Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance)

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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 Committee[(1)],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure[(2)],

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 they 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 online platform economy, it is therefore important that undertakings can trust online intermediation services 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, leads to an increased dependence of such business users, particularly micro, small and medium-sized enterprises (SMEs), 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, in effect, behave unilaterally in a way that can

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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 online platform economy.

(3) Consumers have embraced the use of online intermediation services. A competitive, fair, and transparent online ecosystem where companies behave responsibly is also essential for consumer welfare. Ensuring the transparency of, and trust in, the online platform economy in business-to-business relations could also indirectly help to improve consumer trust in the online platform economy. Direct impacts of the development of the online 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, in effect, 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 providers of online intermediation services and business users might 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 commercial 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

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improve the proper functioning of the internal market and to address possible emerging fragmentation in the specific areas covered by 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 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 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 business users or corporate website users are offering goods or services to consumers located in the Union, it is necessary to ascertain whether it is apparent that the business users or corporate website users direct their 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 point (c) of Article 17(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council[(3)] and point (b) of Article 6(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council[(4)]. 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 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.

(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 online, on the online portal of the provider of online intermediation services in question

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or that of the business user, offline or in fact not at all, meaning that there should be no requirement for any contractual relationship between the business users and consumers as a precondition for online intermediation services 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 the facilitation of transactions within 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 those transactions between business users and consumers involve any monetary payment or whether they 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 should not be covered by this Regulation. Technological functionalities and interfaces that merely connect hardware and applications should not be 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 the 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 should be understood as referring solely to natural persons, where they are acting for purposes which are outside their trade, business, craft or profession.

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(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 voice 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 the terms and conditions were unilaterally determined should be evaluated case by case on the basis of an overall assessment. For that overall assessment, the relative size of the parties concerned, the fact that a negotiation took place, or that certain provisions thereof might have been subject to such a negotiation and determined together by the relevant provider and business user should not, in itself, be decisive. In addition, the obligation for providers of online intermediation services to make their terms and conditions easily available to 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 in any way able to 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, towards their business users, the transparency of any additional distribution channels and potential affiliate programmes that they might use to market those goods or services. Additional channels and affiliate programmes should be understood in a technologically 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 and 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 those 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.