have to disclose any trade secrets. [Art. 5 (4)].
– Representative actions may be brought against search engine operators who fail to comply with these obligations [Art. 12 (1)]. The provisions on representative actions against platform operators apply mutatis mutandis.

Main Changes to the Status Quo

- In future, platform and search engine operators must provide traders with comprehensive information.
- Platform operators must provide a complaint-handling system for their users participate in a mediation if the traders so require.

Statement on Subsidiarity by the Commission

Online platforms operate across borders so Member States cannot achieve the objective of the Regulation on their own and there is a possibility of legal systems becoming fragmented. Only the EU is able to adopt provisions which provide for uniform requirements regarding transparency and possibilities for redress.

Policy Context

In its Communication on a Strategy for the Digital Single Market, the Commission looked at the importance and market power of certain online platforms [COM(2015) 192, p. 12-13] and, in its Communication on Online Platforms in the Digital Single Market, found that there was a need for action [COM(2016) 288]; as did the European Parliament [2016/2276(INI), p. 18]. In its Mid-Term Review on the Strategy for the Digital Single Market, it considered the lack of transparency in contractual relations between online platforms and traders, as well as the lack of possibilities for dispute resolution, to be a problem [COM(2017) 228, p. 9-12].

Legislative Procedure

26 April 2018	Adoption by the Commission
6 December 2018	Opinion of the Committee on the Internal Market and Consumer Protection
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Communications Networks, Content & Technology (leading)
Committees of the European Parliament:	Internal Market, Rapporteur: Christel Schaldemose (S&D)
Federal Ministries:	Economic Affairs and Energy (leading)
Committees of the German Bundestag:	Economic Affairs and Energy (leading); Legal Affairs; Digital Agenda; EU Affairs
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The proposal for a Regulation, on the one hand **increases transparency and foreseeability for traders** by imposing transparency and notification obligations on the operators of platforms and search engines. On the other hand, the proposal restricts the entrepreneurial and contractual freedom of platform operators. The fact that platforms are an important sales channel for traders and that "potentially harmful trading practices" may arise, does not justify such intervention: **Instead of generally applicable transparency and notification obligations, case-by-case examination of whether a platform is exploiting** a dominant market position or **user dependence, should** in fact **continue.** The Commission's blanket approach means that even small platforms will be covered by the transparency and notification obligations although no traders are dependent on them. Small platforms will thus be subject to unnecessary red tape and the deployment of new platforms will be hindered. The individual details of the Commission proposal are assessed as follows:

The fact that the Regulation applies irrespective of the place of establishment, firstly prevents competitive disadvantages for EU-based operators and, secondly, ensures that the latter cannot avoid the Regulation by way of an establishment outside the EU. The specification that the Regulation only applies where there is a "contractual relationship" between the platform operator and trader/consumer, may lead to inconsistency of application because the EU Member States have different contract law rules on the question of whether there is an intention to be bound.

The proposed transparency obligations with regard to rankings make the latter more predictable. The non-disclosure obligation regarding trade secrets preserves the operators' incentive to make innovations. Transparency obligations are pushed to their limits, however, where operators use self-learning algorithms with dynamic ranking parameters in order to set the rankings. In this case, transparency requires disclosure of the algorithm which is, however, a trade secret. In addition, the operators themselves may not know of the importance of the individual dynamic parameters.

The proposed **requirements for transparency** regarding whether and how operators give themselves preferential treatment as traders, **where operators are themselves present on their own platform, enable traders to better evaluate the competing offers of platform operators**. In addition, the disclosure may give rise to public pressure for platform operators to refrain from favouring their own content.

The duty to disclose complaints supports - due to the threat of damage to reputation - the incentive to refrain from "unfair trading practices". Releasing small platform operators from this duty is justifiable as otherwise, small operators would bear a disproportionate burden and the deployment of new platforms would be hindered.

It is appropriate that representative organisations are entitled to bring an action as many traders are reluctant to do so for fear of reprisals or of the greater financial resources of search engines and platform operators. **The right to bring proceedings before national courts** also **ensures that a claim is possible in the EU even if an operator specifies a place of jurisdiction outside the EU** in its GTCs.

Legal Assessment

Legislative Competency

Unproblematic.

Subsidiarity.

Unproblematic.

Compatibility with EU Law in other respects

Where traders are not dependent on operators, transparency and notification obligations are disproportionate because contractual matters can be negotiated between traders and operators themselves. These obligations must also not lead to operators charging themselves for breaches of competition law. There are further concerns about the following individual provisions:

The provision under which platform operators always have to provide "objective grounds" in their GTCs for terminating their services is disproportionate and thus unlawful because it may result in forced contracts if serious grounds for termination exist but are not contained in the GTCs. In addition, it should be made clear that platform operators can also terminate their contracts, subject to a notice period if necessary, without giving reasons.

The fact, that unclear and therefore contentious clauses in GTCs become invalid only in case of a court order and only with effect for the future, amounts to a legally misguided preferential treatment for the platform operator. It will induce them to draft unclear GTCs until a court orders them to stop. This provision also contravenes the doctrine recognised in international trade relations that interpretation goes against the interests of the draftsman ("contra proferentem").

Where traders are not dependent on operators, the duty to introduce a complaints handling system is unnecessary and therefore disproportionate. In such a relationship, one may assume that complaints by traders will not be ignored by the platform operators.

Furthermore, it is also disproportionate and therefore unlawful, to impose a unilateral obligation on platform operators to enter into contractual mediation. A unilateral, mandatory order to enter mediation is no substitute for the willingness to reach an amicable agreement. **The same applies to the provision whereby half of the mediation costs must be borne by the platform operators** in every case**.** In the case of such mediation - which was not initiated by the platform operator anyhow - an agreement on costs should also be possible. This provision is also inappropriate where the trader abuses the rule on mediation. Ultimately, a neutral mediation body should be considered for the appointment of mediators as their impartiality and independence may be undermined if they are long-term appointed by operators.

Impact on German Law

The Regulation will impact the law on GTCs for companies, Section 305 et seqq. German Civil Code (BGB).

Conclusion

Transparency obligations enable traders to assess competing offers from platform operators when the latter are themselves active on their platform. Instead of generally applicable transparency and notification obligations, case-by-case examination of whether a platform is exploiting user dependence should continue. Where there is no dependence, transparency and notification obligations are disproportionate. The right to bring proceedings before national courts ensures that a claim is possible in the EU even if an operator specifies a place of jurisdiction outside the EU. The provision under which platform operators always have to provide "objective grounds" in their GTCs for terminating their services is disproportionate and thus unlawful because it may result in forced contracts. The same applies to the provision whereby half of the mediation costs must be borne by platform operators.