

Discussion Draft of a Directive on Online Intermediary Platforms

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Chapter I: Scope and definitions

Article 1: Scope

1. This Directive applies where contracts for the supply of goods, services or digital content are concluded between a supplier and a customer with the help of an online intermediary platform.
2. This Directive does not apply to:
 - (a) platforms operated in the exercise of public authority;
 - (b) platforms where contracts for the supply of financial services are concluded between a supplier and a customer;
 - (c) [other exceptions].
3. This Directive does not affect national general contract law such as the rules on formation, validity, illegality or effects of a contract, in so far as general contract law aspects are not regulated in this Directive.

Article 2: Definitions

For the purpose of this Directive:

- (a) 'online intermediary platform' means an information society service accessible through the internet or by similar digital means which enables customers to conclude contracts with suppliers of goods, services or digital content. This does not include services which only identify relevant suppliers and which direct customers to those suppliers' websites or contact details;
- (b) 'platform operator' means a trader who operates an online intermediary platform;
- (c) 'customer' means any natural or legal person who uses an online intermediary platform for obtaining goods, services or digital content;
- (d) 'supplier' means any natural or legal person who uses an online intermediary platform for marketing goods, services or digital content to customers;
- (e) 'supplier-customer contract' means a contract under which goods are to be delivered or services or digital content provided by a supplier to a customer against the payment of a price in money [OPT: or against any other counter-performance including personal data];
- (f) 'platform-customer contract' means a contract concluded between a platform operator and a customer on the use of an online intermediary platform;
- (g) 'platform-supplier contract' means a contract concluded between a platform operator and a supplier on the use of an online intermediary platform;
- (h) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;

(i) 'trader' means any natural person or legal person, irrespective of whether privately or publicly owned, who is acting for purposes relating to its trade, business, craft or profession in relation to contracts covered by this Directive;

(j) 'platform user' means a supplier or a customer who uses the online intermediary platform;

(k) 'reputational feedback system' means any mechanism for rating or reviewing suppliers, customers, goods, services or digital content.

Article 3: Level of harmonisation

Member States must not maintain or introduce in their national law provisions diverging from those laid down in this Directive, including more or less stringent provisions affording a different level of protection for suppliers or customers [OPT: unless otherwise provided for in this Directive].

Article 4: Relation to other EU instruments

1. The requirements laid down in this Directive are in addition to requirements contained, in particular, in Directive 2005/29/EC, in Regulation (EU) 2016/679, as well as in Directive 2011/83/EU, Directive 2006/123/EC, Directive 2015/2366/EU and Directive 2000/31/EC.

2. If any provision of this Directive conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act prevails and applies to those specific sectors.

Chapter II: General provisions

Article 5: Information

Information to be provided under this Directive must be clear and transparent.

Article 6: Transparency of listings

Where the placement within a listing on the online intermediate platform depends on:

(a) the supplier paying for better placement; or

(b) any corporate link between supplier and platform operator this must be indicated to the customer.

Article 7: Communication via platform

1. Where the online intermediary platform offers facilities for communication between customer and supplier relating to the conclusion or performance of supplier-customer contracts, the platform provider must forward any communications without undue delay.

2. For communications between a supplier and a customer, receipt of the communication by the platform operator's communication system is considered as receipt by the intended recipient if the communication was made by a consumer, or by a customer in a contract between businesses.

Article 8: Reputational feedback systems

1. A platform operator who provides a reputational feedback system on its online intermediary platform must provide information about the modalities of collection, processing and publication of ratings and reviews.
2. The reputational feedback system must comply with standards of professional diligence.
3. A reputational feedback system is presumed to comply with standards of professional diligence if it complies with either:
 - (a) voluntary national standards transposing European standards, the references of which have been published by the Commission in the Official Journal of the European Union; or
 - (b) the standards set out in paragraph (4).
4. Standards in the meaning of paragraph (3) are:
 - (a) If the platform operator claims that that reviews originate from real customers it has to take reasonable and proportionate steps to verify that reviews are based on a confirmed transaction.
 - (b) If a review has been solicited in exchange for any benefit, this must be indicated.
 - (c) If a review is rejected, the reviewer must be informed without undue delay about the rejection and the reasons for such rejection.
 - (d) Reviews must be published without undue delay.
 - (e) The order in which reviews are presented by default must not be misleading. Platform users must be able to view reviews in chronological order.
 - (f) If the reputational feedback system excludes older reviews, this must be indicated to platform users. The exclusion period must be reasonable but not shorter than 12 months.
 - (g) If reviews are consolidated into an overall rating, the total number of reviews on which the rating is based must be indicated.
 - (h) The platform operator must provide a free-of-charge complaint mechanism which allows a platform user to submit a reasoned notification if it has doubts regarding the authenticity of a review.
5. On termination of the platform-supplier or of the platform-customer contract, the platform operator must provide a facility for existing reviews to be transferred to a different reputational feedback system in a structured, commonly used and machine-readable format.

Article 9: Duty to protect users

If the platform operator, on obtaining credible evidence of (a) criminal conduct of the supplier or customer to the detriment of another platform user, or (b) conduct of the supplier or customer which is likely to cause physical injury, violation of privacy, infringement of [OPT: corporeal] property, deprivation of liberty or violation of another similar right of the other party, fails to take adequate measures for the protection of platform users, the platform operator is liable for damages caused to platform users by this failure.

Article 10: Mandatory nature

Any contractual term in a platform-customer contract or a platform-supplier contract which, to the detriment of the customer or the supplier, excludes the application of the national measures transposing the provisions of this Chapter, derogates from them or varies their effects is not binding.

Chapter III: Duties of the platform operator towards the customer

Article 11: Duty to inform about platform operator and supplier

1. The platform operator must inform the customer [OPT: in good time] before the conclusion of a supplier-customer contract that the customer will be entering into a contract with a supplier and not with the platform operator.
2. The platform operator must ensure that the supplier informs the customer whether it offers its goods, services or digital content as a trader.

Article 12: Mandatory nature in favour of consumers

In relations between a platform operator and a consumer the parties may not, to the detriment of the consumer, exclude the application of the national measures transposing the provisions in this chapter or derogate or vary its effect.

Chapter IV: Duties of the platform operator towards the supplier

Article 13: Duty to inform about online intermediate platform

Before concluding the platform-supplier contract, the platform operator has a duty to inform the supplier:

- (a) that the supplier will supply goods, services or digital content under contracts with customers and not with the platform operator;
- (b) about fees due to the platform operator, and how they are calculated;
- (c) about any payment mechanism which the platform operator provides for supplier-customer contracts;
- (d) about any method of transferring communications between the supplier and its customers;
- (e) whether the platform operator selects customers for the supplier, and whether the supplier has the right to reject a proposed customer [OPT: a proposed supplier-customer contract].

Article 14: Duty to provide facilities for informing customers

The platform operator must provide to the supplier facilities for fulfilling the supplier's information duties towards the customer.

Article 15: Mandatory character of the rules

The parties may not exclude or deviate from the provisions of Chapter 4 to the detriment of the supplier. [OPT: This does not apply to platform operators who exclusively accept businesses as platform users].

Chapter V: Liability of the platform operator

Article 16: Overview

1. A platform operator who presents itself to customers and suppliers as intermediary in a prominent way is not liable for non-performance under supplier-customer contracts.
2. In addition to any other liability of the platform operator under platform-supplier contracts or platform-customer contracts, a platform operator may be liable:
 - (a) to customers for failure to remove misleading information given by suppliers under Art. 17;
 - (b) to customers who can reasonably rely on the predominant influence of the platform operator over suppliers under Art. 18;
 - (c) to customers or suppliers for misleading statements made by the platform operator under Art. 19;
 - (d) to customers or suppliers for guarantees given under Art. 20.

Article 17: Duty to remove misleading information given by suppliers

1. If a supplier presents misleading information on the platform, and this is communicated by a notification addressed to the platform operator, the platform operator is liable for damages caused by the misleading information unless the platform operator takes appropriate measures to remove or rectify the misleading information.
2. If the platform operator uses a reputational feedback system for rectifying misleading information provided by the supplier, the platform operator bears the burden of proof that misleading information presented by the supplier was efficiently counteracted through the reputational feedback system.
3. Where Art. 18 applies, the platform operator cannot use a reputational feedback system for discharging the duty under paragraph (1).

Article 18: Liability of the platform operator for nonperformance of suppliers

1. If the customer can reasonably rely on the platform operator having a predominant influence over the supplier, the platform operator is jointly liable with the supplier for nonperformance of the supplier-customer contract.
2. When assessing whether the customer can reasonably rely on the platform operator's predominant influence over the supplier, the following criteria are to be considered in particular:
 - (a) The supplier-customer contract is concluded exclusively through facilities provided on the platform;

- (b) The platform operator can withhold payments made by customers under supplier-customer contracts;
- (c) The terms of the supplier-customer contract are essentially determined by the platform operator;
- (d) The price to be paid by the customer is determined by the platform operator;
- (e) The platform operator provides a uniform image of suppliers or a trademark;
- (f) The marketing is focused on the platform operator and not on the suppliers;
- (g) [OPT:] The platform operator promises to monitor the conduct of suppliers.

Article 19: Misleading statements made by the platform operator

1. If a platform operator makes misleading statements about suppliers or about goods, services or digital content offered by suppliers, the platform operator is liable for damage which this misleading information has caused to customers.
2. If a platform operator makes misleading statements about customers, the platform operator is liable for damage which this misleading information has caused to suppliers.

Article 20: Guarantees

A platform operator is liable for guarantees given about suppliers or customers, or about goods, services or digital content offered by suppliers.

Article 21: Mandatory nature

The parties may not deviate from the platform user's rights arising from the national measures transposing the provisions of this Chapter or vary their effects to the detriment of the platform user. [OPT: This does not apply to platform operators who exclusively accept businesses as platform users].

Chapter VI: Redress

Article 22: Right to redress

1. A platform operator who, under Arts. 17 or 18, has become liable towards a customer for:
 - (a) a supplier's misleading statements; or
 - (b) a supplier's failure to perform the supplier-customer contract has the right to be indemnified by the supplier.
2. A supplier who has become liable towards a customer because of misleading statements made by the platform operator has the right to be indemnified by the platform operator.

Article 23: Mandatory nature

The parties may not deviate from the supplier's rights arising from the national measures transposing the provisions of this Chapter or vary their effects to the detriment of the supplier.

Chapter VII: Final Provisions

Article 24: Applicable law

1. The national measures of a Member State transposing the provisions in Chapter II apply to online intermediary platforms which operate in the internal market and are run by platform operators who have their habitual residence in that state. Online intermediary platforms which are run by platform operators who have their habitual residence in a non-Member State are governed by the national measures transposing the provisions in Chapter II of the Member State where the interests of suppliers or customers are, or are likely to be, affected.
2. The national measures of a Member State transposing the provisions in Chapters III – V apply to platform-customer contracts and to platform-supplier contracts which are governed by the law of that Member State. Art. 12 Regulation (EC) 864/2007 applies accordingly.
3. The national measures of a Member State transposing the provision in Chapter VI apply to platform-customer contracts and to platform-supplier contracts where Art. 15 Regulation EC 593/2008 invokes the law of that Member State.
4. Regardless of whether they are consumers, customers may not be deprived of the protection offered by this Directive by a choice of the law of a non-Member State. This does not apply to platform operators which exclusively accept businesses as customers.

Article 25: Enforcement

1. Member States must ensure that adequate and effective means exist to ensure compliance with this Directive.
2. The means referred to in paragraph 1 must include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions transposing this Directive are applied:
 - (a) public bodies or their representatives;
 - (b) consumer organisations having a legitimate interest in protecting consumers;
 - (c) professional organisations having a legitimate interest in acting.

Article 26: Penalties

1. Member States must lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and must take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.
2. Member States must notify those provisions to the Commission by ... and must notify it without delay of any subsequent amendment affecting them.

Article 27: Transposition

1. Member States must adopt and publish, by ..., the laws, regulations and administrative provisions necessary to comply with this Directive. They must forthwith communicate to the Commission the text of these measures in the form of documents and inform the Commission

of any subsequent amendments without delay. They must apply those measures from ... [6 months later than the date in the first sentence]. When Member States adopt those measures, they must contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States may determine how such reference is to be made.

2. The provisions of this Directive apply to contracts by ... [6 months later than the date in the first sentence of para (1)], irrespective of whether or not concluded before, on or after this date].

Article 28: Entry into force

This Directive enters into force on the 20th day following its publication in the Official Journal of the European Union.

Article 29: Addressees

This Directive is addressed to the Member States.