

## The new Online Platform Regulation

The Online Platform Regulation is the first-ever set of rules aiming at creating a fair, transparent and predictable business environment for small businesses and traders on online platforms, aiming at contributing to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and online search engines are granted with appropriate transparency, fairness and effective redress possibilities. In particular, the new rules introduce, among others, restrictions on certain unfair practices, different transparency and fairness requirements, and an alternative dispute resolution system, all of which will have a real impact on the usage terms and conditions of many online services.

The main purpose of this article is to provide a high-level overview of the impact of the Regulation (EU) 2019/1150 of the European Parliament and of the Council of June 20, 2019 - effective as of 12 July 2020 ("Online Platform Regulation") - on the service contracts entered into by providers of online intermediation services and their business users.

### Scope of application

The Online Platform Regulation applies to online intermediation services and online search engines provided to business users and corporate website users established in the European Union which offers, through such platforms, their goods and services to consumers located in the European Union. Among the online intermediation services that fall within the scope of the new regulation there are e-commerce market places - including collaborative ones -, online software application services, such as the app stores, and online social media services on which companies may present their products or services to consumers, regardless of the technology used to provide such intermediation services.

From a contractual point of view, the Online Platform Regulation broadly refers to any “terms and conditions” including all terms and conditions or specifications, irrespective of their name or form, governing the contractual relationship between the provider of online intermediation services and its business users. However, not all online service contracts are in scope, but only those that have been unilaterally determined by the service provider, an element that has to be assessed taking into account all relevant circumstances of the case including the relative size of the parties and the negotiation of the contract, or of certain of its parts, which however cannot be deemed decisive by themselves.

Considering the far-reaching application of the Online Platform Regulation, many online service providers will be affected by its entry into force, including those that are located outside the European Union offering their services to businesses operating in the single market.

#### Requirements of service terms and conditions

The Online Platform Regulation lays down certain transparency requirements that will oblige online intermediation service providers to update their current terms and conditions. First of all, service contracts will have to be drafted by the provider in a plain and intelligible language and easily available to the users at all stage of their contractual relationship with the provider, including during the precontractual stage.

Additionally, terms and conditions of online intermediation services will have to provide, at least, the following:

- the grounds for the provider decisions to suspend, terminate or impose any other kind of restrictions on the services;
- information on any additional distribution channels and potential affiliate programs through

which the service provider might market the goods and services offered by the business users;

- information regarding the effects of the terms and conditions on the ownership and control of the business users' intellectual property rights;

- the main parameters determining the ranking on the platform, and the reasons for the relative importance of those main parameters as opposed to other parameters. In the event such main parameters include the possibility to influence the ranking against any direct or indirect remuneration paid by the business users, the service contract will also have to contain a description of this possibility and of its effect on the ranking;

- if applicable, both a description of the type of ancillary goods and services offered to consumers through the online intermediation service by the service provider or by any third party, and a description of whether, and under which conditions, the business user is also allowed to offer its own ancillary goods and services through the online intermediation service;

- a description of any differentiated treatment the service provider gives, or might give, to their own group of company's goods or services compared to the economic, commercial and legal treatment offered to business users;

- information on the conditions under which the business users can terminate their contractual relationship with the provider of online intermediate services;

- a description of the technical and contractual access, or absence thereof, to the information provided or generated by the business user, which the service provider will maintain after the expiry of the contract;

- a description of access of the technical and contractual access, or absence thereof, of business users to any personal data or any other data which business users or consumers provided for the use of the online intermediation services or which are generated through the provision of such services;
- where applicable, the grounds for any restriction of the ability of business users to offer the same goods or services to consumers under different conditions through other means than through such services;
- all relevant information relating to the access to and function of the internal complaint-handling system; and
- the identification of two or more mediators appointed by the service provider that are willing to attempt to settle the disputes between the provider and the business users.

The Online Platform Regulation also introduces specific requirements specifically applicable with respect to the providers of online search engines services which will have to set out an up to date, easily and publicly available description, drafted in plain and intelligible language, of the main parameters determining the ranking as well as any differentiated treatment which they give to their own group of company's goods or services compared to those offered to other business users.

Change to the terms and conditions, suspension and termination of the service

In order to achieve the transparency and fairness of the contractual relationship between the online intermediation service providers and their business users, the Online Platform Regulation also crystalizes many practices that were already common in the context of online services. For instance, service providers are no longer entitled to retroactively change their terms and conditions - unless such amendments are required to comply with a legal or

regulatory obligation or are beneficial to their users – and, in any case, providers will have to communicate to business users any proposed change prior to their implementation. To this end, any modification to the terms and conditions will not take effect before the expiration of a reasonable and proportionate notice period that cannot be shorter than 15 days, unless business users are required to implement technical or commercial adaptations in order to comply with the proposed revision. Business users are then entitled to either terminate the contract before the expiry of the notice period or decide to waive the notice period by way of a written statement or a clear affirmative action, such as the submission of new goods and/or services to the online intermediation service during the notice period.

Alongside the safeguard mechanisms applicable with respect to one-sided modifications of the service terms and conditions, the Online Platform Regulation also sets out specific rules on the providers' unilateral decision to suspend, restrict or terminate the services. The rationale of this additional layer of protection is to reduce the negative impact that businesses heavily relying on a single online platform for the sale of their products and services may incur in case of a sudden suspension, interruption or termination of the service. To this purpose, not only service providers will have to specifically set out the grounds for any decision they take to suspend, terminate or anyhow restrict the service in their terms and conditions, but also they will have to communicate to the affected business users, prior to or at the time of the restriction or suspension take effect, the reasons for that decision. Moreover, in the event of termination of the service, the notice will have to be provided at least 30 days in advance, unless the providers' decision was taken as a consequence of the business users repeated breach of the service terms and conditions. In any case, service providers will always have to give to business users the opportunity to clarify the facts and circumstances related to the restriction, suspension or termination of the service through the internal complaint-handling process.

## Internal complaint-handling systems

The Online Platform Regulation introduces an alternative dispute resolution system that service providers will have to implement in order to handle claims raised by their business users including a description of the access and functioning of such system within their service terms and conditions. In particular, the dispute resolution process will have to be easily accessible and free of charge as well as ensure that all claims are handled within a reasonable time frame and in accordance with the principles of transparency and equal treatment, taking also into account the importance of the complaint and its complexity.

Through the internal dispute resolution mechanism, business users will have to be able to lodge directly with the service provider their complaints related to any alleged non-compliance of the obligations laid down in the Online Platform Regulation; any technological issues related directly to the provision of online intermediation services; and any measures taken by the service provider which relates directly to the provision of the services. Service providers are required to adequately address the issues raised by the business users and process them swiftly and effectively, communicating the outcome of the process in an individualized manner and using a plain and intelligible language.

In addition, any disputes arising out of or in relation to the provision of the online intermediation services, including complaints that could not be resolved by means of the internal complaint-handling system, can be submitted by the parties to a mediation process. Mediators are appointed by the service provider within the terms and conditions and have to meet specific subjective requirements, such as being impartial and independent, in order to ensure the maximum level of transparency and efficiency in the mediation process. Service providers will be also required to bear a reasonable proportion of the total costs of mediation and business users will remain in any case entitled to initiate judicial proceedings with respect to their claim at any time before, during or after the mediation.

## Conclusion

The entry into force of the Online Platform Regulation might reshape the relationship between providers of online intermediation services and small and medium businesses using such services, rebalancing the contractual powers of the parties in favor of the latter.

Notwithstanding that, the Online Platform Regulation does not introduce a sanctioning regime applicable in case of violations of its provisions by the service providers, with the exception of the invalidity of certain inconsistent service terms and conditions