
Intellectual Property, Media and IT

Newsletter | Portugal

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I. Regulation (EU) 2019/1150: New rules for online platforms and business users

Regulation (EU) 2019/1150 of the European Parliament and of the Council of June 20, 2019 (the “P2B Regulation”), on promoting fairness and transparency for business users of online intermediation services, came into effect on July 12, 2020.

The P2B Regulation sets out the first rules intended to regulate the provision of online intermediation services, such as online search engines, e-commerce platforms and markets and auctions, app stores, social media, streaming platforms and all other third-party content. Its aim is to encourage competition and protect businesses based on digital platforms (“Business Users”).

The Portuguese authorities will implement and enforce the P2B Regulation directly. Although no offenses are envisaged, lawmakers will be able to define them in national legislation according to the values and limits the European Union has established in recent legislative acts.

Scope

The P2B Regulation applies to online intermediation services and online search engines that provide services to Business Users located in the EU that offer goods and services to consumers located in the EU, during at least part of a transaction, regardless of the place where those service providers are established. These services also include those that facilitate the start of direct transactions between Business Users and consumers, regardless of whether the transactions will finally be concluded online or involve any form of monetary payment.

Mandatory information and restrictions on the contracting freedom of intermediaries

The P2B Regulation is not completely new in Portugal, as Decree Law 446/85, of October 25, which establishes the legal regime for standard contract terms, already established restrictions on parties’ freedom to contract.

We highlight the new obligations applicable to intermediaries (the “Intermediaries”) that must be reflected in the terms and conditions drafted and presented for providing online intermediation services and making online search engines available:

- Ensure a minimum notice period of at least 15 days before any changes to terms and conditions are implemented and grant Business Users a right to termination if they disagree with the changes.
- Grant notice of at least 30 days before terminating the contract, indicating the reasons for the online service provider’s decision to terminate the service.
- Clear and intelligible information on:



- standard contract terms for the Business User to terminate;
 - the main parameters and operation of the ranking system;
 - the procedure to make decisions on suspending, terminating or restricting the services to be provided by the Intermediary;
 - the availability of other channels to sell the Business User's goods and services;
 - the impact of the contract on the ownership and control of the Business User's intellectual property rights;
 - how the differentiated treatment applies to the services provided;
 - commercial and technical access to personal or other data generated through the provision of services;
 - the terms under which to offer ancillary services; and
 - access to and functioning of the internal complaint-handling system.
- Although voluntary, access should be granted to two or more mediators to resolve disputes between the provider and the Business User.
- The Business User's identity must be clearly visible in the offer of products and services.

Guarantees of fair and equitable treatment for Business Users

Online service providers must provide Business Users with notice of any restriction, interruption or suspension of services before or when taking effect on a durable medium, providing a statement of reasons. If the provider decides to terminate all its services, it must give at least 30 days between the date the notification is made and the date the termination takes effect.

If a legal or regulatory obligation establishes a shorter period of action or if the Business User were to have repeatedly infringed the applicable terms and conditions, the above notice period will not apply. However, the provider will continue to be bound to provide a statement of reasons on a durable medium, unless legal or regulatory provisions indicate otherwise.

These decisions will be able to be challenged through an internal system for handling Business Users' complaints.

This internal complaint-handling system must be easily accessible and free of charge for Business Users, and it must ensure a response within a reasonable time frame. It must ensure a response on matters such as:

- alleged non-compliance by the provider with any obligations established in the P2B Regulation affecting the complainant;
- technological issues that relate directly to the providing of the services; and
- measures the provider takes that affect the complainant, namely the suspension, interruption or restriction of the online services.



The provisions of these rules on internal procedures will not apply to Intermediaries if they qualify as small enterprises within the meaning of the Annex to Recommendation 2003/361/EC, defining micro, small and medium-size enterprises.

Transparency of rankings

Under the P2B Regulation, ranking is “the relative prominence given to the goods or services offered through online intermediation and online search engines.”

The information provided must enable the Business Users to understand how the ranking mechanism works, so they can actively influence its result. The provider must also inform of the possibility and effects of influencing the ranking through direct or indirect remuneration.

Providers of online search engines must also set out an up-to-date description of the main parameters and their relative importance in determining the ranking of all the indexed sites, so that all users can understand their operation.

When there is no contractual relationship between the providers of online search engines and Business Users, the above description must be easily and publicly available on the online search engine.

The Intermediaries are not required to disclose algorithms that with reasonable certainty might deceive customers or manipulate search results.

Differentiated treatment and competing offers by Intermediaries

The P2B Regulation establishes that Intermediaries must inform Business Users of the existence of any differentiated treatment they give and the economic, commercial and legal reasons for doing so.

The need for this requirement is based on the increased frequency with Intermediaries simultaneously host Business Users on their platforms and sell products directly (either through the Intermediaries themselves or through companies that they control) that compete with those of the Business Users.

Although the P2B Regulation does not provide a definition of differentiated treatment, it states that any unequal treatment among Business Users in any of the following aspects will be considered differentiated treatment:

- Access to any personal data or other data generated during the providing of services by the online intermediary.
- Ranking or other settings applied.
- Any direct or indirect remuneration charged for using online intermediation services or online search engines.



- Access to, conditions for, or any direct or indirect remuneration charged for using services or functionalities or technical interfaces that are relevant and are directly connected or ancillary to the platform's services.

II. National legislation

Council of Ministers Resolution 29/2020 of April 21

Establishes the general principles to set up and regulate technology-free zones

Council of Ministers Resolution 30/2020 of April 21

Approves the Digital Transition Action Plan

Council of Ministers Resolution 31/2020 of April 21

Creates the Portugal Digital Mission Structure

Decree Law 9/2020 of March 10

Introduces the measures required to comply with the obligation to keep a digital complaints book.

Commission Implementing Regulation 2020/208 of the European Commission of February 14

Amends Regulation (EC) 29/2009, establishing requirements on data link services for the Single European Sky.

Council of Ministers Resolution 7-A/2020 of February 7

Approves the strategy and schedule to distribute fifth-generation mobile communications.

III. Case law

Decision by the Supreme Court of Justice (7th Section) of January 15, 2020 – Case No. 2227/18

“In view of the interpretative nature of the rule added for the parties from the option to choose between voluntary arbitration or the competent court of law, it must be concluded that the arbitration tribunal is competent to rule, in actions for the defense, on the lack of validity of an event constituting a patent, with mere inter partes effect.”

Decision by the Lisbon Court of Appeals of December 30, 2019 – Case No. 1008/17

“Justification for imposing an actual term of imprisonment for cyberstalking conduct in the form of offenses associated with threats, computer fraud, harassment, undue use of image perpetrated using social networks and the Internet.”



Decision by the Evora Court of Appeals of October 8, 2019 - Case No. 180/19

“Transmission of data and localization traffic and related data necessary to identify the signer or registered user is not admissible in the investigation of a crime of aggravated theft, as it is not a serious offense.”

Decision by the Lisbon Court of Appeals of December 17, 2019 - Case No. 233/18

“Registration of an unused mark merely so that its generic component used by a third-party competitor cannot be used by it is an abuse of rights.”

Decision by the Porto Court of Appeals of November 7, 2019 - Case No. 1606/17

“The Data Protection Act does not prevent access by the tax authorities to data on the personal and private life of citizens when there is a legitimate reason to justify such access.”

IV. Regulations, resolutions, recommendations, opinions and others

CNPD – Resolution 2020/277

On June 29, the National Data Protection Commission published a decision on a request for prior consultation and assessment of the impact on data protection of the STAYWAY COVID system to track the spread of COVID-19 through the voluntary use of an application for personal mobile devices.

CNPD – Regulation 310/2020

On March 31, 2020, regulations were published on the fees payable for assessing and issuing decisions on consultations submitted to the National Data Protection Commission.

Assembly of the Republic Resolution 9/2020

On February 20, 2020, a recommendation to the government was published regarding the safeguarding of the quality of the universal postal system.

ANACOM – Notice 613/2020

On January 14, 2020, a notice was published on the bill to regulate the remuneration methodology for accessing and using infrastructure.

ANACOM - 2020-2022 Multiple-Year Schedule of Activities

On January 6, 2020, approval was given to the multiple-year schedule of activities of the National Communications Authority for the three-year 2020-2022 period, following Public Hearing 2 held in 2019.

European Commission – Report and communication

On June 24, 2020, a report was published on a review of the General Data Protection Regulation (GDPR), as well as a communication on the alignment of EU acts with the Data Protection Directive according to the law.



European Commission – White paper

On February 19, 2020, a white paper was published on *Artificial Intelligence: a European approach to excellence and trust*.

European Commission – Communication

On February 19, 2020, the European Strategy for Data was published.

European Commission – Report

On February 19, 2020, a report was published on the safety and liability implications of artificial intelligence, the Internet of things and robotics.

EDPB – Guidelines 5/2020

On May 4, 2020, the European Data Protection Board published its guidance on consent within the sphere of personal data processing.

EDPB – Guidelines 3/2019

On January 29, 2020, version 2.0 of the Guidelines of the European Data Protection Board (“EDPB”) on processing of personal data through video devices was published.

EDPB – Guidelines 1/2020

On January 28, 2020, version 1.0 of the Guidelines of the European Data Protection Board on processing personal data in the context of connected vehicles and mobility-related applications was published.

CNPD - Information

On June 5, 2020, the CNPD issued binding information declaring that the period for responding to the projects for deliberation previously notified by the CNPD will end on July 3, 2020.



Contact

Cuatrecasas, Gonçalves Pereira & Associados,
Sociedade de Advogados, SP, RL
Sociedade profissional de responsabilidade limitada

Lisbon

Praça Marquês de Pombal, 2 (e 1-8º) | 1250-160 Lisboa | Portugal
Tel. (351) 21 355 3800 | Fax (351) 21 353 2362
cuatrecasasportugal@cuatrecasas.com | www.cuatrecasas.com

Oporto

Avenida da Boavista, 3265 - 5.1 | 4100-137 Porto | Portugal
Tel. (351) 22 616 6920 | Fax (351) 22 616 6949
cuatrecasasporto@cuatrecasas.com | www.cuatrecasas.com

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