



Council of the European Union
General Secretariat

**Interinstitutional files:
2018/0112(COD)**

Brussels, 26 September 2018

WK 11228/2018 INIT

LIMITE

**MI
COMPET
DIGIT
IND
TELECOM
PI
AUDIO
JUSTCIV**

WORKING PAPER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

WORKING DOCUMENT

From:	Presidency
To:	Working Party on Competitiveness and Growth (Internal Market)
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 - draft Presidency compromise Proposal

Delegations will find attached a new Presidency compromise text covering only Articles 5-12 and their corresponding recitals. The Presidency compromise text for the remaining articles will be distributed before the next COMPRO Working Party meeting on 11 and 12 October 2018 (latter morning only).

Proposal for a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on promoting fairness and by means of transparency for business users and corporate
website 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 Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Online intermediation services are key enablers of entrepreneurship, 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 also allow consumers in the Union to exploit those benefits, in particular by increasing their choice of goods and services offered online.

¹ OJ C , , p. .

² OJ C , , p. .

- (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.
- (3) 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.
- (4) The dependence of business users on online intermediation services also leads to a situation 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.

- (5) Online intermediation services and online search engines, as well as the commercial 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 ~~in respect of business users and corporate website users~~ **and the lack of effective redress mechanisms** hamper the full realisation of that potential and negatively affect the proper functioning of the internal market. ~~In addition, the full realisation of that potential is hampered, and the proper functioning of the internal market is negatively affected, by diverging laws of certain Member States which, with a varying degree of effectiveness, regulate those services, while other Member States are considering adopting such laws.~~
- (6) A ~~uniform and~~ targeted set of mandatory rules should therefore be established at Union level to ensure a fair, predictable, sustainable and trusted online business environment within the internal market by ensuring, in particular, that the business users of online intermediation services are afforded appropriate transparency as well as effective redress possibilities throughout the Union. Those rules should also provide for appropriate transparency as regards the ranking of corporate website users in the search results generated by online search engines. At the same, those rules should be such as to safeguard the important innovation potential of the wider online platform economy. **It is appropriate to clarify that this Regulation should be without prejudice to national civil law such as the rules on the formation or modification of a contract, the validity of terms and conditions, the validity of the retention or termination of a contract, the rules on liability and tort rules. Member States should therefore remain free to apply national laws which prohibit or sanction unilateral conduct or unfair commercial practices.**

- (7) 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. 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. The application of this Regulation is crucial for safeguarding the public interests of the Union, such as its political, social or economic organization, which is why the Regulation shall apply irrespective of the law otherwise determined to be applicable to a contract pursuant to the rules laid down in Regulation (EU) 2008/593 [...].
- (8) A wide variety of business-to-consumer commercial 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, ~~or offline~~ or in fact not at all. In addition, the services should be provided on the basis of contractual relationships between the providers and business users which offer goods and services to consumers ~~and between the providers and the consumers~~. Such a contractual relationship should be deemed to exist where both parties concerned express their intention to be bound in an unequivocal and verifiable manner, without an express written agreement necessarily being required.
- (9) 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 and online social media services. 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 serving tools ~~or~~ 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. ~~However, the pure fact that the business user's website or applications, including mobile application, can be accessed by clicking on a banner advertisement (or similar actions) should not be deemed as facilitating the initiation of direct transactions.~~ 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. Also, technology online intermediation services that connect hardware and applications are not covered by this Regulation, as these are not directly connected with the provision of goods or services. 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.

- (10) 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.

- (11) For reasons of consistency, the definition of online search engine used in this Regulation should be aligned with the definition used in Directive (EU) 2016/1148 of the European Parliament and of the Council³.
- (12) In order to effectively protect business users where needed, this Regulation should apply **regardless of whether** ~~where the~~ terms and conditions of a contractual relationship, ~~regardless of~~ **aside from** their name or form, are ~~not~~ individually negotiated by the parties **or not** to them. ~~Whether or not terms and conditions were individually negotiated should be determined on the basis of an overall assessment, whereby the fact that certain provisions thereof may have been individually negotiated is, in itself, not decisive.~~
- (13) 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 ~~clear~~ **plain, intelligible** and unambiguous language ~~which is easily understood by an average business user~~. Terms and conditions should not be considered to have been drafted in ~~clear~~ **plain, intelligible** and unambiguous 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.
- (14) 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 ~~in a verifiable manner~~ **in a retrievable manner** 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. 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, envisaged proposed changes which are of mere**

³

Directive (EU) 2016/1148 of the European Parliament and of the Council concerning measures for a high common level of security of network and information systems across the Union (OJ L 194, 19.7.2016, p. 1).

editorial nature that do not alter the content or meaning of terms and conditions are not covered by the term ‘modification’. The requirement of notifying proposed modifications in a retrievable manner should enable business users to effectively review these modifications at a later stage.

- (15) In order to protect business users it should be possible for a competent court to establish that non-compliant terms and conditions are should not be binding on the business user concerned, with effects *ex nunc*. Any such finding by a court This should however only concern the specific provisions of the terms and conditions which are not compliant. meaning that the The remaining provisions should remain valid and enforceable, in as far as they are valid and enforceable under national law and can be severed from the non-compliant provisions. Any further review of the content of terms and conditions under national law should remain unaffected.
- (16) A provider of online intermediation services can have legitimate reasons to decide to suspend or terminate the provision of its services, in whole or in part, to a given business user, including by delisting individual goods or services of a given business user or effectively removing search results. However, given that such decisions can significantly affect the interests of the business user concerned, they should be properly informed of the reasons thereof at least [x] days before the entry into force of that decision, with a statement of reasons for that decision in a verifiable manner such as on a durable medium in a retrievable manner. The statement of reasons should 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. In addition, requiring a statement of reasons should help to prevent or remedy any unintended removal of online content provided by business users which the provider incorrectly considers to be illegal content, in line with Commission Recommendation (EU) No 2018/334⁴. The statement of reasons should identify the objective ground or 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 that led to that decision. The requirement of verifiability should enable business users to retrieve decisions of online intermediation services regarding the suspension or termination of their services at any point in time.
- (16a) However, where a provider of online intermediation services is required to suspend or terminate, in whole or in part, the provision of its online

⁴ Commission Recommendation (EU) No 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online (OJ L 63, 6.3.2018, p. 50).

intermediation services to a given business user, under a regulatory obligation pursuant to national or Union law, or in order to benefit from the liability exemption as laid down in Article 14 of Directive 2000/31/EC, the period of at least [x] days should not apply. Nonetheless, the provider of online intermediation services should provide the business user concerned with a statement of reasons for any such course of action taken in a retrievable manner within [x] days.

- (17) 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 or websites of business users as presented, organised or communicated to consumers 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, social wrapping or other saliency tools, or combinations thereof.

Providers of online intermediation services 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 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. 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 to 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

This description 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 external 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 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.

- (18) 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 reasons for 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. Whilst the providers are under no circumstances required to disclose any trade secrets as defined in Directive (EU) 2016/943 of the European Parliament and of the Council⁵ when complying with this requirement to disclose the main ranking parameters, the description given should at least be based on actual data on the relevance of the ranking parameters used.
- (19) 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

⁵ 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).

other business users of its online intermediation services which are not controlled by the provider. In such situations, in particular, it is important that the provider of online intermediation services 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 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. **These information requirements do not touch the providers' right to voluntarily supply any additional descriptions to business users.**

- (20) The ability to access and use data, including personal data, can enable important value creation in the online platform economy. 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, in order to enable business users to understand whether they can use the data to enhance value creation, including by possibly retaining third-party data services. **These information requirements do not touch the providers' right to voluntarily supply any additional descriptions to business users.** Processing of personal data should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council.⁶
- (21) 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.
- (22) 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

⁶ 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) (Text with EEA relevant) (OJ L 119, 4.5.2016, p. 1).

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 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 addition, ensuring that providers of online intermediation services publish information on the functioning and effectiveness of their internal complaint-handling system should help business users to understand the 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.

- (23) 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 cases other than any alleged non-compliance with the legal obligations of this Regulation, the internal complaint-handling systems should moreover not be open to complaints involving only negligible negative effects on the business user concerned.~~ 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/EC⁷. The consolidation rules laid down in this Recommendation ensure that any circumvention is prevented. employ fewer than 50 persons and whose annual turnover and/or annual balance sheet total or those of the group it belongs does not exceed EUR 10 million. This exemption stands in line with the relevant provisions of Commissions Recommendation 2003/361/EC⁸-supplemented by a link to the annual turnover and/or annual balance sheet total of the group in order to prevent circumvention, for instance by using subsidiaries.**
- (24) 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

⁷ ~~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).~~

⁸ ~~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, p. 36).~~

intermediation services should facilitate mediation by, in particular, identifying **at least two** mediators with which they are willing to engage. **The minimim 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, **all identified 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 concrete dispute has arisen between them.** **In line with Directive (EU) No 2008/52 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 terminate it at any time.**

- (25) 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. However, that proportion should never be less than half of those costs.

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 Commission Recommendation 2003/361/EC. The consolidation rules laid down in this Recommendation ensure that any circumvention is prevented.

- (26) In order to facilitate the settlement of disputes relating to the provision of online intermediation services using mediation in the Union, the Commission should 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.

- (27) 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, **qualified entities** **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. 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 **qualified entities** **organisations or associations** exercise that right effectively and in an appropriate manner **they should meet certain criteria. and to ensure the prevention of possible abusive actions.** 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. Member States ~~should~~ may also ~~communicate to the Commission certain the name and purpose of their national entities organisations, associations and public bodies which are qualified to bring an action according to the provisions of this Regulation. The~~ This additional possibility of a designation of ~~qualified entities by Member States instead of individual decisions by courts~~ 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 easier and shorter. ~~as the court does not need to have a long examination of the entitlement for a legal claim.~~ The Commission should ensure the publication of a list of these organisations, associations and public bodies ~~qualified entities in the Official Journal of the European Union, whereby this list should serve as refutable proof of the legal capacity of the organisation, association or public body bringing the action.~~ 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

- (28) Codes of conduct, drawn up either by the service providers concerned or by qualified 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.
- (29) The Commission should periodically evaluate this Regulation, in particular with a view to determining the need for amendments in light of relevant technological or commercial developments.
- (30) 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 Disabilities⁹.
- (31) As the objective of this Regulation, namely to regulate specific aspects of transparency and redress in order 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

⁹ 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>

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.

- (32) It is appropriate to clarify that this Regulation should not affect the application of the relevant rules of Union law applicable in the areas of judicial cooperation in civil matters, competition, consumer protection, electronic commerce and financial services.
- (33) 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:

Article 1

Subject-matter and scope

1. This Regulation lays 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 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 to contracts concluded with the providers of those services.
3. This Regulation shall be without prejudice to national civil law, in particular contract law and national laws which prohibit or sanction unilateral conduct or unfair commercial practices.

Article 2

Definitions

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

- (1) 'business user' means any natural or 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) No 2015/1535 of the European Parliament and of the Council¹⁰;

¹⁰ 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).

- (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, ~~on the one hand,~~ the provider of those services and, ~~on the other hand,~~ both those business users, which offer goods and services to consumers and the consumers to which those business users offer goods or services;
- (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 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, phrase or other input, and returns ~~links~~ 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 ~~websites~~ 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 ~~to consumers by business users~~ through online intermediation services, or ~~websites indexed for~~ relevance given to consumers search results by online search engines, as presented, organised or communicated ~~to those consumers~~ 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) 139/2004¹¹;
- (10) 'terms and conditions' means all terms, ~~and~~ conditions, ~~clauses and other information~~ 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.~~
- (11) 'mediation' means an alternative dispute resolution procedure any structured process as defined in Article 3(a) of Directive (EU) No 2008/52 of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.**

Article 3

Terms and conditions

1. Providers of online intermediation services shall ensure that their terms and conditions:
 - (a) are drafted in ~~clear~~ plain, intelligible and unambiguous 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 ~~objective~~ grounds for decisions to suspend or terminate, in whole or in part, the provision of their online intermediation services to business users.
2. Providers of online intermediation services shall notify in a verifiable manner retrievable manner to the business users concerned any envisaged proposed modification of their terms and conditions.

¹¹ 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).

The envisaged **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 envisaged **proposed** modifications.

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**.

3. ~~Modifications to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of paragraph 3 shall be null and void.~~

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 non-binding.

4. ~~Paragraph 3 shall not apply w~~Where a provider of online intermediation services is subject to a legal **regulatory** obligations 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 3~~2~~, **the this notice period shall not apply.**

Article 4

Suspension and termination

1. Where a provider of online intermediation services decides to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, it shall, **in a retrievable manner**, provide the business user concerned, **at least [x] days before that decision enters into effect** ~~without undue delay~~, with a statement of reasons for that decision **in a verifiable manner.**

2. The statement of reasons referred to in paragraph 1 shall contain a reference to the specific facts or circumstances that led to the decision of the provider of online intermediation services, as well as a reference to the applicable objective ground or grounds for that decision referred to in Article 3(1)(c).

3. Where a provider of online intermediation services is required to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user,

- (a) under a regulatory obligation pursuant to national or Union law, or
(b) in order to benefit from the liability exemption as laid down in Article 14 of Directive 2000/31/EC,

the period referred to in paragraph 1 shall not apply.

The provider of online intermediation services shall nonetheless provide the business user concerned with a statement of reasons in a written form for any such course of action taken within [x] days.

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.

Where those main parameters include the possibility to influence ranking against any direct or indirect remuneration paid by business users to the provider of online intermediation services concerned, that provider of online intermediation services shall also include in its terms and conditions a description of those possibilities and of the effects of such remuneration on ranking.

2. Providers of online search engines shall set out for corporate website users the main parameters determining ranking **and the reasons for the relative importance of those main parameters as opposed to other parameters**, by providing an easily and publicly available description, drafted in **plain and intelligible and unambiguous** language on the online search engines of those providers. They shall keep that description up to date.
- 2a. **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 paragraph 1 and 2.**
3. The descriptions referred to in paragraphs **1, and 2 and 2a** 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.
4. 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 any trade secrets as defined in Article 2(1) of Directive (EU) 2016/943.

Article 6

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.

2. The description referred to in paragraph 1 shall cover at least, where applicable, any differentiated treatment through specific measures taken by, or the behaviour of, the provider of the online intermediation services 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 or consumers provide for the use of the online intermediation services concerned or which are generated through the provision of those services;
 - (b) ranking;
 - (c) any direct or indirect remuneration charged for the use of the online intermediation services concerned;
 - (d) access to, ~~or conditions for use of,~~ **or any direct or indirect remuneration charged for the use of** services that are directly connected or ancillary to the online intermediation services concerned.

Article 7

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 at least 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 **and if that data is provided to third parties;**

- (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.

Article 8

Restrictions to offer different conditions through other means

1. Where, in the provision of their services, providers of online intermediation services **in accordance with national law** 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 9

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 for business users. 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 legal obligations laid down in this Regulation which ~~negatively~~ affects the complainant;
- (b) technological issues which relate directly to the provision of online intermediation services, and which affect the complainant ~~in a non-negligible manner~~;
- (c) measures taken by, or behaviour of, that provider which relate directly to the provision of the online intermediation services, and which ~~negatively~~ affect the complainant ~~in a non-negligible manner~~.

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, in a manner which is proportionate to the importance and complexity of that issue;
- (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 clear **plain and intelligible** ~~and unambiguous~~ language.

3. Providers of online intermediation services shall include 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 annually establish and make easily available to the public information on the functioning and effectiveness of their internal complaint-handling system.

That information shall include the total number of complaints lodged, the ~~subject-matter~~ **main types** of the complaints, **and the average time period needed** to process the complaints ~~and the decision taken on the 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/EC¹². enterprises which employ fewer than 50 persons and/or whose annual turnover and/or annual balance sheet total or those of the group it belongs to does not exceed EUR 10 million.**

Article 10

Mediation

1. Providers of online intermediation services shall identify in their terms and conditions ~~one~~ **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 9.

¹² ~~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, p.36).~~

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.

1a. Providers of online intermediation services and their business users shall be free to jointly identify any mediator of their choice not identified in the terms and conditions of the provider of online intermediation services concerned after a concrete dispute has arisen between them.

2. The mediators referred to in paragraph 1 ~~and 1a~~ shall meet the following requirements:

- (a) they are impartial and independent **of both the provider of online intermediation services and the business user concerned;**
- (b) their mediation services are affordable for ~~an average~~ **a** business user 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 disputes.

3. Providers of online intermediation services **and business users** shall engage in good faith in any attempt to reach an agreement through the mediation of any of the mediators which they identified in accordance with paragraph 1 ~~or the mediator identified in accordance with paragraph 1a~~, with a view to reaching an agreement on the settlement of the dispute.

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. ~~However, providers of online intermediation services shall in any case bear at least half of the total cost.~~

4a. 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.

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 during or after the mediation process.

Article 11

Specialised mediators

The Commission shall 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 10(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.

**Judicial proceedings by representative organisations or associations and by public bodies
qualified entities**

1. **Qualified entities** 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 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. **Member States shall designate qualified entities to the Commission.** Organisations or associations shall have the right referred to in paragraph 1 only where, at the time of bringing the action, 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;
 - (c) they are of a non-profit making character;
 - (d) they disclose fully and publicly information on the membership, governance structure, personnel and finances.
- 2a.** In Member States where such 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.
- 2b.** **Member States may communicate to the Commission:**
 - (a) **organisations or associations located in their Member State that meet the requirements of paragraph 2 upon their request;**
 - (b) **public bodies set up in their Member State that meet the requirements of paragraph 2a**
that are granted the right referred to in paragraph 1.
- 2c.** **The Commission shall draw up a list of the organisations, associations and public bodies according to paragraph 2b, 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.

The courts or administrative authorities shall accept this list as proof of the legal capacity of the organisation, association or public body, without prejudice to their right to examine whether the purpose of the claimant justifies its taking action in a specific case.

Member States shall communicate the name and purpose of these designated entities to the Commission. The Commission will draw up a list of the qualified entities referred to in paragraph 2 and publish it in the *Official Journal of the European Union*.

3. The right referred to in paragraph 1 shall be without prejudice to the rights of business users and corporate website users to individually take action before competent national courts, in accordance with the rules of the law of the Member State where the action is brought, to address any non-compliance by providers of online intermediation services with the relevant requirements laid down in this Regulation.

Article 13

Codes of conduct

1. ~~The Commission shall~~ **Providers of online intermediation services or organisations and associations within the meaning of this Regulation are encouraged to draw up** ~~the drawing up of codes of conduct by providers of online intermediation services and by organisations and associations representing them,~~ **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. Providers of online search engines or organisations and associations within the meaning of this Regulation ~~The Commission shall~~ are encouraged to draw up ~~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(2) and (3).

Article 14

Review

1. By [date: three years after the date of entry into force], 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 assessing the compliance with, and impact on the online platform economy of, the obligations laid down in Articles 5, 6, 7 and 8, and whether additional rules, including regarding enforcement, may be required to ensure a fair, predictable, sustainable and trusted online business environment within the internal market.
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. The Commission shall ensure that the opinions of the Member States and the relevant stakeholders located in the Member States are given the opportunity to actively take part in the drawing up of the evaluation report. It shall also take into account the content and functioning of any codes of conduct referred to in Article 13, where appropriate.

Article 15

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 [date: ~~six~~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 Brussels,

For the European Parliament

The President

For the Council

The President