

# Bird & Bird

*Vademecum* for online  
intermediation services providers  
with reference to business users



# Vademecum for online intermediation services providers with reference to business users

On 20 June 2019 the Regulation (EU) 2019/1150 "on promoting fairness and transparency for business users of online intermediation services" was published ("**Regulation**").

The Regulation aims at laying down contractual rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities.

The Regulation will enter into force on 12 July 2020 in all EU countries.

## 1. Who are the recipients of the Regulation?

This Regulation shall apply to most of the online intermediation services and online search engines.

In particular:

Online intermediation services which	Examples
<p><b>a</b> constitute <u>information society services</u> (namely, providers which perform any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services);</p> <p><b>b</b> allow <u>business users to offer goods or services to consumers</u>, with a view to facilitating the initiation of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;</p> <p><b>c</b> are <u>provided to business users</u> on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers.</p>	<p><b>1</b> online e-commerce market places (on which business users are active);</p> <p><b>2</b> online software applications services (such as application stores); and</p> <p><b>3</b> online social media services, irrespective of the technology used to provide such services. In this sense, online intermediation services could also be provided by means of voice assistant technology.</p>

Online search engines which	Examples
<p><b>a</b> mean a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input; and</p> <p><b>b</b> return results in any format in which information related to the requested content can be found.</p>	<p><b>1</b> encompass voice requests;</p> <p><b>2</b> web search engine.</p>

(Art. 1, par. 2; art. 2 of the Regulation).

## 2. Who is not involved by the Regulation?

This Regulation shall not apply to:

- a** online peer-to-peer intermediation service without the presence of business users;
- b** online intermediation services not offered to consumers;
- c** online payment services;
- d** online advertising tools;
- e** online advertising exchanges, which are not provided with the aim of facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers.

(Recital n. 11; art. 1, par. 3, of the Regulation).

## 3. What shall the terms and conditions of the providers of online intermediation services include?

Providers of online intermediation services shall ensure that their terms and conditions:

- a** are drafted in plain and intelligible language;
- b** are easily available to business users at all stages of the commercial relationship, including in the pre-contractual stage;
- c** set out the grounds for decisions to suspend or terminate or impose any other kind of restriction upon, in whole or in part, the provision of their online intermediation services to business users;
- d** include information on any additional distribution channels and potential affiliate programs through which the providers of online intermediation services might market goods and services offered by business users;
- e** include general information regarding the effects of the terms and conditions on the ownership and control of intellectual property rights of business users;
- f** include information on the conditions under which business users can terminate the contractual relationship with the provider of online intermediation service;
- g** include a description of the technical and contractual access, or absence thereof, to the information provided or generated by the business user, which they maintain after the expiry of the contract between the provider of online intermediation services and the business user;

h include a description of the technical and contractual access, or absence thereof, of business users to any personal data or other data, or both, which business users or consumers provide for the use of the online intermediation services concerned or which are generated through the provision of those services.

It is also requested that the identity of the business user providing the goods or services on the online intermediation services is clearly visible.

Finally, providers of online intermediation services shall not impose retroactive changes to terms and conditions, except when they are required to respect a legal or regulatory obligation or when the retroactive changes are beneficial for the business users.

(Art. 3, par.1; art. 3, par. 5; art. 8; art. 9; art. 11, par. 3 of the Regulation).

## 4. How can providers of online intermediation services amend their terms and conditions?

Any proposed changes by providers of online intermediation services of their terms and conditions shall:

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notified by providers to the business users concerned (hereinafter "Notice Period") on a durable medium, namely by means of any instrument which enables business users to store information addressed personally to them in a way that is accessible for future reference and for a period of time adequate for the purposes of the information and allows the unchanged reproduction of the information stored.	implemented before at least 15 days from the date on which the provider of online intermediation services notifies the business users concerned about the proposed changes.

However, providers of online intermediation services shall grant a longer Notice Period when this is necessary to allow business users to make technical or commercial adaptations to comply with the changes.

In case of such changes, the business user concerned shall have the right to: i) terminate the contract with the provider of online intermediation services before the expiry of the Notice Period (such termination shall take effect within 15 days from the receipt of the notice pursuant to the first subparagraph, unless a shorter period applies to the contract) or; ii) either by means of a written statement or a clear affirmative action, waive the Notice Period at any moment from receipt of the notice.

It's noteworthy that, during the Notice Period, submitting new goods or services to the online intermediation services shall be considered as a clear affirmative action to waive the Notice Period, except in cases where the reasonable and proportionate Notice Period is longer than 15 days because the changes to the terms and conditions require the business user to make significant technical adjustments.

(Art. 3, par. 2, of the Regulation).

## 5. What happens if the providers of online intermediation services do not comply with the above provisions of the Regulation?

Terms and conditions which do not comply with the requirements described in the above paragraphs shall be null and void.

(Art. 3, par. 3, of the Regulation).

## 6. Are there any exceptions of the above provisions?

The Notice Period shall not apply where a provider of online intermediation services:

- is subject to a legal or regulatory obligation which requires it to change its terms and conditions in a manner which does not allow it to respect that Notice Period; or
- has exceptionally to change its terms and conditions to address an unforeseen and imminent danger related to defending the online intermediation services, consumers or business users from fraud, malware, spam, data breaches or other cybersecurity risks.

(Art. 3, par. 4, of the Regulation).

## 7. What happens where a provider of online services decides to restrict or suspend the provision of its online intermediation services?

Where a provider of online intermediation services decides to restrict or suspend the provision of its online intermediation services to a business user, it shall provide the business user concerned, prior to or at the time of the restriction or suspension taking effect, with a statement of reasons for that decision on a durable medium.

(Art. 4, par.1, of the Regulation).

## 8. ...and in case a provider of online services decides to terminate the provision of the whole of its online intermediation services?

Where a provider of online intermediation services decides to terminate the provision of the whole of its online intermediation services to a business user, the statement of reasons for that decision shall be provided to the business user concerned, at least 30 days prior to the termination taking effect and still base the decision on a durable medium.

The above notice term of 30 days shall not apply where a provider of online intermediation services:

- a is subject to a legal or regulatory obligation which requires it to terminate the provision of the whole of its online intermediation services to a given business user in a manner which does not allow it to respect that notice period; or
- b exercises a right of termination under an imperative reason pursuant to national law which is in compliance with European Union law;
- c can demonstrate that the business user concerned has repeatedly infringed the applicable terms and conditions, resulting in the termination of the provision of the whole of the online intermediation services in question.

In the above cases the provider of online intermediation services shall provide the business user concerned, without undue delay, with a statement of reasons for that decision on a durable medium.

(Art. 4, par. 2; art. 4, par. 4, of the Regulation).

## 9. What shall be included in the statement of reasons by a provider in the event of restriction, suspension and termination of the provision of its online intermediation services?

The statement of reasons shall contain a reference to the specific facts or circumstances, including contents of third party notifications that led to the decision of the provider of online intermediation services.

This statement shall be not provided where the provider of online services i) is subject to a legal or regulatory obligation not to provide the specific facts or circumstances or the reference to the applicable ground or grounds, or ii) can demonstrate that the business user concerned has repeatedly infringed the applicable terms and conditions, resulting in termination of the provision of the whole of the online intermediation services in question.

(Art. 4, par. 5, of the Regulation).

## 10. What happens where the restriction, suspension and termination of the provision of the online services is revoked by the online intermediation provider?

Where the restriction, suspension or termination is revoked by the provider of online intermediation services, it shall reinstate the business user without undue delay, including providing the business user with any access to personal or other data, or both, that resulted from its use of the relevant online intermediation services prior to the restriction, suspension or termination having taken effect.

(Art. 4, par. 3, of the Regulation).

## 11. Shall the "ranking" be set out in the terms and conditions of a provider of online intermediation services?

According to the definition provided in the Regulation, "ranking" means 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, organized 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, organization or communication.

Providers of online search engines shall set out in their terms and conditions the main parameters, which are most significant in determining ranking and the relative importance of those main parameters, by providing an easily and publicly available description, drafted in plain and intelligible language, on the online search engines of those providers ("**Description of Parameters**"). They shall keep that Description of Parameters up to date.

Where the main parameters include the possibility to influence ranking against any direct or indirect remuneration paid by business users or corporate website users to the respective provider, that provider shall also set out a Description of Parameters of those possibilities and of the effects of such remuneration on ranking.

(Art. 5, par. 1-3, of the Regulation).

## 12. What shall the Description of Parameters include?

The Description of Parameters shall be sufficient to enable the business users or corporate website users to obtain an adequate understanding of whether, and if so how and to what extent, the ranking mechanism takes account of the following:

- the characteristics of the goods and services offered to consumers through the online intermediation services or the online search engine;
- the relevance of those characteristics for those consumers;
- as regards online search engines, the design characteristics of the website used by corporate website users.

When complying with those requirements, providers of online intermediation services and providers of online search engines shall not be required to disclose algorithms or any information that, with reasonable certainty, would enable the deception of consumers or consumer harm through the manipulation of search results.

(Art. 5, par. 5-6 of the Regulation).

### 13. What shall providers of online intermediation services set out...

#### When offering ancillary goods and services?

Where ancillary goods and services, including financial products, are offered to consumers through the online intermediation services, either by the provider of online intermediation services or by third parties, the provider of online intermediation services shall set out in its terms and conditions a description of the type of ancillary goods and services offered 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 services.

(Art. 6 of the Regulation).

#### When providing a differentiated treatment for many goods or services?

Providers of online search engines shall set out a description of any differentiated treatment which they give, or might give, in relation to goods or services offered to consumers through those online search engines by, on the one hand, either that provider itself or any corporate website users which that provider controls and, on the other hand, other corporate website users.

That description shall refer to the main economic, commercial or legal considerations for such differentiated treatment and in particular to:

- a access that the provider, or that the business users or corporate website users which that provider controls, may have to any personal data or other data, or both, which business users, corporate website users or consumers provide for the use of the online intermediation services or the online search engines concerned;
- b ranking or other settings applied by the provider that influence consumer access to goods or services offered through those online intermediation services by other business users or through those online search engines by other corporate website users;
- c any direct or indirect remuneration charged for the use of the online intermediation services or online search engines concerned;
- d access to, conditions for, or any direct or indirect remuneration charged for the use of services or functionalities, or technical interfaces, that are relevant to the business user or the corporate website user and that are directly connected or ancillary to utilizing the online intermediation services or online search engines concerned.

Where, in the provision of their services, providers of online intermediation services restrict the ability of business users to offer the same goods and services to consumers under different conditions through other means than through those services, they shall include the grounds for that restriction in their terms and conditions and make those grounds easily available to the public.

(Art. 7, par. 2-3; art. 10 of the Regulation).

### 14. Are there any specific provisions about the settlement of the claims in the Regulation?

With reference to the settlement of the claims, providers of online intermediation services shall: i) provide for an internal system for handling the complaints of business users which shall be easily accessible and free of charge for business users and shall ensure handling within a reasonable time frame; ii) identify in their terms and conditions two or more mediators with which they are willing to engage to attempt to reach an agreement with business users on the settlement, out of court, of any disputes between the provider and the

business user arising in relation to the provision of the online intermediation services concerned, including complaints that could not be resolved by means of the adopted internal complaint-handling system.

(Art. 11; art. 12 of the Regulation).





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