

EU "P2B – Platform to Business" Regulation adopted:

New rules impose more transparency and fairness to online platforms and search engines

A new EU Regulation imposing more transparency, fairness, predictability and trustfulness for online intermediation services and search engines has just been adopted with reference number (EU) 2019/1150.

Online intermediation services present an opportunity for businesses to expand their market scope and commercial prospects. They also profit consumers, who can better compare quality and prices, and have a wider choice of goods and services. However, they also raise challenges, particularly on the need to protect the interests of business users, who might find themselves more dependant. This is particularly true for medium- and small-size companies, for whom marketplaces and other intermediary aggregators play a major role in business.

The aim of the new Regulation is therefore to give businesses a more predictable relationship with online platforms and provide access to effective and swift means of redress. Platforms will have to go to extra lengths to ensure compliance, but this should encourage more businesses to trust them. Eventually this should benefit consumers and allow for a less fragmented digital single market.

This initiative forms part of the EU Digital Single Market Strategy, as one of the actions taken to tackle unfair contracts and trading practices in platform-to-business relations. Outgoing President Juncker in his 2017 State of the Union specifically pointed to a need to safeguard a fair, predictable, sustainable and trusted business environment in the online economy.

Framework

More than a million companies trade through online platforms in the EU, serving 60% of private consumption, and 30% of public consumption of goods and services related to the total digital economy are transacted via online intermediaries. Online engines and platform rankings can have a strong impact on consumer choice, and platform owners can unilaterally harm (or favour) business websites using them. When all market users concentrate on and only use the most popular platform, online intermediaries gain extraordinary power, de facto excluding the competition. In such cases, online platform behaviour might basically dictate the market success or failure of the undertakings using them.

The balance of power in "P2B" relationships is ultimately comparable to that in business-to-consumer ones. This means that Platforms are liable to occupy dominant positions – which makes it paramount to avoid any possible competition abuse. In fact, the e-commerce sector was recently the object of a European Commis-



sion inquiry. In this context, the geoblocking Regulation (EU) 2018/302 was also adopted. In particular, the following potential harmful practices carried out by online intermediaries have been detected: unexplained changes in the terms and conditions, delisting of goods and services, lack of transparency concerning the ranking criteria and the processing of data, and lack of efficient redress mechanisms.

Who is affected?

The new rules will apply to **online intermediation services**, i.e. providers such as e-commerce market places (e.g. Amazon, eBay), **search engines** (e.g. Google Search, Bing), price comparison and booking websites (e.g. Airbnb, Skyscanner, TripAdvisor), app stores (e.g. Apple App Store, Microsoft Store) and social media (e.g. Facebook, Instagram).

The Regulation does not apply to online advertising, payment services, search engine optimisation and services that connect hardware and applications that do not intermediate direct transactions between businesses and consumers, as well as intermediaries operating only between businesses. It also excludes online retailers, such as supermarkets and single brand retailers (e.g. Nike.com), to the extent that such online retailers directly sell only their own products. Interestingly, brand retailers can sometimes compete with platforms and marketplaces, their own brand distributors.

The new rules only apply to **information society services** as defined in the Single Market Transparency Directive (EU) 2015/1535. It might be argued, therefore, that services such as those offered by "Uber" will not be covered by the Regulation as, according to the CJEU (see case C-320/16, Uber France), they are not "information society services" but rather "transport services".

From a **territorial** viewpoint, the Regulation applies to providers whose business



users both: (i) are established in the Union; and (ii) have their business users offer their goods or services to consumers (natural persons) located in the Union at least for part of the transaction. These criteria apply irrespective of the place of establishment or residence of the providers and irrespective of any other applicable law. The applicability of this Regulation does not depend on the location of its direct addressees, but on the location of their clients. It places the burden on platforms to monitor the activity of their business users/clients.

Main obligations introduced by the new Regulation:

a) Terms and Conditions

The new Regulation provides that the **terms and conditions** of online intermediaries must be drafted in plain and intelligible language, be available throughout the whole stage of the commercial relationship on a durable medium and that the terms and conditions should:

- **Set the grounds for the decisions to impose any kind of restriction**, suspend, (including by delisting and lowering in the ranking) or terminate the provision of the online intermediation services. These decisions should be accompanied by a statement of reasons and means for the businesses to clarify their positions; the statement of reason is due prior to or at the time of the restriction or suspension and 30 days before termination; this provision does not apply where there is a legal or regulatory obligation or in cases of repeated infringement;
- Indicate the provision of at least **15 days notice of any change in the terms and conditions**. During the notice period business users can withdraw from the contractual relationship without further obligation;
- Include information on the effect of the terms and conditions on the **ownership or exploitation of the Intellectual Property rights** of the business users. Also, providers should not completely prevent their business users from **featuring their**

trading identity as part of their offering or presence on the relevant online intermediation services.

Non-compliant terms and conditions will be considered **null and void**.

b) Ranking

Providers must **outline the main parameters determining ranking** beforehand. This provision is designed to improve predictability for business users and allow them to compare the ranking practices of various providers. The outline should also include an explanation of any possibility for business users to actively influence ranking against remuneration (to be intended also as "indirect remuneration"), as well as an explanation of the effects thereof. Providers should not, however, be required to disclose the detailed functioning of their ranking mechanisms, including algorithms. In this respect, Luxembourg-based readers will note that the new law on the protection of trade secrets, transposing Directive (EU) 2016/943, has just been adopted in the Grand Duchy. From now on, an instrument of positive law will finally provide for protection, including enforcement instruments, to know-how, commercial information and technological information.

c) Favoured treatment

Where a provider itself offers certain goods or services to consumers through its own online search engine, it might compete directly with its business users. The new rules impose a transparency obligation and require providers to **clearly indicate any differentiated treatment**, whether through legal, commercial or technical means, that they might grant to their own goods and services. From the opposite perspective, providers are also required to indicate grounds, and make such grounds also available to the public, for the possible **restrictions** to business users to offer goods or services **under more favourable conditions** through other means, particularly with reference to the main economic, commercial or legal considerations for the restrictions. This provision applies without prejudice to other applicable rules, including in the area of competition and the fight against unfair commercial practices.

d) Data Protection

The Regulation requires that users should be provided with a clear **description of the scope, nature and conditions of their access to and use of certain categories of data** (personal and non-personal). Business users should be told whether the provider shares with third parties any data which was generated through the use of the intermediation service by the business user. In particular, any sharing of data with third parties for purposes not essential to the actual functioning of the online intermediation services – namely when the provider makes economic gains

with such data sharing – should be notified to business users.

e) Redress and Dispute Resolution

One of the main impacts of the provisions of the P2B Regulation is that requiring providers to establish an **internal complaint-handling system** which is meant to allow business users to have access to immediate, suitable and effective possibilities of redress, namely in cases of restriction, suspension or termination of the services. Providers who are "small businesses" are not subject to this requirement. Pending the complaint procedure, providers might maintain the decision that they have taken. Recourse to the internal complaint handling system is without prejudice to the right of the parties to initiate judicial proceedings at any time. Also, the Regulation encourages the use of **mediation** by requiring providers to indicate two mediators with whom they are willing to engage.

f) Enforcement

The Regulation imposes a general requirement to provide adequate and effective enforcement. In particular, organisations, associations representing business users or corporate website users, as well as certain public bodies set up in Member States, should be able to take action before national courts. "**Class actions**" are therefore possible against the providers.

Stay tuned

This Regulation should be welcomed as online engines have a very powerful role in today's economy. It was necessary that they be subject to transparency and fairness requirements and that their business users be granted appropriate means of redress. Thanks mainly to the intervention of the European Parliament, the Regulation adopts the principle of technological neutrality. Its provisions apply regardless of the specific technology used by providers and business users, and there is an express mention of voice-activated applications. The EU legislature is aware of the fact that the quick pace of innovation should not hamper the application of the principles of the law.

Member States and stakeholders will have until July 2020 to prepare themselves and be compliant with the new provisions. It will be interesting to follow closely how the sector will react and what will be the changes in practice.

Benedetta MARSICOLA,
Avocat, Member of the Milan Bar and
admitted to the Luxembourg Bar (list IV)
Associate

Virginie LIEBERMANN,
Avocat à la Cour, Member of the Luxembourg Bar
Counsel

MOLITOR Avocats à la Cour

Portrait-robot de l'Intelligence Artificielle

Par Rolando GRANDI, gérant d'Echiquier Artificial Intelligence, La Financière de l'Echiquier

Une voiture peut-elle écrire un roman ? La réponse peut surprendre. *1 The Road*, un livre retraçant le trajet d'amis voyageant entre New-York et La Nouvelle-Orléans, a été écrit en 2018 par une Cadillac... équipée de caméra de surveillance, d'un GPS et d'un microphone connectés à une IA, qui avait été nourrie de 200 classiques anglo-saxons. Au fil du road trip, le manuscrit se déroulait ligne à ligne, sur papier. Un livre fondateur d'un nouveau genre ou une nouvelle prouesse de l'intelligence artificielle (IA) ?

L'IA, un artiste comme un autre ?

Avec l'art, l'IA a trouvé un nouveau terrain d'exploration. Elle s'immisce dans toutes les disciplines artistiques et repousse toutes les frontières de la création.

Des prouesses rendues possibles par les progrès des technologies d'apprentissage, la *machine learning* (apprentissage automatique) et son évolution, le *deep learning* (apprentissage profond de la machine). Le *deep learning* est une évolution particulièrement importante puisqu'elle vise à imiter le cerveau humain en s'appuyant sur un réseau de neurones artificiels. Plus un système de *machine learning* reçoit de données, plus il apprend et devient précis. Et c'est le fameux *Big Data* qui accélère la courbe d'apprentissage et permet l'automatisation des analyses de données.

L'irruption du *deep learning* a révolutionné la façon dont les artistes appréhendent les IA qui sont maintenant capables d'apprendre, de créer grâce aux données antérieures qui leur ont été fournies, de réaliser des œuvres et de peindre des tableaux C'est le cas du *Portrait d'Edmond de Bellamy* qui a fait grand bruit sur le marché de l'art contemporain. Vendue 430 000 dollars aux enchères par Christie's fin 2018 et créée par une IA nourrie d'œuvres de peintres reconnus, cette œuvre du collectif d'artistes français *Obvious* a battu ce jour-là Andy Warhol, dont un imprimé a été cédé 75 000 dollars. Le résultat est souvent si remarquable que l'on ne peut différencier à l'œil nu lequel est le ré-

sultat de l'IA ou celui du peintre. C'est le cas de *The Next Rembrandt*, lancé par MICROSOFT en 2016 ; le logiciel utilisé répertorie les caractéristiques des portraits de Rembrandt et, couplé à une imprimante, crée une œuvre inédite reprenant tous les codes stylistiques de l'illustre maître de l'art.

Autre terrain de prédilection de l'IA, la musique. GOOGLE a récemment permis à ses utilisateurs de créer une partition à la manière de Jean-Sébastien Bach, lors du 334^e anniversaire du compositeur, et HUAWEI a terminé la symphonie inachevée n°8 de Schubert (1822).

L'IA de la start-up luxembourgeoise AIVA a achevé une pièce pour piano de Dvorak, 115 ans après sa mort, l'outil s'étant nourri de 30 000 partitions et des 115 œuvres du compositeur. C'est grâce au *deep learning* qu'AIVA – Artificial Intelligence Virtual Artist – développe l'art de la composition. L'IA a analysé 15 000 partitions d'illustres compositeurs grâce à l'algorithme pour générer un modèle mathématique et intuitif de la musique qui lui permet de produire des compositions musicales de tous les styles, sur demande. Parmi ses clients, on compte déjà PIO-

NEERS, NVIDIA, IBM et GOOGLE qui sont d'autant plus importants car ils permettent de développer des applications économiques significatives comme la musique pour les jeux vidéo. En tant que *gamer*, le plus frustrant est de se retrouver avec un très bon jeu vidéo dont l'ambiance est détériorée par des musiques répétitives quand on peut y jouer plusieurs heures. Grâce à l'IA d'AIVA, les jeux vidéo seront dotés d'un catalogue de musique conséquent qui s'adaptera à chaque situation ce qui rendra les jeux plus immersifs et engageants.

En pleine effervescence, le marché de l'art continuera à se transformer sous l'impulsion de l'IA, qui repousse les frontières de la création... mais pas seulement. En 2035, la valeur ajoutée brute du secteur des arts, divertissement et loisirs dans les pays développés¹⁾ est estimée à 453 milliards de dollars, et en ajoutant l'apport de l'IA, à 541 milliards de dollars²⁾ soit le PIB de la Belgique.

1) dont les Etats-Unis, la France, la Belgique, le Royaume-Uni, la Suède, les Pays-Bas, l'Allemagne, l'Autriche, l'Espagne et l'Italie
2) How AI boosts Industry Profits and Innovation Accenture and Frontier Economics (2017)