

IMPACT OF THE ACT NO. 2016-1321 DATED 7 OCT. 2016 FOR A DIGITAL REPUBLIC ON ONLINE INTERMEDIATION PLATFORMS

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French Privacy, Data Protection and Information Management Alert

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The French Act No. 2016-1321 of 7 Oct. 2016 for a Digital Republic (the "Digital Republic Act") amends the existing framework for online intermediation platform created under Article L.111-5-1 of the French Consumer code by the Act No. 2015-990 of 6 August 2015.

The Digital Republic Act creates a general, autonomous and impersonal status of online platform operator ("OPO") and completes the existing legal framework relating to consumer protection through the consumers' prior information.

1. THE STATUS OF ONLINE PLATFORM OPERATOR

The Digital Republic Act creates a status of an OPO under Article L.111-7, I of the French Consumer Code (the "FCC") which defines such OPO as " (...) *any natural or legal person offering, as a profession, on a paid or unpaid basis, an online communication service to public based on: 1 ° The classification or referencing, by way of computer algorithms, of contents, of products or services offered or published online by third parties; 2° Or the linking of several parties so as to the sale of a product, the supply of a service or the exchange or sharing of a content, product or service*".

This definition is deliberately broad and open in order to encompass as many online intermediation activities as possible, including B2C or C2C.

In this respect, online marketplaces and comparators directed toward B2C and C2C will undoubtedly enter the OPO category, and therefore be subject to the new obligations weighing on OPOs (see below).

On the other hand, the inclusion of this definition in the FCC excludes B2B relationships from the resulting undertaking. It is worth noting however that the broad definition of an OPO might still be relevant to qualify B2B platforms.

2. THE NEW UNDERTAKINGS BEARING ON OPOS

The Digital Republic Act completes the existing legal framework relating to consumer information, which amount to public policy^[1]. As such, natural or legal persons subject to this status will need to comply with the additional obligations relating to consumer information and consumers will benefit from the protective regime regardless of its inclusion in OPOs' terms and conditions. The Digital Republic Act also establishes an obligation for OPOs to create, implement and publish their "best practices" relating to consumer information.

a. Additional consumer information requirements

Regardless of the mandatory compliance with other information requirements set out by French law^[2] and EU regulations^[3], OPOs are subject to a new general obligation to inform consumers under Article L.111-7, II of the FCC. OPOs must thus provide their users with fair, clear and transparent information relating to:

- the terms of use relating to their intermediation service;
- the methods used for the referencing, de-referencing and sorting of the contents, products or services accessible through their platform;
- the existence of a contractual or capitalistic relationship between the OPO and the advertiser or seller, as well as the existence of a remuneration benefiting the OPO, where such elements may influence the ranking or referencing of the contents, products or services accessible through the platform;
- the capacity of the advertiser and the civil and social rights and obligations of the parties where consumers are dealing with either professionals or non-professionals.

The extent of the information to be communicated pursuant to Article L.111-7, II of the FCC remains unclear as of today. In this respect, sector-specific application decrees, tailored to the nature of the OPO's activities, will detail the information to be communicated by OPOs to their users and the way through which such information will need to be provided. These decrees may be published during the first months of 2017.

In addition, conflicts may arise between this new obligation to provide consumers with specific information and others OPO's rights, e.g. trade secrets. Indeed, an OPO may use a secret algorithm in order to reference or rank contents on its platform, and such algorithm may be subject to trade secrets prohibiting its public disclosure. Such balance might be ascertained by the forthcoming application decrees. In the meantime, specific attention will need to be given to the draft decrees in order to prevent any overreaching undertaking to disclose information to both end users and competitors alike.

b. Sector-specific regulation of online consumer opinions

The Digital Republic Act provides for specific requirements relating to OPOs collecting, moderating or displaying consumer opinions. These requirements also apply to OPOs publishing consumer opinions as an ancillary service to their main activity, e.g. marketplaces or comparators.

Pursuant to Article L. 111-7-2 of the FCC, OPOs will need to provide their users with fair, clear and transparent information relating to the publication and processing of online consumer opinions. More precisely, they will need to provide their users with the following:

- whether or not online consumer opinions are subject to review and, where applicable, the characteristics of such control;
- the date of a consumer opinion as well as the date of its update, if any;
- the reasons which caused an opinion published online by a consumer to be rejected by the platform.

In addition, OPOs will need to set up a free functionality in order to enable the persons in charge of any product or service subject of an online consumer opinion to report any questioning relating to the authenticity of that opinion, provided that such report is justified.

Again, forthcoming application decrees will specify the characteristics and content of the information to be provided by OPOs pursuant to Article L. 111-7-2 of the FCC.

c. Best practices

Article L.111-7-1 of the FCC reinforces the additional consumer information requirements bearing on certain OPOs by requiring the creation and publication of their "best practices" relating to the procedures and means allocated to consumer information.

Only OPOs whose activity exceeds a given number of connections - also to be defined by a forthcoming decree - will be subject to this new obligation. The affected OPOs will need to create and publish "best practices" with respect to the enforcement of their obligation to provide clear, transparent and fair information to consumers. In light of the above, these "best practices" will need to be formalized in a document in order to be published, whether online or not.

An administrative authority (the French General Directorate for Competition, Consumer and Fraud Repression - the "DGCCRF") will control the existence of such "best practices". This authority will also be able to proceed with a comparison of several "best practices" and request additional information from OPOs. This authority will publish the results of its controls on a regular basis and may publish a list of OPOs that failed to comply with their new consumer information requirements as an informal sanction.

3. APPLICABLE SANCTIONS

Regardless of other sanctions applicable to breaches of the consumer information obligations under the FCC^[4], any failure to comply with the new consumer information requirements set out by Article L.111-7 and L.111-7-2 of the FCC may trigger the following sanctions pursuant to Article L.131-4 of the FCC:

- €75.000 administrative fine for natural persons;
- € 375.000 administrative fine for legal persons.

The DGCCRF is in charge of controlling, investigating and sanctioning uncompliant OPOs^[5]. Usually, the DGCCRF will first establish a report relating to a breach of the FCC, and then send a cease-and-desist letter, subject to financial penalty. In case of a continued breach and failure to comply, the DGCCRF will then be able to enforce the aforementioned fines against an OPO.

Notes:

^[1] Article L.111-8 of the French Consumer code.

^[2] See e.g. Article L.111-1 seq. of the French Consumer code, Article 19 of the French Act for Trust in the Digital Economy, Article 1112-1 of the French Civil code and Article 32 of the French data protection act.

^[3] See e.g. Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

^[4] Article L.131-1 seq. of the French Consumer code.

[5] Article L.522-1 seq. of the French Consumer code.

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