Consumer Law READY

Consumer Law Training
for European SMEs

Module 6

Rights and Obligations in Digital Markets

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Readers should also remember that EU and national legislation is being continuously updated: any paper version of the modules should be checked against possible updates on the website www.consumerlawready.eu.

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Introduction

Dear entrepreneur,

This Handbook is part of the Consumer Law Ready-project addressed specifically to micro, small and medium-sized companies that interact with consumers.

The Consumer Law Ready-project is a European-wide project managed by EUROCHAMBRES (the Association of European Chambers of Commerce and Industry, in a consortium with BEUC (the European Consumer Organisation) and SMEunited (the Association of Crafts & SMEs in Europe). It is funded by the European Union with the support of the European Commission.

The objective of the project is to assist you in complying with the requirements of EU consumer law.

EU consumer law consists of different pieces of legislation adopted by the European Union over the last 25 years and transposed by each EU Member State in their respective national law. In 2017, the European Commission has concluded an evaluation to check whether the rules are still fit for purpose. The result was overall positive[1]. The main finding was that the existing rules need to be better enforced by authorities and better known by businesses and consumers. The Consumer Law Ready-project aims to enhance the knowledge of traders, in particular of SMEs, regarding consumer rights and their corresponding legal duties. This year, the consortium developed a module on rules concerning online economy, to share valuable information with entrepreneurs regarding their rights and obligations when they sell on platforms.

The Handbook consists of six modules. Each one deals with one particular topic of EU consumer law:

- Module 1 deals with the rules on pre-contractual information requirements
- Module 2 presents the rules on the consumer's right to withdraw from distance and off-premises contracts
- Module 3 concentrates on the remedies which traders must provide when do not conform with the contract
- Module 4 focuses on unfair commercial practices and unfair contract terms
- Module 5 introduces alternative dispute resolution and the Online Dispute Resolution (ODR) platform, an official website managed by the European Commission dedicated to helping consumers and traders resolve their disputes out-of-court.
- Module 6 presents the main information entrepreneurs need to know when using platforms to sell their goods and services.

This Handbook is just one of the learning materials created within the Consumer Law Ready- project. The website **consumerlawready.eu** contains other learning tools, such as videos, quizzes and an 'e-test' through which you can obtain a certificate. You can also connect with experts and other SMEs through a forum.

[1] You can find more information about the evaluation, its findings and follow-up actions on the website of the European Commission: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

Module 6 of the Handbook aims to make you familiar with the latest legislation on digital platforms. The online market reality has changed with a multiplication of platforms and digital service providers. As platforms and search engines have become crucial for businesses to promote their goods and services, the EU took actions against unfair contracts and trading practices. The rules shall limit the power of online services and platforms to control aspects such as what personal data is collected, sold and by whom, how online ranking works or what content is shown.

The rules aim to establish clear obligations and requirements for the platform economy. The module presents rights and obligations from 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 (Platform to Business - P2B Regulation), Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act – DSA) and Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act - DMA). For more in-depth information about the provisions of these legislations, please consult the **guidance documents of the European Commission**[2] that is available in all official languages of the EU.

The three regulations aim at bringing more transparency, protect end-users online and also open up opportunities for businesses. They set clear rules and obligations concerning for example the dissemination of illegal content online and ensure fairer and more open digital markets. The Platform to Business Regulation aims to create a fair, transparent and predictable environment for businesses using platforms to reach consumers. Building on the P2B, the DMA aims to promote fairness and contestability in the online sector. The DSA sets out harmonised rules for a safe, predictable and trusted online environment. The rules primarily set out obligations for online intermediary services, such as platforms, to ensure fair market access and competition for businesses and consumer protection.

We encourage you to get familiar with these Regulations and this module.

We hope that you find the information provided in the Handbook useful.

[2] Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council; For DMA: https://digital-markets-act.ec.europa.eu/index_en

What is the platform economy and why does it matter?

Platform economy refers to the transaction of goods and/or services via online intermediary services, which is an increasing trend. These platforms can offer services for consumers and businesses to connect and buy products more easily.

The COVID pandemic forced businesses to turn their business models around, and thus participated in increasing the platform economy.

Search engines have a significant impact on the sales of SMEs, with the top 5 search results attracting 88% of clicks.

Who is concerned by the Regulations?

Under the P2B Regulation, the DSA and the DMA, online intermediary services meeting certain conditions have to comply with certain requirements set out in these regulations. These regulations also set out rights for business users, end users and consumers.

Example: Platforms can be for example online marketplaces, social networks, video-sharing platforms, app stores, search engines, online travel and accommodation platforms and operating systems.

What should I pay attention to in the terms and conditions?

Terms and conditions (T&Cs) must give businesses a reasonable degree of predictability on the most important aspects of their relationship with the platform.

Terms and conditions must be:

Accessible, which means easy to find, permanently accessible and available before entering the contractual relationship.

Example: If the entrepreneur must log into a portal first, T&Cs are not easily available. Same, if the entrepreneur must click through different pages, T&Cs are not easily available.

Understandable, drafted in plain and intelligible language. T&Cs can take the form of manuals, FAQs, videos, etc as long as they are understandable. The DSA obliges intermediary services to set out the T&C in clear, plain, intelligible, user-friendly and unambiguous language, that must be publicly available in an easily accessible and machine-readable format. Regarding very large online platforms (VLOPs) and very large online search engines (VLOSEs), they are obliged to publish those T&C in the official languages of all the Member States in which they offer their services.

Complete, including all the required content from the DSA and P2B Regulation. The T&Cs should foster transparency, predictability, protection of recipients of the service, and the avoidance of unfair or arbitrary outcomes. Overall, the DSA obliges online intermediary services to include information on any policies, procedures, measures, and tools used for the purpose of content moderation, including algorithmic decision-making and human review, as well as the rules of procedure of their internal complaint handling system as well as easily accessible information on the right to terminate the use of the service. More specifically, based on these two pieces of legislation, T&C must include information such as:

- Information about need to justify the decisions by platforms about suspensions, restrictions and termination of business user accounts (Statements of reasons) (30 day minimum notice period)
- Termination right of business users
- Transparency on ranking following search by the customers
- Ancillary goods and services
- Transparency on differentiated treatment
- specific contractual terms

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- access to data
- Impact on business users IP rights
- restrictions to offer different conditions through other means
- content moderation policies
- functioning of internal complaint-handling mechanisms and (at least two) mediation services.

Can the platform change the terms and conditions?

Platforms are entitled to modify their T&Cs. However, they must notify businesses about the proposed changes at least 15 days before applying them. Under the DSA, relevant changes including for instance those modifying the rules on information that is permitted on the services, or other such changes which could directly impact the ability of the recipients to make use of the service changes, must be informed though appropriate means,

Longer notice periods may apply for changes requiring businesses to make complex adaptations.

Examples: When entire features of the platform, that are relevant for the business, are removed or added; when businesses might need to adapt their goods or re-programme their services to be able to continue to operate on the platform.

A business can also waive the notice period. The waiving has to be done by means either of a written statement or a clear affirmative action.

Example: affirmative action can be when new goods or services are offered within these 15 days. This does not count for cases where the reasonable and proportionate notice period is longer than 15 days because businesses need to make significant technical adjustments.

The notice period can also be suspended, when there is a legal obligation or an unforeseen and imminent danger (e.g. fraud, malware, Spam, or other cybersecurity risks) requiring change.

If the notice period was not respected without reasons, the change is invalid.

The notification must be made on a durable medium (e.g. e-mail), meaning that the business user can keep it for future reference.

Platforms must not impose retroactive changes, unless beneficial for the businesses, provided for by legal or regulatory obligations or to avert an unforeseen and imminent danger.

What happens if the platform terminates, restricts or suspends my account?

In certain cases, platforms can terminate (closing definitely the account) suspend (e.g delisting a good or service or removing it from search results) or restrict (e.g impacting negatively the sale of a good, for example, by lowering the ranking).

DSA Transparency Database – Statements of reasons - here.

Following a proportionality principle, termination of an account must be the last resort.

The platform must provide a statement of reasons on a "durable medium" (i.e. a medium enabling business users to keep the information for future reference; e.g. letter, e-mail). For restriction and suspension, the statement of reasons must be shared at the latest at the same time the action takes effect. In the DSA, different restrictions that may affect recipients of the service are considered (e.g. full and/or partial suspension or termination of accounts, of monetary payments or visibility of specific items of information, etc). For any of those possible restrictions, the DSA establishes a minimum of information that must be provided by the platform in a clear and easily comprehensible way but, at the same time, being as precise and specific as reasonably possible.

For termination, it must be given at least 30 days in advance**.**

Exceptions: Platforms do not have to comply with the notice period if the termination, restriction or suspension was done to comply with legal or regulatory obligations or after businesses' infringement of T&Cs.

Example : This might concern serious forms of illegal or unsuitable content, a good or service's safety, forgery, fraud, spam, hacking of personal data etc

The platform must give an opportunity to clarify the facts leading to the decision and refer it to a complaint-handling system. It must preserve the data associated with the business account so that it can be reinstated in case of erroneous termination.

How can I end my contractual relationship with a platform?

Business might want to terminate the contractual relationship after a change in T&Cs or for other reasons.

The contractual relation between platforms and businesses must be fair and conducted in good faith. Thus, platforms shall include information for businesses on how they can terminate their contractual relationship in their T&Cs.

What about my data?

A description of **the data access policies** concerning data which businesses or consumers provide or generate when using the OIS needs to be given in the T&Cs. This must include:

- what data can be accessed (actively provided or generated through use)
- by whom
- under what conditions (how can it be used) i.e. the scope, nature and conditions of their access to and use of the relevant categories of data (e.g. ratings and reviews)

This description can be general and does not have to exhaustively list all actual data points.

Access to data can also be fully restricted for businesses, but platforms need to clearly state this.

The DMA sets out further obligations for very large platforms designated by the European Commission as gatekeepers concerning the use of data and data sharing with businesses (see below).

Platforms must indicate in the T&Cs if and to what extent the service provider maintains access to information provided or generated by the business during the contractual relationship after the ending of the contractual relationship.

Can platforms impose certain conditions?

Provider of OIS (online intermediary service, e.g platforms) can prescribe conditions concerning the offering of goods or services.

If OIS providers decide to prescribe conditions, such as precluding business users from offering goods and services on better conditions or at lower prices, OIS providers need to state the grounds for that restrictions in their T&Cs and publish the description to be easily found.

In case of gatekeepers designated under the DMA, OIS providers cannot prescribe such differentiated conditions and must ensure that businesses can apply different conditions across different channels they use to reach their customers. For example, seller sealing on OIS should not be prevented to offer lower prices and better conditions on its own website as oppose to conditions on online marketplace it also uses to reach its customers.

Considerations for this restriction can be of economic, commercial or legal nature.

Can platforms treat offers differently?

Platforms may treat their offer differently from the offer of competing under the P2B Regulation, giving the OIS provider's offers economic advantage. This must be clearly stated in the T&Cs.

OISs and search engines for which an undertaking has been designated as gatekeeper under the DMA are prohibited from self-preferencing in search results or on marketplaces, for example.

Example: Unequal treatment can be on access to data, ranking or other settings applied by the provider that influence consumer access to goods or services, remuneration charged for the use of the services access to, conditions for, or any direct or indirect remuneration charged for the use of services or functionalities, or technical interfaces, that are directly connected or ancillary to the services provided

What kind of goods and services am I allowed to offer?

Ancillary goods and services are products that typically depend on, and are directly related to, the primary good or service in order to function. They can be offered by the OIS or by a third party.

Example: a repair service for a certain good, financial products, an insurance in addition to a certain good or service (e.g. rental insurance), goods that complement the primary product, goods constituting an upgrade or a customisation tool to the primary good.

When ancillary goods and services are offered, the provider of an OIS shall specify this in the T&Cs and describe whether and under which conditions the

business is also allowed to offer its own ancillary goods and services.

The description does not need to refer to the specific good or service, but can be more general as long as it is sufficiently descriptive to understand the ancillary good or service.

What information can I get on ranking?

OIS must set out the main parameters determining ranking in their T&Cs. Main parameters could be:

- indicators used for measuring the quality of goods or services of business users;
- use of editors and their ability to influence the ranking;
- elements that do not or only remotely relate to the good or service itself, such as presentational features of the online offer;

Information on Ranking needs to go beyond simply enumerating the parameters, but needs to add explanatory information (e.g. company-internal reasons for the choice of parameters).

Under the DSA, platforms will clearly present the parameters for those recommender systems or rankings in an easily and comprehensible way that ensures recipients of the service understand how information is prioritised for them, including at least the most important criteria and the reasons for their respective importance.

Where influence on the ranking against remuneration is possible, this needs to be set out as well. The Commission has set out further guidelines concerning ranking parameters: **see here**

Additionally, ranking transparency obligations are specified in the DSA. The DMA prohibits self-preferencing in Ranking for gatekeepers.

Can I display my company's logo on the platform?

Business logos, trademarks or brand names are important IP rights. OIS must provide general information about the handling of IP rights of business users in their T&Cs.

Businesses must not be restricted to use their logo on the platform and should be able to make their trading identity visible as part of their offer on OIS. Nevertheless, the platform can still intervene in how it should be displayed.

What are the other obligations of platforms?

The DSA comprises the legal framework that creates a safer digital space in which the fundamental rights of all users of digital services, including business users, are protected, while establishing a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally. The rules specified in the DSA apply to online intermediaries and platforms (for example online marketplaces, social media platforms or app stores). As regards platforms

some of those obligations for instance refer to T&C requirements, notice and action mechanisms, cooperation with national authorities, appointment of points of contact and legal representatives, complaint and redress mechanisms as well as out of court dispute settlements, or the transparency of recommender systems, among others.

The DSA provides with tailored asymmetric obligations[3], depending on the type and specificities of the relevant services as well as their size and reach, applying the most stringent due diligence obligations to VLOPs and VLOSEs as they have become quasi-public spaces for communication and trading. Those obligations for instance refer to the requirement to conduct annual risk assessments, independent audits, put in place, where necessary, mitigation measures and to set up crisis response mechanisms, additional online advertising transparency, and data access and scrutiny, among others.

In addition, in the DSA there is an entire section devoted to online marketplaces that establishes additional obligations[4] to these platforms, except for micro and small enterprises. Those obligations basically deal with traceability of traders (know your business customer principle), compliance by design and right to information.

What are gatekeepers and what are their obligations?

Gatekeepers are very large platforms, that are designated as gatekeeper by the Commission. Under the DMA, a designated gatekeeper has to comply with a list of obligations in relation to the Core Platform Services (CPSs) which are listed in the Commission decision designating the undertaking as a gatekeeper.

Since 5 September 2023, the EC has designated seven gatekeepers. Their designations do not cover all their services, but only certain Core Platform Services.

- Alphabet

-Amazon

-Apple

-Booking

-ByteDance

-Meta

-Microsoft

When platforms are designated as gatekeepers, they have additional obligations to ensure they do not engage in unfair business practices.

***Example*:** Unfair business practices can be:

- self-preferencing, i.e. prioritizing their services over similar services provided by third-party providers (ranking their own products or services higher than those of competitors)
- Most Favored Nation clauses, i.e. prohibiting their business users from offering their good and services elsewhere at different prices and conditions
- combining personal data from numerous services (like Facebook and WhatsApp) under one company's ownership; using non-publicly available data generated by its business users in competition with those business users
- discriminatory access conditions
- excluding the right of business users to complain to public authorities, including national courts and to

[3] See Annex 3 - due diligence obligations

[4] See Annex 4 – obligations for online marketplaces

seek redress (e.g. confidentiality clauses in their T&Cs)

On top of prohibiting unfair practices, The DMA requires platforms, amongst other obligations, to:

- obtain users' consent before tracking them for marketing purposes
- permit users to easily change the default settings and delete pre-installed apps
- allow businesses to promote their products or services through direct channels or third-party services, even if the pricing differs from that of the gatekeeper, and allow users to access these via the gatekeeper's platform.
- end users and corporate users must be able to **report non-compliance** issues to the relevant legal authorities.
- in certain circumstances, allow the **use of third-party apps and appstores** on gatekeepers' operating system(s).
- allow businesses to interoperate (interconnect) with the gatekeepers software and hardware.
- allow users to port their data from the gatekeeper to other authorized businesses.

Do I have obligations towards gatekeepers?

The DMA imposes obligations only on designated gatekeepers. The DMA aims to create fairer and more open digital markets. It therefore prohibits certain practices by gatekeepers which have been identified as harmful or imposes specific obligations on gatekeepers to safeguard fair and equal opportunities for businesses. The DMA does not create any obligations for the businesses using services of gatekeepers. For example, online retailer using Amazon marketplace service or hotel using Booking.com services are not subject to any obligation under the DMA, but may benefit from its provisions.

Benefiting from new business opportunities created by the DMA, does not mean that such businesses are not required to comply with laws that apply to them, such as those requiring them to protect personal data of their customers.

To ensure security and privacy, businesses should pay specific attention to:

-use secure tools or plugins to obtain user consent and ensure their personal information is safe.

-keep privacy policies up-to-date and straightforward to avoid any confusion. Always obtain explicit consent from customers before collecting or using their personal information.

-if you integrate with gatekeeper services like Google Consent Mode, make sure to provide consent signals.

-give users access to retrieve their data in compliance with DMA regulations.

-verify the legal compliance of gatekeeper platforms and services. In addition, keep yourself updated on any changes or additions to the gatekeeper's rules.

Before collecting or processing personal data through gatekeeper platforms or services, consent must be obtained, and the gatekeeper must be informed accordingly. Businesses must comply with requirements from GDPR. This means:

- transparency about data usage (privacy policy)
- explicit user consent (keep record of consent forms)
- robust security measures.

What can I do in case of conflict with the platform?

In case of conflict between businesses and platforms, entrepreneurs have different choices.

Platform internal complaint handling system: All platforms, except for small ones (less than 50 pax staff, 10 million EUR turnover) must set up an internal complaint handling system free of charge.

The complaint should be handled within a reasonable time frame and based on principles of transparency, equal treatment and proportionality.

From all dispute resolution options, they are the most widely available and used mechanism for addressing complaints and solving business user issues.

Platforms are required to publish reports on the functioning of their complaint handling system (e.g. number of complaints, their subject matter, time taken to process complaints and the decision taken).

They also need to provide information in their T&Cs on access to their complaint handling system.

Should a complaint concern the general conditions of access, such as those laid down in terms and conditions of relevant services, to a gatekeeper's designated online search engine, online social networking service or app store, then the business user can user the alternative dispute settlement mechanism the gatekeeper has to provide free of charge under the DMA.

Specialised mediators

Mediation services are impartial and independent. In their T&Cs, platforms (except for small OIS; less than 50 pax staff, 10 million EUR turnover) have to share with businesses at least two specialised mediators they agree to engage with. They must provide relevant information to business users on how to use this procedure.

Platforms should bear a reasonable amount of costs for mediation (determined by mediation service). Up until now, a frequent number of OIS has not yet indicated possible mediation services (35% of OIS)

Access to mediation is not conditional upon having gone through internal complaint handling first.

Courts

Often seen as a last resort, businesses can receive support from organisations and associations representing business users' interest.

These entities shall be able to take action before competent national courts in case of non-compliance of platforms with the Regulation.

What are the enforcement and complaints mechanism when dealing with gatekeepers?

If gatekeepers act unfairly and do not comply with the requirements of the DMA, business users can directly inform the Commission's DMA team (EC-DMA@ec.europa.eu). Employees of gatekeepers can also provide information through a secure whistleblower tool (https://digital-markets-act.ec.europa.eu/whistleblower-tool_en). Business

users can also go to the competent authorities of the Member States who will then inform the Commission.

Companies should pay attention to the other complaint handling mechanisms from platforms' T&Cs.

As a last resort, they can go to Court. A designated gatekeeper is prohibited from restricting business users' right to go to Court.

What are the benefits for SMEs?

-Equal treatment in ranking concerning their offer compared to the offer of the gatekeeper (no self-preferencing)

-Build on data portability between online services

-Profit from consented data transfer

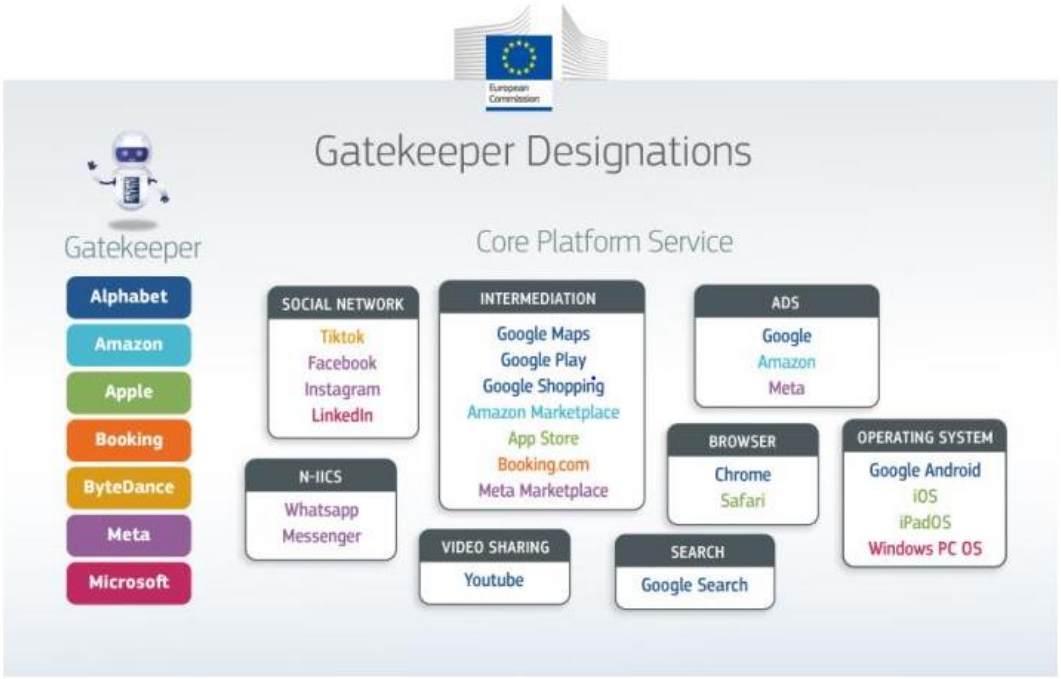
Annexes

Annex 1 - List of centres providing mediation services specifically on these issues

Mediation centres/ Mediators	Location	Description
CEDR[5]	UK	Includes a panel of mediators located throughout Europe covering 22 languages, enabling them to operate on a pan-European basis. They also have two specialised schemes to deal with complaints directed at Google and Amazon.
e-POM	Online	Online mediation portal that facilitates the appointment of mediators for specific cases related to platform-to-business relationships.
Bundesverband Onlinehandel (German Federal Association of E-Commerce)	DE	Mediation centre specialised in B2B disputes, which expanded its services to offer mediation services in cases related to the P2B Regulation.
Reuling Schutte	NL	Centre specialised for 10 years in providing alternative dispute resolution for businesses, and in particular in providing mediation services.
Centrum Mediacji Lewiatan (Lewiatan Mediation Centre)	PL	Centre specialised in B2B mediation, including P2B cases. Part of the Konfederacji Lewiatan (Confederation Lewiatan) which represents 4 100 enterprises and their employees' interests in connection with the EU institutions.
Mediator of Enterprises	FR	Mediation centre established in 2010 by the French government. Provides P2B mediation services to signatories of the Charter of E-Commerce.
Polimeni Legal	IT	Mediation centre specialised in e-commerce and digital marketplaces. Has handled around 10 to 15 mediation cases related to the P2B Regulation.

[5] Note that since the UK is out of the EU, there might be slight differences.

Annex 2 – Overview of designated gatekeepers and their core platform services



Annex 3- Due diligence obligations

	VERY LARGE PLATFORMS	ONLINE PLATFORMS	HOSTING SERVICES	ALL INTERMEDIARIES
Transparency reporting	•	•	•	•
T&Cs	•	•	•	•
Cooperation with national authorities	•	•	•	•
Points of contact & legal representatives	•	•	•	•
N&A	•	•	•	
Reporting criminal offences	•	•	•	
Complaint & redress mechanisms, OOC dispute settlement	•	•		
Trusted flaggers	•	•		
Prohibition of Dark Patterns	•	•		
Measures against abusive notices	•	•		
Special obligations for marketplaces (e.g. KYBC, random checks)	•	•		
Bans on targeted ads to children and based on special categories of personal data	•	•		
Accessibility	•	•		
Transparency of recommender systems	•	•		
Advertising transparency	•	•		
Risk management	•			
Independent audits	•			
User can opt out of profiling	•			
Data sharing with authorities & researchers	•			
Codes of conduct	•			
Crisis response cooperation	•			

Cumulative

Annex 4 - Obligations for online marketplaces

Traceability of traders

- ☐ Obligation to gather information on the identity of traders
- ☐ Best effort to assess whether the information is reliable and complete
- ☐ Obligation to display such information to consumers

Compliance by design

- ☐ Interface design: enable traders to disclose information
- ☐ Consumers will see clearly, e.g.: logos and trademarks, labels & markings for compliance with EU law, identification of products
- ☐ Best efforts to assess if the information is complete
- ☐ Reasonable efforts for random checks that goods are not listed as illegal in public databases

Right to information

- ☐ Information to consumers who have purchased illegal goods / services

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