# The EU's P2B regulation

What you need to know

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## What you need to know

**E-commerce market places, social media, online apps and other online intermediaries such as search engines play a crucial role for many businesses. They enable them to participate in an increasingly globalized and digital economy and easily reach out to their customers across borders. According to the European Commission, 1 million businesses are already selling goods and services via online platforms across the EU's internal market.**

Given their growing importance, large online platforms in particular are subject to increased regulatory scrutiny. The Commission is currently conducting impact assessments and has provided several proposals around its long-planned Digital Services Act package **(DSA)** and the so called New Competition Tool **(NCT)**, more specific drafts of which are expected to be released in late 2020 or early 2021.

In a nutshell, the DSA proposal aims to modernise the current legal framework for digital services by means of two main pillars: first, clear rules framing the responsibilities of digital services to address the risks faced by their users and to protect their rights; and, second, the introduction of ex ante rules covering large online platforms which act as "gatekeepers" (whereas it remains to be seen under which criteria a platform provider would qualify as having "gatekeeper" power; this generally refers to providers which allegedly have a certain degree of control over online platform ecosystems).

With the NCT, the Commission aims to introduce a new regulatory toolkit in order to bridge what it sees as an enforcement gap. As noted in this blog post relating to the NCT proposal and this blog post concerning the DSA proposal, while both the DSA and the NCT proposals have generated lively debate within the EU legal and public policy community, there has been relatively little coverage in the wider press, despite the widespread impact the DSA and NCT will have if they become part of the Commission's armoury of enforcement tools.

Even less attention has been given to the main subject of this post: namely, the recently adopted EU regulation on platform-to-business relations (Regulation (EU) 2019/1150, the **P2B Regulation**), which has been in force since 12 July 2020. This regulation introduced significant constraints to the contractual freedom of a number of online intermediaries, such as online platforms and search engines, and provided for new rights for business users which rely on the services they provide.

We outline below which businesses are affected by the P2B Regulation, what they need to know and how they should be approaching compliance.

### Who is subject to the P2B Regulation?

The P2B Regulation applies to both EU and non-EU service providers, if the services provided are offered within the EU in accordance with two further criteria. More specifically, providers of **online intermediation services** and **online search engines** are subject to the P2B Regulation, in each case whether or not they are established in the EU, provided that the following two-step test is met:

- the business users (or corporate website users, together hereinafter "business users") of the service are established in the EU; and
- the business users offer their goods/services to consumers located in the EU via the online platform/search engine.

In short, the P2B Regulation focusses on online intermediation service providers that enable EU-based business users to reach consumers in the EU. While the definition of online search engines is straight-forward, the definition of online intermediation services is a new concept, which provides for the following cumulative criteria:

- any information society services (within the meaning of Directive (EU) 2015/1535): i.e. any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services…;
- …which allows business users to offer goods or services to consumers, with a view to facilitating the initiation of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded…;
- …and which 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.

The recitals of the P2B Regulation describe e-commerce marketplaces, app stores and social media for business as the most prominent examples of covered services. However, the exact scope of application is not entirely clear, e.g. whether some delivery service platforms would be considered as an information society service or not remains to be seen.

In contrast, the P2B Regulation does 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. This means, B2B-only platforms are generally not covered by the scope of the regulation.

Interestingly, whereas the regulation primarily targets large platforms, SME online intermediation services do still fall within the scope of the P2B Regulation. This is confirmed by the Q&A document on the regulation published by the EU Commission. SME providers do, however, benefit from certain exclusions concerning the compliance obligations outlined below (e.g. they do not need to have to set up or have in place an internal complaint handling mechanism or specify mediators in their terms and conditions). By contrast, all search engines, i.e. also SME search engines, are subject to the same set of rules, i.e. transparency on ranking and differentiated treatment (Articles 5 and 7).

## What do online market places and search engines need to consider?

Service providers covered by the regulation will need to ensure compliance in several areas, most prominently by reviewing and possibly changing their terms and conditions **(T&Cs)**. These now must be, amongst other obligations:

- be drafted in plain and intelligible language (Article 3(1)(a);
- be easily available to business users at all stages of their commercial relationship with the provider of online intermediation services, including in the pre-contractual stage (Article 3(1)(b);
- include certain obligatory information, in particular:
  - a description of the grounds on which the online intermediation service may base its decisions to suspend, terminate or otherwise restrict the use of its services by business users (Article 3(1)(c));
  - information on any additional distribution channels or affiliate programmes (such as other websites, apps or another online intermediation service) it uses to market the goods and services offered by a business user to consumers on the online intermediation service (Article 3(1)(d));
  - general information regarding the overall effects, if any, of the terms and conditions on the ownership and control of intellectual property rights of business users (Article 3(1)(e)).

For any proposed changes to T&Cs, a 15-day **minimum** notice period must be given, and the changes must be notified via a durable medium (including email). Business users shall also have the right to terminate the contract if they do not agree to the proposed changes.

Compliance with the above obligations should not be taken lightly, as, pursuant to Article 3(3), T&Cs that do not comply with the requirements of Article 3(1) are deemed to be null and void, and therefore non-enforceable. The same holds true for changes to T&Cs which do not comply with the described regime. In this regard, it is also important to note that service providers shall not impose retroactive changes to T&Cs, except when they are required to respect a legal or regulatory obligation or when the retroactive changes are beneficial for the business users (Article 8(a)).

## In addition to requirements relating to T&Cs, several other requirements must be met, including:

- A description of the **main parameters determining ranking** and the reasons for the relative importance of those main parameters as opposed to other parameters (Article 5(1)).
- A description of the possibility, if it exists, to **influence ranking against any direct or indirect remuneration** paid by business users to the online intermediation service and the effects of such remuneration on ranking (Article 5(3)).
- A description of what **ancillary goods and services**, including financial products, providers of online intermediation services are offered to consumers through the online intermediation services, either by the online intermediation service itself or by a third party (Article 6). This also includes a description of whether and under what conditions the business user is also allowed to offer its own ancillary goods and services through the online intermediation service (Article 6).
- Information on any differentiated treatment, i.e. on the main considerations how online intermediation services providers **treat and rank** goods or services offered by themselves or by business users they control compared to those offered by third-party business users (Article 7(1)).
- Information under which conditions a business user can **terminate** its contractual relationship with the online intermediation service (Article 8 (b)).
- A description of the **access**, if any, or absence thereof, to any **information** provided or generated by the business user, where the online intermediation service maintains such access after the end of the contractual relationship (Article 8(c)).
- A description of applicable **data access policies**, that is, 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 (Article 9(1)).
- If a provider restricts the ability of business users to **offer different conditions** through other means, a description of the main grounds for that restriction must be included in the T&Cs and be easily available to the public. (so called 'most favoured nation' (MFN) clauses) (Article 10). Pursuant to the Commission, this applies, for instance, where the provider precludes business users from offering goods and services on better conditions or at lower prices on their own website or through other online intermediation services.
- Implementation of an **internal complaint-handling** system and information on how business users can use the internal complaint-handling system and how the system operates (Article 11).
- The names of two or more **mediators** with which the online intermediation service providers is willing to engage to attempt to settle, out of court, any disputes that may arise with the business user arising in relation to the provision of the online intermediation services concerned (Article 12(1)).

# Looking ahead

## What do online market places and search engines need to do?

The P2B Regulation leaves it to the member states to determine the enforcement mechanisms for adequate and effective enforcement of the P2B Regulation (Article 15), although it also requires that representative bodies with a legitimate interest are able to take action before competent national courts (Article 14(1)). Thus, depending on the law of the member states, not only could such organisations could initiate e.g. injunction proceedings, but they might also be able to seek damages on behalf of business users.

Against this background and the fact that non-compliance with the regulation could lead to T&Cs being declared invalid, providers which are subject to the P2B Regulation should review their compliance with the obligations that it imposes. This could include the following:

- Review existing T&Cs to make sure that they meet the new requirements, both in terms of transparency and substance, on a regular basis. Any updates need to be conducted in line with (in particular) the notice requirements under the P2B Regulation.
- Update their contract management systems in order effectively to manage the new notice obligations in a compliant manner.
- Ensure that they comply with the new transparency requirements in their terms and conditions, in particular concerning information on ranking of goods and services and search results. Care is needed here: these disclosure obligations potentially engage confidential information and should be assessed in each individual case in order to avoid unnecessary disclosure of valuable information. Furthermore, considering that even temporary changes to main parameters may need to be reflected (e.g. possibly in the course of "Black Friday" deals etc) and this could trigger changes to T&Cs / upfront notification obligations, companies are well-advised to consider this early on to avoid multiple updates in the future.
  - In this regard, it should be noted that the Commission is currently working on guidelines concerning ranking to help online intermediation services and online search engines better understand this obligation. In its press release on the P2B regulation of 10 July 2020, the Commission announced that the official guidelines on ranking will be published "in the coming weeks". Companies should thus make sure to check the developments regularly in this regard.
- Last but not least, a complaint handling system needs to be set-up, or, if one already exists, sufficient information about the system must be provided to business users, including regarding mediation options (see above).

## Key contacts


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