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NOTE

From:	Presidency/General Secretariat of the Council
To:	Permanent Representatives Committee
No. prev. doc.:	5877/19
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on promoting fairness and transparency for business users of online intermediation services - Analysis of the final compromise text with a view to agreement

I. INTRODUCTION

1. On 26 April 2018, the Commission presented a proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services¹. The proposal is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU).
2. The proposed Regulation aims to contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services, as well as corporate website users, in relation to online search engines, are granted appropriate transparency and effective redress possibilities.

¹ Doc. 8413/18 + ADD1.

3. The European Economic and Social Committee provided its opinion on the proposal on 19 September 2018².
4. On 7 December 2018, the European Parliament Committee on Internal Market and Consumer Protection (IMCO) voted on its report³.
5. On 29 November 2018, the Council (Competitiveness) agreed on a General Approach⁴ and mandated the Presidency to enter into informal trilogue negotiations with representatives from the European Parliament and the European Commission in order to explore the possibility of reaching an agreement at first reading.
6. Following three informal trilogue meetings, coupled with an intensive schedule of technical meetings with the representatives from the European Parliament and the European Commission, provisional political agreement was reached on 13 February 2019, the text of which is set out in the Annex to this note.

II. KEY POLITICAL ISSUES

7. In relation to the key political issues the following elements should be noted:
 - (a) **"Fairness package"**: The Presidency agreed to remove practices (a) and (e) from the previously proposed "blacklist" of the European Parliament and to incorporate practices (b)–(d) in Article 8 "*Specific contractual terms*" (alongside the accompanying Recital 31) with the introductory paragraph inspired by the Unfair Contract Terms Directive. Two of these practices were transposed as transparency requirements. In Article 1 a general reference to the principle of "fairness" was introduced.
 - (b) **Ranking**: The previous suggestion in the Article concerning ranking (previous Article 5(2)) by the European Parliament has been transposed to Article 7(1).
 - (c) **Operating systems**: The concerns of the European Parliament regarding the risk of using operating systems to circumvent this Regulation have been encompassed in the compromise text in Recitals 11 and 29 (the latter explicitly mentioning operating systems) and in Article 7(3)(c).

² TEN/662 – EESC-2018.

³ Doc. A8-0444/2018.

⁴ Doc. 13876/18.

- (d) **Online search engines** have been incorporated into Article 7 on differentiated treatment as a transparency requirement and as part of a compromise package, in exchange for the deletion of a similar amendment of the European parliament in the previous Article 5(2) on ranking.
- (e) **Data sharing** with third parties has been incorporated into Article 9(2)(d) as an information requirement, also regarding the purpose of such data sharing.
- (f) **MFN clauses**: The text of Article 10 on offering different conditions was reverted to the text of the initial Commission proposal.
- (g) **Final provisions**: The application date has been set to 12 month after the publication, and the review is set to 18 months after the application date.

III. CONCLUSION

8. The Permanent Representatives Committee is therefore invited to:

- (a) analyse the consolidated text as set out in the Annex to this note and confirm the agreement on the overall compromise package;
- (b) mandate the Presidency to send a letter to the European Parliament stating that if the Parliament were to adopt the amended text of the proposed Regulation, in accordance with Article 294(3) of the Treaty on the Functioning of the European Union (TFEU), in the same form as set out in the Annex to this note (subject to revision by the lawyer linguists of both institutions), the Council would, in accordance with Article 294(4) TFEU, approve the European Parliament's position and the act shall be deemed to be adopted in the wording which corresponds to the European Parliament's position.

REGULATION (EU) 2019/...
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of ...

on promoting fairness and transparency for business users of online intermediation services

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee⁵,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure⁶,

⁵ OJ C 440, 6.12.2018, p. 177.

⁶ Position of the European Parliament of ... (not yet published in the Official Journal) and Decision of the Council of ...

Whereas:

- (1) Online intermediation services are key enablers of entrepreneurship ***and new business models***, trade and innovation, which can also improve consumer welfare and which are increasingly used by both the private and public sectors. They offer access to new markets and commercial opportunities allowing undertakings to exploit the benefits of the internal market. They **■** allow consumers in the Union to exploit those benefits, in particular by increasing their choice of goods and services ***as well as by contributing to offering competitive pricing online, but also raise challenges that need to be addressed in order to ensure legal certainty.***

- (2) Online intermediation services can be crucial for the commercial success of undertakings who use such services to reach consumers. ***To fully exploit the benefits of the platform economy, it is therefore important that undertakings can trust platforms with which they enter into commercial relationships. This is important mainly because*** the growing intermediation of transactions through online intermediation services, fuelled by strong data-driven indirect network effects, lead to an increased dependence of such business users, particularly micro, small and medium-sized enterprises, on those services in order for them to reach consumers. Given that increasing dependence, the providers of those services often have superior bargaining power, which enables them to effectively behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their businesses users and, indirectly, also of consumers in the Union. ***For instance, they might unilaterally impose on business users practices which grossly deviate from good commercial conduct, or are contrary to good faith and fair dealing. This Regulation addresses such potential frictions in the platform-economy.***

- (3) *Consumers have embraced the use of online intermediation services and a competitive, fair, and transparent online ecosystem where companies behave responsibly is also essential for consumer welfare. Ensuring transparency and trust the online platform economy in business to business relations, could indirectly help to improve also consumer trust in the online economy. Direct impacts of the development of the platform economy on consumers are, however, addressed by other Union law, especially the consumer acquis.*
- (4) Similarly, online search engines can be important sources of Internet traffic for undertakings which offer goods or services to consumers through websites and can therefore significantly affect the commercial success of such corporate website users offering their goods or services online in the internal market. In this regard, the ranking of websites by providers of online search engines, including of those websites through which corporate website users offer their goods and services to consumers, has an important impact on consumer choice and the commercial success of those corporate website users. Even in the absence of a contractual relationship with corporate website users, providers of online search engines can therefore effectively behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of corporate website users and, indirectly, also of consumers in the Union.

- (5) The ***nature of the relationship between*** business users ***and*** online intermediation services ***may also lead to situations*** in which business users often have limited possibilities to seek redress where unilateral actions of the providers of those services lead to a dispute. In many cases, those providers do not offer accessible and effective internal complaint-handling systems. Existing alternative out-of-court dispute settlement mechanisms can also be ineffective for a variety of reasons, including a lack of specialised mediators and business users' fear of retaliation.
- (6) Online intermediation services and online search engines, as well as the **■** transactions facilitated by those services, have an intrinsic cross-border potential and are of particular importance for the proper functioning of the Union's internal market in today's economy. The potentially unfair and harmful trading practices of certain providers of those services ***and the lack of effective redress mechanisms*** hamper the full realisation of that potential and negatively affect the proper functioning of the internal market. **■**
- (7) ***A targeted set of mandatory rules should be established at Union level to ensure a fair, predictable, sustainable and trusted online business environment within the internal market. In particular, business users of online intermediation services should be afforded appropriate transparency as well as effective redress possibilities throughout the Union in order to facilitate cross border business within the Union and thereby improve the proper functioning of the internal market and to address possible emerging fragmentation in the specific areas covered by the provisions of this Regulation.***

- (8) ■ Those rules should also provide for appropriate *incentives to promote fairness and* transparency, *especially* as regards the ranking of corporate website users in the search results generated by online search engines. At the same *time*, those rules should be such as to *recognise and* safeguard the important innovation potential of the wider online platform economy *and allow for healthy competition leading to increased consumer choice. It is appropriate to clarify that this Regulation should not affect national civil law, in particular contract law, such as the rules on the validity, formation, effects or termination of a contract, in so far as the national civil law rules are in conformity with Union law and to the extent that the relevant aspects are not covered by the provisions of this Regulation. Member States should remain free to apply national laws which prohibit or sanction unilateral conduct or unfair commercial practices to the extent that the relevant aspects are not covered by this Regulation.*

- (9) Since online intermediation services and online search engines typically have a global dimension, this Regulation should apply to providers of those services regardless of whether they are established in a Member State or outside the Union, provided that two cumulative conditions are met. Firstly, the business users or corporate website users should be established in the Union. Secondly, the business users or corporate website users should, through the provision of those services, offer their goods or services to consumers located in the Union at least for part of the transaction. ***In order to determine whether a business user or a corporate website user is offering goods or services to consumers located in the Union, it should be ascertained whether it is apparent that the business user or corporate website user directs his activities to consumers located in one or more Member States. This criterion should be interpreted in accordance with the relevant case law of the Court of Justice of the European Union on Article 17(1)(c) of Regulation (EC) No 1215/2012 of the European Parliament and of the Council⁷ and Article 6(1)(b) of Regulation (EC) No 593/2008 of the European Parliament and of the Council⁸***. Such consumers should be located in the Union, but do not need to have their place of residence in the Union nor have the nationality of any Member State. Accordingly, this Regulation should not apply where the business users or corporate websites users are not established in the Union or where they are established in the Union but where they use online intermediation services or online search engines to offer goods or services exclusively to consumers located outside the Union or to persons who are not consumers. ***Furthermore, this Regulation should apply irrespective of the law otherwise applicable to a contract.***

⁷ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (OJ L 351, 20.12.2012, p. 1).

⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), (OJ L 177, 4.7.2008, p. 6).

- (10) A wide variety of business-to-consumer ■ relations are intermediated online by providers operating multi-sided services that are essentially based on the same ecosystem-building business model. In order to capture the relevant services, online intermediation services should be defined in a precise and technologically-neutral manner. In particular, the services should consist of information society services, which are characterised by the fact that they aim to facilitate the initiating of direct transactions between business users and consumers, irrespective of whether the transactions are ultimately concluded either online, on the online portal of the provider of the online intermediation services in question or that of the business user, ■ *offline or in fact not at all, meaning that there is no requirement for any contractual relationship between the business users and consumers as a precondition for an online intermediation service falling within the scope of this Regulation. The mere inclusion of a service of a marginal character only should not be seen as making the aim of a website or service to facilitate transactions in the meaning of online intermediation services.* In addition, the services should be provided on the basis of contractual relationships between the providers and business users *which offer goods or services to consumers*. Such a contractual relationship should be deemed to exist where both parties concerned express their intention to be bound in an unequivocal ■ manner *on a durable medium*, without an express written agreement necessarily being required.

- (11) Examples of online intermediation services covered by this Regulation should consequently include online e-commerce market places, including collaborative ones on which business users are active, online software applications services, *such as application stores*, and 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. It should also not be relevant whether or not those transactions involve any monetary payment or that transactions are concluded in part offline.* However, this Regulation should not apply to *peer-to-peer online intermediation services without the presence of business users, pure business-to-business online intermediation services which are not offered to consumers*, online advertising tools and 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. *For the same reason, search engine optimisation software services as well as services which revolve around advertising-blocking software are not covered by this Regulation. Technological functionalities and interfaces that merely connect hardware and applications are not covered by this Regulation, as they normally do not fulfil the requirements for online intermediation services. However, such functionalities or interfaces can be directly connected or ancillary to certain online intermediation services and where this is the case, the relevant providers of online intermediation services should be subject to transparency requirements related to differentiated treatment based on these functionalities and interfaces.* This Regulation should also not apply to online payment services, since they do not themselves meet the applicable requirements but are rather inherently auxiliary to the transaction for the supply of goods and services to the consumers concerned.

- (12) In line with the relevant case-law of the Court of Justice of the European Union and in light of the fact that the dependent position of business users has been observed principally in respect of online intermediation services that serve as a gateway to consumers in the form of natural persons, the notion of consumer used to delineate the scope of this Regulation is to be understood as referring solely to natural persons, where they are acting for purposes which are outside their trade, business, craft or profession.
- (13) ***Considering the quick pace of innovation, the definition of online search engine used in this Regulation should be technology-neutral. In particular, the definition should be understood to also encompass vocal requests.***

- (14) ***Providers of online intermediation services tend to use pre-formulated terms and conditions and*** in order to effectively protect business users where needed, this Regulation should apply where the terms and conditions of a contractual relationship, regardless of their name or form, are ***unilaterally determined by the provider of online intermediation services***. Whether or not terms and conditions were ***unilaterally determined*** should be ***evaluated case-by-case*** on the basis of an overall assessment, whereby ***the relative size of the parties concerned, the fact that a negotiation took place, or*** that certain provisions thereof may have been ***subject to such a negotiation and determined together by the relevant provider and business user should***, in itself, not ***be*** decisive. ***In addition, the obligation for providers of online intermediation services to render their terms and conditions easily available for business users including in the pre-contractual stage of their commercial relationship means that business users will not be deprived of the transparency resulting from this Regulation as a result of them being able to in any way successfully negotiate.***

- (15) To ensure that the general terms and conditions of a contractual relationship enable business users to determine the commercial conditions for the use, termination and suspension of online intermediation services, and to achieve predictability regarding their business relationship, those terms and conditions should be drafted in ***plain and intelligible*** language. Terms and conditions should not be considered to have been drafted in ***plain and intelligible*** language where they are vague, unspecific or lack detail on important commercial issues and thus fail to give business users a reasonable degree of predictability on the most important aspects of the contractual relationship. ***Moreover, misleading language should not be considered to be plain and intelligible.***
- (16) ***In order to ensure that business users have sufficient clarity regarding where, and to whom, their goods or services are being marketed, providers of online intermediation services should ensure transparency towards their business users regarding any additional channels and potential affiliate programmes that the online intermediation service may use to market said goods or services. Additional channels and affiliate programmes should be understood in a technological neutral manner but could, inter alia, include other websites, apps or other online intermediation services used to market the goods or services offered by the business user.***

- (17) *The ownership and control of intellectual property rights online can have significant economic importance for both the providers of online intermediation services as well as their business users. To ensure clarity and transparency for business users and for their better understanding, providers of online intermediation services should within their terms and conditions include general, or more detailed, information if they so wish, regarding the overall effects, if any, of said terms and conditions on the ownership and control of intellectual property rights of the business user. Such information could, inter alia, include information such as the general usage of logos, trademarks or brand names.*
- (18) *In order to ensure that business users can fully exploit the commercial opportunities offered by online intermediation services, providers of these services should not altogether prevent their business users from featuring their trading identity as part of their offering or presence on the relevant online intermediation services. However, this prohibition of interference should not be understood as a right for business users to unilaterally determine the presentation of their offering or presence on the relevant online intermediation services.*

- (19) Ensuring transparency in the general terms and conditions can be essential to promoting sustainable business relationships and to preventing unfair behaviour to the detriment of business users. Providers of online intermediation services should therefore also ensure that the terms and conditions are easily available at all stages of the contractual relationship, including to prospective business users at the pre-contractual phase, and that any modifications to those terms are notified *on a durable medium* to business users within a set notice period which is reasonable and proportionate in light of the specific circumstances and which is at least 15 days. ***Proportionate longer notice periods of more than 15 days should be given where the revised terms and conditions require business users to make changes in order to comply with the modification, for example by requiring them to make significant technical adjustments to their goods or services.*** That notice period should not apply where, and to the extent that, it is waived in an unambiguous manner by the business user concerned or where, and to the extent that, the need to implement the modification without respecting the notice period stems from a legal obligation incumbent on the service provider under Union or national law. ***However, proposed editorial changes should not be covered by the term ‘modification’ in as far as they do not alter the content or meaning of terms and conditions. The requirement of notifying proposed modifications on a durable medium should enable business users to effectively review these modifications at a later stage. Business users should be entitled to terminate their agreement within 15 days from the receipt of the notice of any modification, unless a shorter period applies to the contract, for example as resulting from national civil law.***

- (20) *In general, submitting new goods or services, including software applications, to the online intermediation services should be considered clear affirmative action to waive the notice period required for modifications to the terms and conditions by the business user. However, in cases where the reasonable and proportionate notice period is longer than 15 days because the modifications to the terms and conditions require the business user to make significant technical adjustments to their goods or services, the notice period should not be considered automatically waived where the business user submits new goods and services. The provider of online intermediation services should expect the modifications to terms and conditions to require the business user to make significant technical adjustments where, for example, entire features of the online intermediation service that business users had access to are removed or added, or where business users may need to re-program their goods and services to be able to continue operating on the platform.*
- (21) In order to protect business users *and to provide legal certainty for both sides*, it should be possible for a competent court to establish that non-compliant terms and conditions are *null and void*, with effects *erga omnes and ex tunc*. Any such finding by a court should however only concern the specific provisions of the terms and conditions which are not compliant. The remaining provisions should remain valid and enforceable, in as far as they can be severed from the non-compliant provisions. Sudden modifications to existing terms and conditions may significantly disrupt business users' operations. In order to limit such negative effects on business users, and to discourage such behaviour, modifications made in contravention of the obligation to provide a set notice period, should therefore be null and void, that is, deemed to have never existed with effects *erga omnes* and *ex tunc*.

- (22) A provider of online intermediation services can have legitimate reasons to decide to **restrict**, suspend or terminate the provision of its services █ to a given business user, including by delisting individual goods or services of a given business user or effectively removing search results. ***Individual listings of business users can also be restricted, short of being suspended; for example through their demotion or dimming in ranking.*** However, given that such decisions can significantly affect the interests of the business user concerned, they should be ***provided, prior to or at the time of the suspension taking effect, with a statement of reasons for that decision on a durable medium. To minimise the negative impact of such decisions on business users, providers of online intermediation services should also allow an opportunity to clarify the facts that led to this decision, which will help the business user, where this is possible, to re-establish compliance. In addition, where the provider of online intermediation services revokes the decision to restrict, suspend or terminate, for example as the decision was made in error or the infringement of terms and conditions that led to this decision has not been committed in bad faith and has been remedied in a satisfactory manner, the provider should reinstate the business user concerned without undue delay, including any access to data available prior to the decision.*** The statement of reasons should ***in this regard*** allow business users to ascertain whether there is scope to challenge the decision, thereby improving the possibilities for business users to seek effective redress where necessary. █ The statement of reasons should identify the █ grounds for the decision, based on the grounds that the provider had set out in advance in its terms and conditions, and refer in a proportionate manner to the relevant specific circumstances, ***including third party notifications***, that led to that decision.

(23) *The termination of the whole of the online intermediation services and the related deletion of data provided for the use of or generated through the provision of online intermediation services represent a loss of essential information, which could have a significant impact on business users and could also impair their ability to properly exercise other rights granted to them by this Regulation. Therefore, the provider of online intermediation services should provide the business user concerned with a statement of reasons on a durable medium, at least 30 days before the termination of the whole of its online intermediation services enters into effect. However, in cases where a regulatory obligation requires a provider of online intermediation services to terminate the provision of the whole of its online intermediation services to a given business user, for example in this notice period should not apply. Equally, the notice period of 30 days should not apply where a provider of online intermediation services invokes rights of termination under national law in compliance with Union law which allow immediate termination where, taking into account all the circumstances of the specific case and weighing the interests of both parties, it cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period. Finally, the notice period of 30 days should not apply where a provider of online intermediation services can demonstrate a repeated infringement of terms and conditions. The various exceptions to the 30 day notice period can in particular arise in connection with illicit or inappropriate content, the safety of a product or service, counterfeiting, fraud, malware, spam, data breaches, other cybersecurity risks or suitability of the product or service to minors. In order to ensure proportionality, providers of online intermediation services should, where reasonable and technically feasible, delist only individual goods or services of a business user. Termination of the whole of the online intermediation services constitutes the most severe measure.*

(24) The ranking of goods and services by the providers of online intermediation services has an important impact on consumer choice and, consequently, on the commercial success of the business users offering those goods and services to consumers. ***Ranking refers to the relative prominence of the offers of business users or relevance given to search results as presented, organised or communicated by providers of online intermediation services or by providers of online search engines, resulting from the use of algorithmic sequencing, rating or review mechanisms, visual highlights, or other saliency tools, or combinations thereof. Predictability entails that providers of online intermediation services determine ranking in a non-arbitrary manner. Providers*** should therefore outline the main parameters determining ranking beforehand, in order to improve predictability for business users, to allow them to better understand the functioning of the ranking mechanism and to enable them to compare the ranking practices of various providers. ***The specific design of this transparency obligation is important for business users as it implies the identification of a limited set of parameters that are most relevant out of a possibly much larger number of parameters that have some impact on ranking. This reasoned description should help business users to improve the presentation of their goods and services, or some inherent characteristics of those goods or services.*** The notion of main parameter should be understood to refer to any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking. ■

(25) *The description of the main parameters determining ranking should also include an explanation of any possibility for business users to actively influence ranking against remuneration, as well as of the relative effects thereof. Remuneration could in this respect refer to payments made with the main or exclusive aim to improve ranking, as well as indirect remuneration in the form of the acceptance by a business user of additional obligations of any kind which may have this as its practical effect, such as the use of any premium features or ancillary services. The content of the description, including the number and type of main parameters, can accordingly vary strongly depending on the specific online intermediation services or online search engine concerned, but should provide business users with an adequate understanding of how the ranking mechanism takes account of the characteristics of the actual goods or services offered by the business user, and their relevance to the consumers of the specific online intermediation services. The indicators used for measuring the quality of goods or services of business users, the use of editors and their ability to influence the ranking of those goods or services, the amplitude of the impact of remuneration on ranking as well as elements that do not or only remotely relate to the product or service itself, such as presentational features of the online offer, could be examples of main parameters that, when included in a general description of the ranking mechanism in plain and intelligible language, should assist business users in obtaining the required adequate understanding of its functioning.*

- (26) Similarly, the ranking of websites by the providers of online search engines, notably of those websites through which undertakings offer goods and services to consumers, has an important impact on consumer choice and the commercial success of corporate website users. Providers of online search engines should therefore provide a description of the main parameters determining the ranking of all indexed websites ***and the relative importance of those main parameters as opposed to other parameters***, including those of corporate website users as well as other websites. In addition to the characteristics of the goods and services and their relevance for consumers, this description should in the case of online search engines also allow corporate website users to obtain an adequate understanding of whether, and if so how and to what extent, certain design characteristics of the website used, such as their optimisation for display on mobile telecommunications devices, is taken into account ***and should also include an explanation of any possibility for business users to actively influence ranking against remuneration, as well as of the relative effects thereof***. In the absence of a contractual relationship between providers of online search engines and corporate website users, that description should be available to the public in an obvious and easily accessible location on the relevant online search engine. ***Areas of websites that require users to log in or register should not be understood as easily and publicly available in this sense***. To ensure predictability for corporate website users, the description should also be kept up to date, including the possibility that any changes to the main parameters should be made easily identifiable. ***The existence of an up-to-date description of the main parameters would also benefit users other than corporate website users of the online search engine. In some cases, providers of online search engines may decide to influence the ranking in a specific case or delist a website from a ranking based on notifications by third parties. Unlike providers of online intermediation services, providers of online search engines cannot due to the lack of any contractual relationship between the parties be expected to notify a corporate website user directly of a delisting or change in ranking due to a notification. Nevertheless, a corporate business user should be able to inspect the notification that has led to the change in ranking or to delisting in the specific case, by investigating the contents of the notice such as in a publicly accessible online database. This would help to mitigate potential abuses of delisting notifications by competitors.***

(27) Providers of online intermediation services or of online search engines should not be required to disclose the detailed functioning of their ranking mechanisms, including algorithms, under this Regulation. Their ability to act against bad faith manipulation of ranking by third parties, including in the interest of consumers, should equally not be impaired. A general description of the main ranking parameters should safeguard those interests, while providing business users and corporate website users with an adequate understanding of the functioning of ranking in the context of their use of specific online intermediation services or online search engines. To ensure that the objective of this Regulation is achieved, consideration of the commercial interests of providers of online intermediation services or online search engines should therefore never lead to a refusal to disclose the main parameters determining ranking. In this regard, whilst this Regulation is without prejudice to the Directive (EU) 2016/943 of the European Parliament and of the Council⁹, the description given should at least be based on actual data on the relevance of the ranking parameters used.

⁹ **Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L 157, 15.6.2016, p. 1).**

- (28) *The Commission should develop guidelines to assist providers of online intermediation services and providers of online search engines in applying the ranking transparency requirements laid down by this Regulation. This effort should help to optimise the manner in which the main parameters determining ranking are identified and presented to business users.*

(29) Where a provider of online intermediation services itself offers certain goods or services to consumers through its own online intermediation services, or does so through a business user which it controls, that provider may compete directly with other business users of its online intermediation services which are not controlled by the provider, ***which may give the provider an economic incentive and the ability to use its control over the online intermediation service or online search engine to provide technical or economic advantages to its own offering, or those offered through a business user which it controls, which it could deny to competing business users. Such behaviour could undermine fair competition and restrict consumer choice.*** In such situations, in particular, it is important that the provider of online intermediation services acts in a transparent manner and provides ***an appropriate*** description of ***and considerations for*** any differentiated treatment, whether through legal, commercial or technical means, ***such as functionalities involving operating systems,*** that it might give in respect of goods or services it offers itself compared to those offered by business users. To ensure proportionality, this obligation should apply at the level of the overall online intermediation services, rather than at the level of individual goods or services offered through those services.

(30) Where a provider of online search engines itself offers certain goods or services to consumers through its own online search engines, or does so through a corporate website user which it controls, that provider may compete directly with other corporate website users of its online search engines which are not controlled by the provider. In such situations, in particular, it is important that the provider of online search engines acts in a transparent manner and provides a description of any differentiated treatment, whether through legal, commercial or technical means, that it might give in respect of goods or services it offers itself compared to those offered by corporate website users. To ensure proportionality, this obligation should apply at the level of the overall online search engines, rather than at the level of individual goods or services offered through those services.

(31) *Specific contractual terms should be addressed in this Regulation, in particular in situations of imbalanced bargaining power, in order to ensure that contractual relations are conducted in good faith and on the basis of fair dealing. Predictability and transparency require that business users are given a real opportunity to become acquainted with changes to terms and conditions, which should therefore not be imposed with retroactive effect unless based on a regulatory obligation or beneficial to them. Business users should in addition be offered clarity as to the conditions under which their contractual relationship with providers of online intermediation services can be terminated. Providers of online intermediation services should ensure that the conditions for termination are always proportionate and can be exercised without undue difficulty. Finally, business users should be fully informed of any access that providers of online intermediation services maintain, after the term of the contract, to the information that business users provide or generate in the context of their use of online intermediation services.*

(32) The ability to access and use data, including personal data, can enable important value creation in the online platform economy, ***both generally as well as for the business users and online intermediation services involved.*** Accordingly, it is important that providers of online intermediation services provide business users with a clear description of the scope, nature and conditions of their access to and use of certain categories of data. The description should be proportionate and might refer to general access conditions, rather than an exhaustive identification of actual data, or categories of data. ***However, identification of and specific access conditions to certain types of actual data that may be highly relevant to the business users could also be included in the description. Such data could include ratings and reviews accumulated by business users on the online intermediation services. Altogether,*** the description should enable business users to understand whether they can use the data to enhance value creation, including by possibly retaining third-party data services. ■

(33) In the same vein, it is important for business users to understand whether the provider shares any data generated through the use of the intermediation service by the business user with third parties. Business users should in particular be made aware of any sharing of data with third parties that occurs for purposes which are not necessary for the proper functioning of the online intermediation services, but where for example the provider monetises data under commercial considerations. To allow business users to fully exercise available rights to influence such data sharing, providers of online intermediation services should also be explicit about any options to opt out from the data sharing where they exist under their contractual relationship with the business user.

(34) *These requirements should not be understood as any obligation for providers of online intermediation services to either disseminate or not to disseminate personal or non-personal data to their business users. However, transparency measures could contribute to increased data sharing and enhance, as a key source of innovation and growth, the aims to create a common European data space. Processing of personal data should comply with the Union legal framework on the protection of natural persons with regard to the processing of personal data, and on respect for private life and the protection of personal data in electronic communications, in particular Regulation (EU) 2016/679 of the European Parliament and of the Council¹⁰, Directive (EU) 2016/680 of the European Parliament and of the Council¹¹ and Directive 2002/58/EC of the European Parliament and of the Council¹².*

¹⁰ *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).*

¹¹ *Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).*

¹² *Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).*

- (35) Providers of online intermediation services might in certain cases restrict in the terms and conditions the ability of business users to offer goods or services to consumers under more favourable conditions through other means than through those online intermediation services. In those cases, the providers concerned should set out the grounds for doing so, in particular with reference to the main economic, commercial or legal considerations for the restrictions. This transparency obligation should however not be understood as affecting the assessment of the legality of such restrictions under other acts of Union law or the law of Member States in accordance with Union law, including in the areas of competition and unfair commercial practices, and the application of such laws.

- (36) In order to enable business users, including those whose use of the relevant online intermediation services might have been suspended or terminated, to have access to immediate, suitable and effective redress possibilities, providers of online intermediation services should provide for an internal complaint-handling system. That internal complaint-handling system should be ***based on principles of transparency and equal treatment applied to equal situations***, aimed at ensuring that a significant proportion of complaints can be solved bilaterally by the provider of the online intermediation services and the relevant business user ***in a reasonable period of time. The online intermediation service providers may maintain the decision they have taken in force during the duration of the complaint. Any attempt to reach an agreement through the internal complaint handling-mechanism does not affect the rights of*** providers of online intermediation services ***or business users to initiate judicial proceedings at any time during or after the complaint handling process. In addition, providers of online intermediation services should publish and verify at least annually*** information on the functioning and effectiveness of their internal complaint-handling system ***to*** help business users to understand the ***main*** types of issues that can arise in the context of the provision of different online intermediation services and the possibility of reaching a quick and effective bilateral resolution.

- (37) The requirements of this Regulation regarding the internal complaint-handling systems aim at allowing providers of online intermediation services a reasonable degree of flexibility when operating those systems and addressing individual complaints, so as to minimise any administrative burden. In addition, the internal complaint-handling systems should allow providers of online intermediation services to address, where necessary, in a proportionate manner any use in bad faith which certain business users might seek to make of those systems. ■ In light of the costs of setting up and operating such systems, it is appropriate to exempt from those obligations any providers of online intermediation services which constitute small enterprises, in line with the relevant provisions of Commission Recommendation 2003/361/EC¹³. ***The consolidation rules laid down in this Recommendation ensure that any circumvention is prevented. This exemption should not affect the right of such enterprises to set up, on a voluntary basis, an internal complaint handling system that complies with the criteria set out in this Regulation.***
- (38) ***The use of the word ‘internal’ should not be understood as preventing the delegation of an internal complaint-handling system to an external service provider or other corporate structure, as long as the operator has full authority and the ability to ensure compliance of the internal complaint-handling system with the requirements in this Regulation.***

¹³ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p36).

(39) Mediation can offer providers of online intermediation services and their business users a means to resolve disputes in a satisfactory manner, without having to use judicial proceedings which can be lengthy and costly. Therefore, providers of online intermediation services should facilitate mediation by, in particular, identifying *at least two public or private* mediators with which they are willing to engage. *The minimum number of mediators to be identified aims at safeguarding the mediators' neutrality.* Mediators which provide their services from a location outside the Union should only be identified where it is guaranteed that the use of those services does not in any way deprive the business users concerned of any legal protection offered to them under Union law or the law of the Member States, including the requirements of this Regulation and the applicable law regarding protection of personal data and trade secrets. In order to be accessible, fair, and as swift, efficient and effective as possible, those mediators should meet certain set criteria. *Nonetheless, providers of online intermediation services and their business users should remain free to jointly identify any mediator of their choice after a dispute has arisen between them. In line with Directive 2008/52/EC of the European Parliament and of the Council¹⁴, the mediation provided for in this Regulation should be a voluntary process in the sense that the parties are themselves in charge of the process and may start and terminate it at any time. Notwithstanding its voluntary nature, providers of online intermediation services should examine in good faith requests to engage in the mediation provided for in this Regulation.*

¹⁴ *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136, 24.5.2008, p. 3).*

- (40) Providers of online intermediation services should bear a reasonable proportion of the total costs of the mediation, taking into account all relevant elements of the case at hand. To that aim, the mediator should suggest which proportion is reasonable in the individual case. ■
- In light of the costs and administrative burden associated with the necessity to identify mediators in terms and conditions, it is appropriate to exempt from that obligation any providers of online intermediation services, which constitute small enterprises, in line with the relevant provisions of Recommendation 2003/361/EC. The consolidation rules laid down in this Recommendation ensure that any circumvention is prevented. Nevertheless, this should not affect the right of such enterprises to identify mediators in their terms and conditions that comply with the criteria set out in this Regulation.*

(41) *Since the providers of online intermediation services should always be required to identify mediators with which they are willing to engage, and should be obliged to engage in mediation in good faith, the obligation of mediation should be established in a way that prevents abuse of the mediation system by business users. As such, business users should also be obliged to engage in mediation in good faith. Providers of online intermediation services should not be obliged to engage in mediation where a business user brings proceedings on a subject in relation to which that business user has previously brought proceedings seeking mediation and it has been determined by the mediator in that case that the business user has not acted in good faith. Providers of online intermediation services should also not be obliged to engage in mediation with business users who have brought forward to the mediator repeated unsuccessful mediation attempts. These exceptional situations should not limit the business user's possibility to bring forward a case for mediation where, as determined by the mediator, the subject matter of the mediation is not related to the previous cases.*

- (42) In order to facilitate the settlement of disputes relating to the provision of online intermediation services using mediation in the Union, the Commission should, *in close cooperation with the Member States*, encourage the setting up of specialised mediation organisations, which are currently lacking. The involvement of mediators having specialist knowledge of online intermediation services and online search engines as well as of the specific industry sectors within which those services are provided should add to the confidence both parties have in the mediation process and should increase the likelihood of that process leading to a swift, just and satisfactory outcome.

(43) Various factors, such as limited financial means, a fear of retaliation and exclusive choice of law and forum provisions in terms and conditions, can limit the effectiveness of existing judicial redress possibilities, particularly those which require business users or corporate website users to act individually and identifiably. To ensure the effective application of this Regulation, organisations, associations representing business users or corporate website users, as well as certain public bodies set-up in Member States, should be granted the possibility to take action before national courts ***in accordance with national law, including national procedural requirements.*** Such action before national courts should aim to stop or prohibit infringements of the rules set out in this Regulation and to prevent future damage that could undermine sustainable business relationships in the online platform economy. In order to ensure that such organisations or associations exercise that right effectively and in an appropriate manner, they should meet certain criteria. ***In particular, they must be properly constituted according to the law of a Member State, be of a non-profit making character and pursue their objectives on a sustained basis. These requirements should prevent any ad hoc constitution of organisations or associations for the purpose of a specific action or specific actions, or for the sake of making profits. Furthermore, it should be ensured that there is no undue influence by any third party providers of financing on decision-making by those organisations or associations. In order to avoid a conflict of interest, it should in particular be prevented that organisations or associations representing business users or corporate website users are subject to undue influence from any providers of online intermediation services or of any online search engines. The full and public disclosure of information on membership and financing should facilitate national courts in assessing whether these eligibility criteria are met.*** Considering the particular status of the relevant public bodies in Member States where such bodies have been set up, it should only be required that those have been specifically charged, in accordance with the relevant rules of national law, with bringing such actions either in the collective interest of the parties concerned or in the general interest, without there being a need to apply those criteria to such public bodies. Any such actions should in no way affect the rights of the business users and corporate website users to take judicial action on an individual basis.

(44) Organisations, associations and public bodies which, in the view of the Member States, should be qualified to bring an action according to the provisions of this Regulation, should be communicated to the Commission. In the course of such a communication, Member States should make specific reference to the relevant national provisions according to which the organisation, association or public body was constituted and, where appropriate, refer to the relevant public register in which the organisation or association is registered. This additional option of a designation by Member States should provide for a certain level of legal certainty and predictability that business users and corporate website users can rely on. At the same time, it aims at making judicial procedures more efficient and shorter, which seems appropriate in this context. The Commission should ensure the publication of a list of these organisations, associations and public bodies in the Official Journal of the European Union, whereby this list should serve as proof of the legal capacity of the organisation, association or public body bringing the action. In case there are any concerns regarding a designation the Member State which designated an organisation, association or public body should investigate those concerns. Organisations, associations and public bodies that are not designated by a Member State should have the possibility to bring an action before national courts subject to examination of legal capacity according to the criteria set out in this Regulation.

- (45) *Member States should be required to ensure adequate and effective enforcement of this Regulation. Different enforcement systems already exist in Member States, which should not be obliged to set up new national enforcement bodies. Member States should have the option to entrust existing authorities, including courts, with the enforcement of this Regulation. This Regulation should not oblige Member States to provide for ex officio enforcement or to impose fines.*
- (46) *The Commission should continuously monitor the application of this Regulation in close cooperation with the Member States. In this context, the Commission should aim to establish a broad information exchange network by leveraging relevant expert bodies, centres of excellence as well as the Observatory on the Online Platform Economy. Member States should at the same time provide any relevant information they have in this context to the Commission. Finally, this exercise should benefit from the overall enhanced transparency in commercial relations between business users and providers of online intermediation services that this Regulation aims to achieve. In order to carry out its duties effectively under Article 16 and Article 18, the Commission should endeavour to gather information from providers of online intermediation services. Providers of online intermediation services should cooperate in good faith in facilitating the gathering of such data, where applicable.*

- (47) Codes of conduct, drawn up either by the service providers concerned or by organisations or associations representing them, can contribute to the proper application of this Regulation and should therefore be encouraged. When drawing up such codes of conduct, in consultation with all relevant stakeholders, account should be taken of the specific features of the sectors concerned as well as of the specific characteristics of micro, small and medium-sized enterprises. ***Such codes of conduct should be worded in an objective and non-discriminatory way.***

- (48) The Commission should periodically evaluate this Regulation ***and closely monitor its effects on the online platform economy***, in particular with a view to determining the need for amendments in light of relevant technological or commercial developments. ***This evaluation should include the effects on business users which may result from the general use of exclusive choice of law and forum provisions in terms and conditions which are unilaterally determined by the provider of the online intermediation services. In order to obtain a broad view of developments in the sector, the evaluation should take into account the experiences of Member States and relevant stakeholders. The group of experts for the Observatory on the Online Platform Economy established in accordance with the Commission Decision C(2018)2393¹⁵ has a key role in informing the evaluation of this Regulation by the Commission. The Commission should therefore duly consider the opinions and reports presented to it by the group. Following the evaluation, the Commission should take appropriate measures. Further measures, including of a legislative nature, may be appropriate if and where the provisions established in this Regulation would prove to be insufficient to adequately address imbalances and unfair trading practices persisting in the sector.***

¹⁵ Commission Decision on setting up the group of experts for the Observatory on the Online Platform Economy, 26.4.2018 C(2018) 2393 final.

- (49) When providing the information required under this Regulation, account should be taken as much as possible of the particular needs of persons with disabilities, in line with the objectives of the United Nations Convention on the Rights of Persons with Disabilities¹⁶.
- (50) As the objective of this Regulation, namely to ensure a fair, predictable, sustainable and trusted online business environment within the internal market, cannot be sufficiently achieved by the Member States, but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

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- (51) This Regulation seeks to ensure full respect for the right to an effective remedy and to a fair trial and promote the application of the freedom to provide a business, laid down in Article 47 and Article 16 of the Charter of Fundamental Rights of the European Union respectively,

HAVE ADOPTED THIS REGULATION:

¹⁶ United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), available at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

Article 1

Subject-matter and scope

1. ***The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down 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.***
2. This Regulation shall apply to online intermediation services and online search engines provided, or offered to be provided, to business users and corporate website users, respectively, that have their place of establishment or residence in the Union and that, through online intermediation services or online search engines, offer goods or services to consumers located in the Union, irrespective of the place of establishment or residence of the providers of those services ***and irrespective of the law otherwise applicable.***
3. ***This Regulation shall not apply to online payment services or to online advertising tools or online advertising exchanges, which are not provided with the aim of the facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers.***

4. *This Regulation shall be without prejudice to national rules which, in conformity with Union law, prohibit or sanction unilateral conduct or unfair commercial practices to the extent that the relevant aspects are not covered by the provisions of this Regulation. This Regulation shall not affect national civil law, in particular contract law, such as the rules on the validity, formation, effects or termination of a contract, in so far as the national civil law rules are in conformity with Union law and to the extent that the relevant aspects are not covered by the provisions of this Regulation.*

5. *This Regulation shall be without prejudice to Union law, in particular Union law applicable in the areas of judicial cooperation in civil matters, competition, data protection, trade secrets protection, consumer protection, electronic commerce and financial services.*

Article 2
Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (1) 'business user' means any ***private individual acting in his commercial or professional capacity or any*** legal person which through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession;
- (2) 'online intermediation services' means services which meet all of the following requirements:
 - (a) they constitute information society services within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council¹⁷;
 - (b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;
 - (c) they are provided to business users on the basis of contractual relationships between ■ the provider of those services and ■ business users, ***which offer goods or services to consumers***;

¹⁷ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

- (3) 'provider of online intermediation services' means any natural or legal person which provides, or which offers to provide, online intermediation services to business users;
- (4) 'consumer' means any natural person who is acting for purposes which are outside his or her trade, business, craft or profession;
- (5) 'online search engine' means a digital service that allows users **to input queries in order** to perform searches of, in principle, all websites or 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 returns **results in any format** in which information related to the requested content can be found;
- (6) 'provider of online search engine' means any natural or legal person which provides, or which offers to provide, online search engines to consumers;
- (7) 'corporate website user' means any natural or legal person which uses **an online interface, meaning any software, including a website or a part thereof and applications, including mobile applications**, to offer goods or services to consumers for purposes relating to its trade, business, craft or profession;

- (8) 'ranking' means the relative prominence given to the goods or services offered ■ through online intermediation services, or ***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;
- (9) 'control' means ownership of, or the ability to exercise decisive influence over, an undertaking, within the meaning of Article 3(2) of Council Regulation (EC) No 139/2004¹⁸;
- (10) 'terms and conditions' means all terms ***and conditions or specifications***, irrespective of their name or form, which govern the contractual relationship between the provider of online intermediation services and their business users and are unilaterally determined by the provider of online intermediation services. ***Whether or not terms and conditions were unilaterally determined shall be evaluated on the basis of an overall assessment, whereby the relative size of the parties concerned, the fact that a negotiation took place, or that certain provisions thereof may have been subject to such a negotiation and determined together by the relevant provider and business user shall, in itself, not be decisive;***

¹⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

- (11) *'ancillary goods and services' means goods and services offered to the consumer prior to the completion of a transaction initiated on the online intermediation services in addition to and as complementary to the primary good or service offered by the business user through the online intermediation services;*
- (12) *'mediation' means any structured process as defined in Article 3(a) of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters;*
- (13) *'durable medium' means any instrument which enables business users to store information addressed personally to them in a way 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.*

Article 3
Terms and conditions

1. Providers of online intermediation services shall ensure that their terms and conditions:
 - (a) are drafted in ***plain and intelligible*** language;
 - (b) are easily available for business users at all stages of their commercial relationship with the provider of online intermediation services, 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 programmes through which the provider of online intermediation services might distribute goods and services offered by the business user;***
 - (e) ***include general information regarding the effects of the terms and conditions on the ownership and control of intellectual property rights.***

■

2. Providers of online intermediation services shall notify *on a durable medium* to the business users concerned any *proposed* modification of their terms and conditions.

The *proposed* modifications shall not be implemented before the expiry of a notice period which is reasonable and proportionate to the nature and extent of the envisaged modifications and to their consequences for the business user concerned. That notice period shall be at least 15 days from the date on which the provider of online intermediation services notifies the business users concerned about the *proposed* modifications. *Providers of online intermediation services shall grant longer periods when this is necessary to allow business users to make technical or commercial adaptations to comply with the modifications.*

The business user concerned shall have the right to terminate the contract with the provider of the online intermediation services before the expiry of the notice period. Such termination shall take effect within 15 days after receipt of the notice, unless a shorter period applies to the contract.

The business user concerned may, either by means of a written statement or a clear affirmative action, waive the notice period referred to in the second subparagraph *at any moment after the notification*.

During the notice period, submitting new goods or services on the online intermediation service shall be considered clear affirmative action to waive the notice period, except for in cases where the reasonable and proportionate notice period is longer than 15 days because the modifications to the terms and conditions require the business user to make significant technical adjustments to its goods or services. In such cases, the notice period shall not be considered automatically waived where the business user submits new goods and services.

3. *Terms and conditions, or specific provisions thereof, which do not comply with the requirements of paragraph 1 as well as* modifications to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of paragraph 2 shall be null and void.

4. ***The notice period set out in*** paragraph 2 shall not apply where a provider of online intermediation services:
- (a) is subject to a legal ***or regulatory*** obligation which requires it to modify its terms and conditions in a manner which does not allow it to respect the notice period referred to in the second subparagraph of paragraph 2;
 - (b) ***has to exceptionally modify their terms and conditions to address an unforeseen and imminent danger related to defending the online intermediation services, their consumers or other business users from fraud, malware, spam, data breaches or other cybersecurity risks.***
5. ***The providers of online intermediation services shall ensure that the identity of the business user providing the goods or services on the online intermediation service is clearly visible.***

Article 4

Restriction, suspension and termination

1. Where a provider of online intermediation services decides to ***restrict or suspend*** the provision of its online intermediation services to a given business user ***in relation to individual goods or services offered by that business user***, it shall provide the business user concerned, ***prior to or at the time of the suspension or restriction taking effect***, with a statement of reasons for that decision ***on a durable medium***.
2. ***Where a provider of online intermediation services decides to terminate the provision of the whole of its online intermediation services to a given business user, it shall provide the business user concerned, at least 30 days prior to the termination taking effect, with a statement of reasons for that decision on a durable medium.***
3. ***In the case of restriction, suspension or termination, the provider of online intermediation services shall provide the business user the opportunity to clarify the facts and circumstances in the framework of the complaint handling process referred to in Article 11. Where the restriction, suspension or termination is revoked by the intermediary service provider, it shall reinstate the business user without undue delay, including 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.***

4. *The notice period in paragraph 2 shall not apply where a provider of online intermediation services:*

- (a) is subject to a legal or regulatory obligation which requires it to terminate or restrict 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 this notice period, or*
- (b) exercises a right of termination under an imperative reason pursuant to national law which is in compliance with Union law;*
- (c) can demonstrate that the business user concerned has repeatedly infringed the applicable terms and conditions, resulting in their termination or restriction of the provision of the whole of the online intermediation services in question.*

In cases where the notice period in paragraph 2 does not apply, 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.

5. *The statement of reasons referred to in paragraph 1 and 2 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, as well as a reference to the applicable grounds for that decision referred to in Article 3(1)(c).*

A provider of online intermediation services does not have to provide a statement of reasons where it is subject to a regulatory obligation not to provide the specific facts or circumstances or the reference to the applicable ground or grounds, or where a provider of online intermediation services can demonstrate that the business user concerned has repeatedly infringed the applicable terms and conditions, resulting in termination or restriction of the provision of the whole of the online intermediation services in question

Article 5

Ranking

1. Providers of online intermediation services shall set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters.
2. Providers of online search engines shall set out **■** the main parameters, ***which individually or collectively 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. They shall keep that description up to date.
3. ***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 those possibilities and of the effects of such remuneration on ranking in accordance with the requirements set out in paragraphs 1 and 2.***

4. ***Where a provider of an online search engine has altered the ranking order in a specific case or delisted a particular website following a third party notification, the provider shall offer the possibility for the corporate website user to inspect the contents of the notice.***
5. The descriptions referred to in paragraphs 1, 2 ***and 3*** 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:
 - (a) the characteristics of the goods and services offered to consumers through the online intermediation services or the online search engine;
 - (b) the relevance of those characteristics for those consumers;
 - (c) as regards online search engines, the design characteristics of the website used by corporate website users.
6. Providers of online intermediation services and providers of online search engines shall, when complying with the requirements of this Article, not be required to disclose ***algorithms nor any information that with reasonable certainty would result in the enabling of deception of consumers or consumer harm through the manipulation of search results. This Article shall be without prejudice to*** Directive (EU) 2016/943.

7. *To facilitate the compliance of providers of online intermediation services and providers of online search engines with and the enforcement of the requirements of this Article, the Commission shall accompany the transparency requirements set out in this Article by guidelines.*

Article 6

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 the online intermediation services or by third parties, the providers of the online intermediation services shall set out in their 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 their own ancillary goods and services through the online intermediation services.

Article 7
Differentiated treatment

1. Providers of online intermediation services shall include in their terms and conditions a description of any differentiated treatment which they give, or may give, in relation to, on the one hand, goods or services offered to consumers through those online intermediation services by either that provider itself or any business users which that provider controls and, on the other hand, other business users. ***This description shall refer to the main economic, commercial or legal considerations for such differentiated treatment.***

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

3. The description referred to in paragraph 1 ***and 2*** shall cover ***in particular***, where applicable, any differentiated treatment through specific measures taken by, or the behaviour of, the provider of the online intermediation services ***or the provider of online search engines*** relating to any of the following:

- (a) access that the provider, or that the business 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 or which are generated through the provision of those services;
- (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 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 **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 **utilising** the online intermediation services **or online search engines** concerned.

Article 8
Specific contractual terms

In order to ensure that contractual relations between providers of online intermediation services and business users are conducted in good faith and based on fair dealing, providers of online intermediation services shall:

- (a) not impose retroactive changes to terms and conditions, except when they are required to respect a regulatory obligation or when the retroactive changes are beneficial for the business users;*
- (b) ensure that their terms and conditions include information on the conditions under which business users can terminate the contractual relationship with the provider of online intermediation services; and*
- (c) include in their terms and conditions 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.*

Article 9
Access to data

1. Providers of online intermediation services shall include in their terms and conditions 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.
2. Through the description referred to in paragraph 1, providers of online intermediation services shall adequately inform business users *in particular* of the following:
 - (a) whether the provider of online intermediation services has access to personal data or other data, or both, which business users or consumers provide for the use of those services or which are generated through the provision of those services, and if so, to which categories of such data and under what conditions;
 - (b) whether a business user has access to personal data or other data, or both, provided by that business user in connection to his or her use of the online intermediation services concerned or generated through the provision of those services to that business user and the consumers of his or her goods or services, and if so, to which categories of such data and under what conditions;

- (c) whether, in addition to point (b), a business user has access to personal data or other data, or both, including in aggregated form, provided by or generated through the provision of the online intermediation services to all of the business users and consumers thereof, and if so, to which categories of such data and under what conditions;
- (d) *whether any data under point (a) is provided to third parties. Where the provision of such data to third parties is not necessary for the proper functioning of the online intermediation services, the provider of online intermediation services shall specify the purpose of such data sharing, as well as any options for business users to opt out.*

3. *This Article shall be without prejudice to the application of Regulation (EU) 2016/679.*

Article 10

Restrictions to offer different conditions through other means

1. 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 grounds for that restriction in their terms and conditions and make those grounds easily available to the public. Those grounds shall include the main economic, commercial or legal considerations for those restrictions.
2. The obligation set out in paragraph 1 shall not affect any prohibitions or limitations in respect of the imposition of such restrictions that result from the application of other Union rules or from national rules that are in accordance with Union law and to which the providers of the online intermediation services are subject.

Article 11

Internal complaint-handling system

1. Providers of online intermediation services shall provide for an internal system for handling the complaints of business users.

That internal complaint-handling system shall be easily accessible ***and free of charge*** for business users ***and ensure handling within a reasonable time frame. It shall be based on the principles of transparency and equal treatment applied to equal situations, and treating complaints in a manner which is proportionate to their importance and complexity.*** It shall allow them to lodge complaints directly with the provider concerned regarding any of the following issues:

- (a) alleged non-compliance by that provider with any █ obligations laid down in this Regulation which █ affects the complainant;
- (b) technological issues which relate directly to the provision of online intermediation services, and which █ affect the complainant █ ;
- (c) measures taken by, or behaviour of, that provider which relate directly to the provision of the online intermediation services, and which █ affect the complainant █ .

2. As part of their internal complaint-handling system, providers of online intermediation services shall:
 - (a) duly consider complaints lodged and the follow-up which they may need to give to the complaint in order to adequately address the issue raised **■** ;
 - (b) process complaints swiftly and effectively, taking into account the importance and complexity of the issue raised;
 - (c) communicate to the complainant the outcome of the internal complaint-handling process, in an individualised manner and drafted in *plain and intelligible* language.
3. Providers of online intermediation services shall *provide* in their terms and conditions all relevant information relating to the access to and functioning of their internal complaint-handling system.
4. Providers of online intermediation services shall **■** establish and make easily available to the public information on the functioning and effectiveness of their internal complaint-handling system. *They shall verify the information at least annually and where significant changes are needed, shall update that information.*

That information shall include the total number of complaints lodged, the *main types* of the complaints, the *average* time period needed to process the complaints and *aggregated information regarding the outcome of* complaints.

5. The provisions of this Article shall not apply to providers of online intermediation services that are small enterprises within the meaning of Article 2 (2) of the Annex to Recommendation 2003/361/EC.

Article 12

Mediation

1. Providers of online intermediation services shall 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 internal complaint-handling system referred to in Article 11.

Providers of online intermediation services may only identify mediators providing their mediation services from a location outside the Union where it is ensured that the business users concerned are not effectively deprived of the benefit of any legal safeguards laid down in Union law or the law of the Member States as a consequence of the mediators providing those services from outside the Union.

2. The mediators referred to in paragraph 1 shall meet the following requirements:
 - (a) they are impartial and independent;
 - (b) their mediation services are affordable for **■** business *users* of the online intermediation services concerned;
 - (c) they are capable of providing their mediation services in the language of the terms and conditions which govern the contractual relationship between the provider of online intermediation services and the business user concerned;
 - (d) they are easily accessible either physically in the place of establishment or residence of the business user, or remotely using communication technologies;
 - (e) they are capable of providing their mediation services without undue delay;
 - (f) they have a sufficient understanding of general business-to-business commercial relations, allowing them to contribute effectively to the attempt to settle the disputes.

3. ***Notwithstanding its voluntary nature***, providers of online intermediation services ***and business users*** shall engage in good faith ***throughout any mediation attempts conducted pursuant to this Article***.

4. Providers of online intermediation services shall bear a reasonable proportion of the total costs of mediation in each individual case. A reasonable proportion of those total costs shall be determined, on the basis of a suggestion by the mediator, by taking into account all relevant elements of the case at hand, in particular the relative merits of the claims of the parties to the dispute, the conduct of the parties, as well as the size and financial strength of the parties relative to one another. ■
5. Any attempt to reach an agreement through mediation on the settlement of a dispute in accordance with this Article shall not affect the rights of the providers of the online intermediation services and of the business users concerned to initiate judicial proceedings at any time *before*, during or after the mediation process.
6. *If requested by a business user, before entering into or during mediation, providers of online intermediation services shall make available to the business user information on the functioning and effectiveness of mediation related to their activities.*
7. *The obligation set out in paragraph 1 shall not apply to providers of online intermediation services that are small enterprises within the meaning of Article 2(2) of the Annex to Recommendation 2003/361/EC.*

Article 13
Specialised mediators

The Commission shall *in close cooperation with the Member States* encourage providers of online intermediation services as well as organisations and associations representing them to individually or jointly set up one or more organisations providing mediation services which meet the requirements specified in Article 12(2), for the specific purpose of facilitating the out-of-court settlement of disputes with business users arising in relation to the provision of those services, taking particular account of the cross-border nature of online intermediation services.

Article 14
Judicial proceedings by representative organisations or associations and by public bodies

1. Organisations and associations that have a legitimate interest in representing business users or in representing corporate website users, as well as public bodies set up in Member States shall have the right to take action before *competent* national courts in the Union, in accordance with the rules of the law of the Member State where the action is brought, to stop or prohibit any non-compliance by providers of online intermediation services or by providers of online search engines with the relevant requirements laid down in this Regulation.

2. *The Commission shall encourage Member States to exchange best practices and information with other Member States based on registries of unlawful acts which have been subject to injunction orders before national courts, where such registries are set up by relevant public bodies or authorities.*
3. Organisations or associations shall have the right referred to in paragraph 1 only where they meet all of the following requirements:
 - (a) they are properly constituted according to the law of a Member State;
 - (b) they pursue objectives that are in the collective interest of the group of business users or corporate website users that they represent *on a sustained basis*;
 - (c) they are of a non-profit making character;
 - (d) *their decision-making is not unduly influenced by any third-party providers of financing, in particular by providers of online intermediation services or of online search engines.*

To this end, organisations or associations shall disclose fully and publicly information on their membership and source of financing.

4. In Member States where ■ public bodies have been set up, those public bodies shall have the right referred to in paragraph 1, where they are charged with defending the collective interests of business users or corporate website users or with ensuring compliance with the requirements laid down in this Regulation, in accordance with the national law of the Member State concerned.
5. *Member States may designate:*
- (a) organisations or associations established in their Member State that meet at least the requirements of paragraph 3 upon their request;*
 - (b) public bodies set up in their Member State that meet the requirements of paragraph 4,*
- that are granted the right referred to in paragraph 1 and shall communicate to the Commission their name and purpose.*
6. *The Commission shall draw up a list of the organisations, associations and public bodies according to paragraph 5, with the specification of their purpose. This list shall be published in the Official Journal of the European Union; changes to this list shall be published without delay and the updated list shall be published every six months.*

7. *The courts shall accept this list as proof of the legal capacity of the organisation, association or public body, without prejudice to the right to examine whether the purpose of the claimant justifies its taking action in a specific case.*
8. *If a Member State or the Commission raises concerns regarding the compliance by an organisation or association with the criteria laid down in paragraph 3, or, regarding the compliance by a public body with the criteria laid down in paragraph 4, the Member State that designated that organisation, association or public body shall investigate the concerns and, where appropriate, revoke the designation if one or more of the criteria are not complied with.*
9. The right referred to in paragraph 1 shall be without prejudice to the rights of business users and corporate website users to **start any** action before competent national courts, in accordance with the rules of the law of the Member State where the action is brought, **which is based on individual rights and aims at stopping** any non-compliance by providers of online intermediation services **or providers of online search engines** with the relevant requirements laid down in this Regulation.

Article 15
Enforcement

1. *Each Member State shall ensure adequate and effective enforcement of this Regulation.*
2. *Member States shall lay down the rules setting out the measures applicable to infringements of the provisions of this Regulation and shall ensure that they are implemented. The measures provided for shall be effective, proportionate and dissuasive.*

Article 16
Monitoring

The Commission, in close cooperation with Member States, shall closely monitor the impact of this Regulation on relations between online intermediation services and online search engines, and their business users or corporate website users. To this end, the Commission shall gather relevant information to monitor changes in these relationships, including by carrying out relevant studies. Member States shall assist the Commission by providing, upon request, any relevant information gathered including about specific cases. The Commission may, for the purpose of this Article and Article 18, seek to gather information from providers of online intermediation services.

Article 17
Codes of conduct

1. The Commission shall encourage the drawing up of codes of conduct by providers of online intermediation services and by organisations and associations representing them, ***together with business users including SMEs and microenterprises and their representative organisations, that are*** intended to contribute to the proper application of this Regulation, taking account of the specific features of the various sectors in which online intermediation services are provided, as well as of the specific characteristics of micro, small and medium-sized enterprises.
2. The Commission shall encourage the drawing up of codes of conduct by providers of online search engines and by organisations and associations representing them, ***that are specifically*** intended to contribute to the proper application of Article 5 **■** .
3. ***The Commission shall encourage the providers of the online intermediation services to adopt and implement sector specific codes of conduct, where such sector specific codes of conduct exist and are widely used.***

Article 18

Review

1. By ... [**18 months** after the date of ***application of this Regulation***], and subsequently every three years, the Commission shall evaluate this Regulation and report to the European Parliament, the Council and the European Economic and Social Committee.
2. The first evaluation of this Regulation shall be carried out, in particular, with a view ***to the following***:
 - (a) assessing the compliance with, and impact on the online platform economy of, the obligations laid down in Articles **3 to 10**;
 - (b) ***assessing the impact and effectiveness of any established codes of conduct to improve fairness and transparency***;
 - (c) ***investigating further the problems caused by the dependence of business users on online intermediation services, and problems caused by unfair trading practices by providers of online intermediation services, and to determine further to which extent those practices continue to be widespread***;

- (d) *investigating whether the competition between goods or services offered by a business user and goods or services offered or controlled by a provider of online intermediation services constitutes fair competition and whether providers of online intermediation services misuse privileged data in this regard;*
- (e) *assessing the effect of this Regulation on any possible imbalances in the relationships between providers of operating systems and their business users;*
- (f) *assessing whether the scope of the Regulation, especially as regards the definition of ‘business user’, is suitable in that it does not encourage bogus self-employment.*

The evaluation shall establish whether additional rules, including regarding enforcement, may be required to ensure a fair, predictable, sustainable and trusted online business environment within the internal market. ***Following the evaluation, the Commission shall take appropriate measures, which may include legislative proposals.***

3. Member States shall provide any relevant information ***they have*** that the Commission may require for the purposes of drawing up the report referred to in paragraph 1.

4. In carrying out the evaluation of this Regulation, the Commission shall take into account *inter alia*, the opinions and reports presented to it by the group of experts for the Observatory on the Online Platform Economy established in accordance with the Commission Decision C(2018)2393. It shall also take into account the content and functioning of any codes of conduct referred to in Article 17, where appropriate.

Article 19

Entry into force and application

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.
2. It shall apply from *twelve* months following the day of its publication.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at ...,

For the European Parliament

The President

For the Council

The President
