

# Strengthening of the enforcement of the P2B Regulation in Portugal

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# The P2B Regulation

European Union Regulation 2019/1150, or the Platform-to-Business Regulation (also commonly known as the “P2B Regulation”), was the first piece of legislation, not only in Europe, but probably in the world, aimed at regulating the relationship between digital platforms and business users. It may have been the first piece of European legislation to introduce the concept of “digital platforms” into positive law, before the Digital Services Act and the Digital Markets Act - as well as the recent proposal for a directive on work on digital platforms.

The platform economy has led to the emergence of diverse digital service providers in different sectors and markets. Through efficient and intuitive mobile applications, they bring together business users and consumers and facilitate commercial interactions and transactions between them. Digital platforms, especially in the so-called network industries, have brought countless benefits to small and medium-sized businesses, be they small retailers, service providers or traders. These businesses have been able to expand their sales channels, reach new markets and consumers, or even create new economic activities and professions.

However, due to the intermediation and gatekeeper functions of intermediation services, which include e-commerce marketplaces, social networks, mobile apps stores, the various ecosystems of the collaborative economy – and, of course, search services that crawl websites – significant risks of more “problematic” “P2B practices” have been identified that could affect the relationships between platforms and their business users.

**The P2B Regulation established binding rules to promote greater trust, transparency and fairness.**


The P2B Regulation, which entered into force on 20 July 2020, established binding rules to promote greater trust, transparency and fairness in these relationships. On the one hand, it introduced rules on how platforms’ general terms and conditions are made available and presented to business users. This will allow them to be aware of the most relevant aspects of their commercial use of the platforms’ services, including information on the conditions under which such use may be suspended or terminated, the restrictions imposed on business users, the description of the access policy to the data provided by business users or consumers, or the main parameters determining their classification or differential treatment on the platform, among others.

On the other hand, the P2B Regulation contains rules on the means available to business users to react to possible problems with platforms, whether they are providers of intermediation services or search services. Platforms are required to provide business users with a complaint handling procedure and to set up a mediation system to resolve disputes.

## Monitoring the application of the P2B Regulation

The European Commission has been given the task of closely monitoring the application of the P2B Regulation by collecting the necessary information and carrying out relevant studies. It has also set up the “Observatory on the Online Platform Economy”, made up of academics and experts, to monitor the market and the effective application of the Regulation.

As for the Member States, they are responsible for ensuring that the P2B Regulation is applied in their legal systems by establishing the appropriate measures and sanctions to respond to infringements.



The first comprehensive evaluation study of the P2B Regulation, which looks at its results standard by standard, was published this year in January 2023 (“Study on Evaluation of Regulation (EU) 2019/1150 (the P2B Regulation)”). The study was organised by the European Commission and carried out by two renowned external consultants. In addition to extensive fieldwork on the compliance practices of platforms and other stakeholders, the study provides a particularly revealing picture of the differences in the enforcement of the P2B Regulation in the different Member States. First, not all Member States have entrusted enforcement to specialised public authorities and some have opted for private enforcement before the courts. Second, some of the approaches taken by the public authorities are more proactive and others more reactive. Furthermore, the penalties, especially the amount of the fines, vary substantially between the Member States: for example, there is a difference between €5 million in the most demanding Member States and €5000 in the others.

There are also very different, if not conflicting, views on internal complaint handling procedures.

According to the same study organised by the Commission, the results of the enforcement of the P2B Regulation so far show that progress is still modest. For example, only one third of digital platforms and intermediation services comply with the obligation to disclose the main parameters for classifying the business users of the platforms. There is a great deal of disagreement among business users about their rights in their relationship with digital platforms, as well as among platforms about their obligations under the P2B Regulation. There are also very different, if not conflicting, views on internal complaint handling procedures. To date, there have only been court cases in four Member States concerning compliance with the P2B Regulation.

# The conclusions of the Commission Report of 12.09.2023

On 12 September, the European Commission published its first report on the evaluation of the P2B Regulation, addressed to the other European institutions. In this report, the Commission presents a first status report on the application of and compliance with the Regulation.

The report stresses that, despite the “initial positive effects of the EU’s P2B Regulation”, its “full potential is not yet reached”. This is due to the fact that the P2B Regulation has not yet been effectively enforced in all Member States and that “awareness among business users and intermediation services is insufficient”. The P2B Regulation report points to a “low alignment” of platforms with the P2B Regulation - around 42.4% - while the level of “alignment” classified as “medium” is 44.1%.


According to the same report, only one third of the general terms and conditions of digital platforms contain information on the main parameters for classifying business users. Moreover, even in these cases, it is not clear whether the information provided strictly complies with the requirements of Article 5 of the P2B Regulation. The list of reasons for suspension or termination remains “too vague in concrete terms for the business user”. The report also explains the relative inefficiency of internal complaints procedures, which the Regulation requires to be easily accessible to business users and to be answered within a reasonable time. Similarly, the use of mediation remains largely “limited”, while no code of conduct has yet been adopted under Article 17 of the P2B Regulation.

For all these reasons, it is not surprising that the report points to the inadequacy of enforcement mechanisms in the Member States. In January this year, eight Member States were questioned by the European Commission for failing to adopt national legislation implementing the P2B Regulation. By August, 21 Member States had adopted national legislation to ensure the effective application of the Regulation.

The Commission concludes that, after these years of application, the level of compliance by platforms is still extremely low, as is the awareness of business users of their rights to information under the Regulation. The Commission recommends that measures be taken to increase the level of awareness and knowledge of the P2B Regulation, taking into account the fact that the perception of this awareness varies from sector to sector. The Commission also identifies as immediate priorities the strengthening of alignment actions with SME platforms and the promotion of the “operationalisation” of codes of conduct, with a particular focus on the accommodation booking and online marketplaces sectors.

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## And Portugal? The recent Decree-Law 68/2023 of 16 August

Taking into account the critical remarks in the European Commission's report on the way in which Member States have ensured the application of the P2B Regulation, Portugal was one of the countries that was the most tardy in defining the penalty mechanisms to respond to infringements of the Regulation. It was also one of the countries targeted by the Commission in the formal notice sent to non-compliant Member States on 23 January 2023.

This omission has recently been remedied with the publication of Decree-Law 68/23 of 16 August ("DL 68/23"), which incorporates the P2B Regulation into national law.

It is a short piece of legislation, but the following points stand out:

- a) As there was some doubt as to which public authority would be responsible for overseeing compliance with the P2B Regulation in Portugal, the Portuguese legislature chose to give this power to the electronic communications regulator, ANACOM. As can be seen from the European Commission's study on the application of the P2B Regulation, the Member States that have designated public enforcement authorities for the P2B Regulation have chosen different options at this level: between economic inspectorates, competition and/or consumer protection authorities, ministerial authorities or, in the case of Italy and the Czech Republic, communications and media regulators. In this respect, Portugal has now joined the latter two cases. Why did the Portuguese legislature choose ANACOM instead of the Competition Authority or, at another level of the Portuguese administrative organisation, the Directorate-General for Consumers, given that the matter goes beyond the strict scope of electronic communications regulation? The answer may lie in the level of sophistication and maturity of the Portuguese regulator, which is used to analysing the fairness and transparency of the contractual rights of business users of electronic communications services. This choice suggests that ANACOM may also be the future coordinator of digital services for the purposes of overseeing and implementing the Digital Services Act, as provided for in its Article 49.

- b) In the exercise of its supervisory powers, ANACOM is empowered to request from digital platforms, whether they are intermediation or search service providers, all the cooperation necessary for the performance of its tasks. To this end, it is granted a number of powers similar to those it has in the electronic communications sector. These include the power to enter the premises where servers are installed, to access servers and information systems, to seize data and to obtain copies of contracts with business users. All these powers seem to confirm that the approach taken by Portugal is to make ANACOM responsible for a proactive, rather than reactive, monitoring of the activities of digital platforms. In this respect, the law also imposes obligations on digital platforms to provide information at the request of ANACOM, again in terms similar to requests for information in the context of the monitoring of communications markets.
- c) Intermediation service providers now have a five-year retention period for, among other things, contractual documentation signed with business users.
- d) With regard to the system of penalties and the level of fines, the new legislation distinguishes between serious and very serious infringements, depending on whether they are infringements of the P2B Regulation - classified as “serious” - or infringements of ANACOM’s obligations or findings resulting from the application of the national enforcement mechanism - classified as “very serious”. Pursuant to Article 5(3) and (4) of Decree-Law 68/2023, the amounts of the fines, especially for large companies - as different forms are provided for micro, small and medium-sized companies - may be between €10,000 and €1 million for serious administrative offences and between €20,000 and €5 million for very serious administrative offences. In addition to fines, platforms may also be subject to other ancillary penalties, again in accordance with the framework regulation for the communications sector.

## The Portuguese legislature chose to entrust the public enforcement of the P2B Regulation to the electronic communications regulator, ANACOM

- e) The establishment of a public enforcement mechanism by the new Decree-Law 68/23 certainly does not affect the application of the rights of individual users and, in the context of collective actions, of organisations or associations representing professional users or users of corporate websites, as referred to in Article 14 of the P2B Regulation. For the last two years, Portugal has decided to adopt a Digital Rights Charter – Law 27/2021 of 17 May – which includes the right of everyone to receive clear and simple information on the conditions of service provision when using platforms and to exercise on platforms the rights guaranteed by this charter and other applicable legislation. It should also be noted that these rights are not limited to individuals, but also include legal persons, such as, in general, business users of platforms. Therefore, the implementation of the P2B Regulation in Portugal will have to rely on the application of other national legislation that is also aimed at digital platforms.

Given the list of issues raised by the Commission in its assessment of the fulfilment of the P2B Regulation’s objectives, ANACOM is expected to take incisive action in the monitoring and implementation of the Regulation in Portugal.

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