



The European Regulatory Framework of Ranking Transparency on Platform Markets – P2B + P2C = P2U

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Abstract Since 2020 at the latest, transparency requirements for the ranking on online platforms have existed in the EU. The European legislature has introduced parallel, but also interacting, “similar” requirements for online platforms relating, on the one hand, to commercial platform users and, on the other hand, to consumers. However, this seemingly obvious approach brings about redundancies and an unclear scope of the information requirements, as the present, according to the European Commission insufficient, information level on platforms shows. This article will explore how much transparency is really required. It aims to show that, though somewhat counterintuitively, transparency requirements in relationships with commercial users (“P2B”) and consumers (“P2C”) are not only similar, but are to be treated identically. Consequently, the present regulatory framework is in need of reform with regard to both the wording of the provisions and their regulatory structure. The article will first outline the principles of a platform economy (Sect. 1) and the legal situation before 2019 (Sect. 2). Then it will critically analyse the matrix structure of the current regulatory system (Sects. 3 and 4). The focus will be placed on concretising the transparency requirements as laid down by the P2B Regulation, on the one hand, and the UCP Directive, on the other. In this regard, the main questions are: Which level of detail of information is required and does the required level of detail differ in P2B and P2C relationships? The relationship with other provisions will also be discussed (Sect. 5). Finally, the article will summarise the findings and provide a proposal for a coherent regulatory framework with a clear wording mirroring the key objective of the regulatory project (Sect. 6).

Keywords Platform economy · UCP Directive · Transparency requirement

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1 Basic Principles of a Platform Economy: Platforms as Intermediaries in Multi-Sided Markets

The structure of online platform markets is characterised by platforms acting as intermediaries¹ between traders and consumers. This role as an intermediary contains risks for competition between traders on platforms.

1.1 The Initial Problem: Tendency of Platforms to Control the Market

On multi-sided platform markets, the ranking, defined as the relative prominence given to the goods offered through online intermediation services, or the relevance given to search results by online search engines, e.g. through the order of goods,² typically has an impact on the relationships both between the platform provider and commercial platform users as suppliers and between the platform provider and consumers as buyers. Consumers usually pick a search result presented to them by the platform on the first page of results. They typically do not look further, and even on the first page they often do not bother to scroll, but only see the first results on the list. This reaction is not objectionable, but rather a simple example of rational apathy. Those on top of the ranking results are more often than not awarded the contract. The ranking is one of the most determining elements as regards competition between suppliers on platforms. Contrary to the principles of private autonomy and competition, the platforms' ranking predetermines consumers' decisions. As a consequence, platforms are not just passive (digital) marketplaces – like their real-world counterparts – but actively determine the market development with their ranking.

1.2 Corrective: Transparency of Rankings

Against this background, European legislation has obliged platforms to create some ranking transparency. As a first step, the EU legislature introduced obligations in the platform-to-business (P2B) relationship with Art. 5 of the Regulation on promoting fairness and transparency for business users of online intermediation services (so-called “P2B Regulation”).³ Subsequently, “similar transparency requirements”⁴ were introduced for the platform-to-consumer (P2C) relationship by the creation of the new Art. 7(4a) of the Directive on Unfair Commercial Practices (so-called “UCP Directive”)⁵ in the Directive on Better Enforcement and Modernisation of

¹ Alexander (2023c), Art. 2, para. 9; Polley et al. (2019), p. 495.

² Recital 24 P2B Regulation; recital 19 Omnibus Directive; European Commission (2020), Guidelines OJ C 424/1, paras. 3 and 36.

³ 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, OJ L 186/57.

⁴ Recital 21 Omnibus Directive.

⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair

Union Consumer Protection Rules (so-called “Omnibus Directive”).⁶ The objective of the EU’s recent regulatory effort is to establish a transparent, fair, predictable and trusted – or at least trustworthy – online environment within the internal market, while also ensuring healthy competition and protection of commercial platform users and consumers.⁷ The question that arises is how these elements interact with each other.

1.2.1 Interaction Between “Transparency”, “Protection of the Other Market Side(s)” and “Competition” in Theory

Competition refers to the presence of multiple suppliers offering substitutable products and rivaling for the buyers’ orders.⁸ Functioning competition presupposes that market participants are able to make informed, and therefore autonomous, economic decisions at all.⁹ In this context, transparency is beneficial by providing information. Information allows “informable and sensible market citizens”,¹⁰ to compare offers¹¹ and make free decisions¹² that satisfy their needs best. As a consequence, the relative power of the individual supplier is limited. Thus, transparency obligations create access to information, create the basis for autonomous decisions, strengthen the opposite side(s) of the market and pave the way for private autonomy and competition.

This line of argument explains why transparency obligations are being made use of as a means for complementary – also known as market-functional or market-constitutive – consumer protection¹³ by the European legislature in private consumer law and the law of unfair competition, most notably Art. 7 UCP Directive. Information requirements correspond to the European model of an

Footnote 5 continued

Commercial Practices Directive”), OJ L 149/22, as amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328/7.

⁶ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328/7.

⁷ Recitals 3, 4, 7, 8, 24, 26 P2B Regulation; recital 21 Omnibus Directive; European Commission (2018b), COM(2018) 185 final, p. 3; European Commission (2018a), COM(2018) 183 final, p. 19; Deutscher Bundestag (2021b), Drs. 19/27873, p. 1 *et seq.*; Arncken (2023), Sec. 16, para. 3; Busch (2022a), Einleitung, para. 6; Alexander (2020), p. 946 *et seq.*; Alexander (2019), p. 1235.

⁸ *Cf.* Podszun (2020/2022), p. F 40 *et seq.*; *cf.* Borchardt/Fikentscher (1957), p. 15.

⁹ Heinze (2021), Einleitung C, para. 67; Podszun (2020/2022), p. F 55.

¹⁰ Glöckner (2020a), Sec. 18, para. 60; Fezer (2010), p. 581; Fezer (2007), p. 1023; Fezer (2006), p. 787.

¹¹ Fezer (2007), p. 1023; Fezer (2006), p. 788.

¹² Podszun (2020/2022), p. F 55.

¹³ *See* for concept, for examples and for the connection: Heinze (2021), Einleitung C, para. 66 *et seq.*; Glöckner (2006), pp. 148, 152 *et seq.*, 195 *et seq.*; Glöckner (2020a), Sec. 18, paras. 57 *et seq.*, 60, 63.

average consumer who is reasonably well-informed and reasonably observant and circumspect,¹⁴ and who is thus empowered to make informed and autonomous economic decisions.¹⁵ Consumers who are empowered to make informed decisions actively participate in the internal market¹⁶ and fulfil their “umpire function”.¹⁷ Thus, transparency obligations constitute and safeguard competition.

1.2.2 Transparency and Platform Markets

This correlation can be applied to the platform economy: without knowledge about the ranking mechanism applied by the platform provider, competition among suppliers on platforms is affected by the ranking. Uninformed consumers tend to choose the option displayed first. They do not decide autonomously as an “umpire”. Instead, they are at risk of being inadvertently steered by the platform,¹⁸ which thus is able to control the market.¹⁹ Without information about the ranking mechanism, not only the competition on platforms but also the competition between platforms is limited. All users are unable to compare the quality of the available platforms. This adds to the strong indirect network effects. As a result, users tend to use the largest platform, which becomes even more dominant and, eventually, wins the “competition for the market”.²⁰ Then all users become dependent on the use of this platform.

Given the economic significance of platforms and the market effects of the ranking mechanisms, combined with the efforts the European legislature has made to get to grips with both, it is all the more disconcerting that the first evaluation presented by the European Commission in September 2023 reached the conclusion that most platforms do not meet the regulatory requirements sufficiently.²¹ One reason for this lack of transparency could be an unclear regulatory framework, especially with regard to the required level of detail.

¹⁴ Recital 18 UCP Directive; ECJ, 12 May 2011, C-122/10 – *Ving Sverige*, EU:C:2011:299, para. 23; ECJ, 19 September 2006, C-356/04 – *Lidl Belgium*, EU:C:2006:585, 2007 GRUR 69, para. 78; ECJ, 13 January 2000, C-220/98 – *Estée Lauder*, EU:C:2000:8, 2000 IIC 997, para. 27; Riesenhuber (2021), Sec. 10, para. 47.

¹⁵ Fezer (2010), p. 581; Fezer (2007), p. 1026 *et seq.*; Fezer (2006), pp. 784, 787; generally, Heinze (2021), Einleitung C, para. 67; Radeideh (2005), p. 43 *et seq.*

¹⁶ Heinze (2021), Einleitung C, para. 67; Glöckner (2006), p. 194; Glöckner (2020a), Sec. 18, para. 59.

¹⁷ Lindacher (2010), p. 44; Beater (2011), Sec. 2, para. 112, Sec. 14, para. 1093, Sec. 25, para. 2179.

¹⁸ Podszun (2020/2022), pp. F 52, F 55 *et seq.*; Hofmann (2022), p. 783.

¹⁹ Podszun (2020/2022), p. F 106.

²⁰ Podszun (2020/2022), p. F 41.

²¹ European Commission (2023), COM(2023) 525 final, p. 10.

1.3 Interests

As a starting point, all laws should serve to balance conflicting interests (“jurisprudence of interests”).²² Consequently, interpretation and evaluation of the law should depend on the interests involved. Having said that, interpretation should not stop there, but also take into account the values and principles underlying the law, where concretising guiding concepts can be useful.²³

First, a look at the interests shows that the main conflict of interest underlying the regulatory framework for ranking transparency is the conflict between the interest in information of platform users (consumers as well as commercial platform users) and the interest in secrecy with regard to the trade secrets of the platform providers.²⁴ These interests especially collide in the question of the level of detail in which the information has to be provided. An ideal balance of the interests involved aims at transparency to a degree that enables the other market parties, i.e. both consumers and commercial users, to make an informed decision about how to make the best use of their resources and to compare competitors, while equally taking into account the platforms’ interest in keeping their business secrets confidential.

2 Legal Situation Before the P2B Regulation and the Omnibus Directive

The question is whether the statutory regime in unfair competition law before the P2B Regulation and the Omnibus Directive were created has failed to achieve the above illustrated balance, rendering additional regulation necessary. Previously, transparency of rankings could be ensured through Arts. 6 and 7 UCP Directive in the version prior to the amendment by the Omnibus Directive.

2.1 Transparency of Rankings Achieved by the Prohibition of Misleading Commercial Practices

Intransparent online rankings might be conceived of as misleading actions (Art. 6 UCP Directive) or misleading omissions (Art. 7 UCP Directive). Both provisions can be harnessed to prohibit intransparent rankings vis-à-vis consumers. On the one hand, the average consumer assumes that ranking is independent and based on relevance.²⁵ In so far, he is subject to a misconception (Art. 6 UCP Directive) if,

²² Federal Supreme Court, 18 May 1955, I ZR 8/54 – *Magnettonaufnahme*, 1955 GRUR 492, 496; Möllers (2020), Ch. 5, para. 19 *et seq.*; Heck (1914), p. 60.

²³ Development of the “jurisprudence of interest” into “jurisprudence of values”: Möllers (2020), Ch. 5, para. 22 *et seq.*; guiding concepts as a concretisation of principles: Riesenhuber (2021), Sec. 10, para. 47.

²⁴ European Commission (2020), Guidelines OJ C 424/1, para. 13; Alexander (2021), p. 693 *et seq.*; Liesem (2019), p. 399.

²⁵ European Commission (2018b), COM(2018) 185 final, p. 3; Peifer (2020), p. 413; Peifer (2021), p. 1457.

contrary to his assumption, the ranking is influenced by (commission) payments.²⁶ On the other hand, the average consumer has no specific idea about the parameters of a ranking; hence, the obligation to provide ranking information in general could be derived from Art. 7(1) UCP Directive, provided it is considered material information.²⁷ Material information is defined as information that is expected to be disclosed, taking into account the interests of both parties, and is of considerable importance for the consumer's commercial decision.²⁸ Online rankings have a significant impact on the commercial decisions of consumers.²⁹ Consumers should be able to make free decisions rather than being steered by the platform. Similar to advertising with product tests, information about the ranking process is crucial to assessing the significance of any specific ranking result.³⁰ There is no way for consumers to obtain this information, whereas platforms can provide it³¹ with some effort, subject to adequate protection of any trade secrets involved.³² Thus, the obligation to provide ranking information, specified in the level of detail through a process of balancing the interests involved,³³ did exist under the regulatory regime prior to 2019.

Moreover, even under the regulatory regime prior to 2019, if a ranking position had been achieved or influenced by payments, such payments had to be indicated under Art. 7(2) UCP Directive.³⁴

2.2 Past Practice of German Courts

German courts have derived an obligation to label rankings influenced by payments, e.g. commissions,³⁵ from the implementation of Art. 6(1)(b) UCP

²⁶ As a result, in the same sense, Federal Supreme Court, 27 April 2017, I ZR 55/16 – *Preisportal*, 2017 GRUR 1265, para. 21 (but within the scope of the German implementation of Art. 7 UCP Directive); District Court of Munich, 18 March 2015, 37 O 19570/14, 2015 WRP 781, para. 41 – *Premium Partner*; District Court of Berlin, 25 August 2011, 16 O 418/11, para. 4; Podszun (2020/2022), p. F 56 *et seq.*; Peifer (2021), p. 1457 (but deals with misconceptions in the context of the German implementation of Art. 7 UCP Directive).

²⁷ In the same vein: District Court of Hamburg, 23 April 2020, 324 O 234/19, 2020 GRUR-RS 19790, paras. 13 *et seq.*, 19; Müller (2021), p. 314 *et seq.*

²⁸ Federal Supreme Court, 21 July 2016, I ZR 26/15 – *LGA tested*, 2016 GRUR 1076, para. 31.

²⁹ Federal Cartel Office (2019), Ref. V-21/17, p. 79; Büscher (2017), p. 441 (with regard to rating platforms).

³⁰ Peifer (2020), p. 413 *et seq.*; Büscher (2017), p. 441 (with regard to rating platforms); Müller (2021), p. 314; with regard to product tests and certification marks: Federal Supreme Court, 16 July 2009, I ZR 50/07 – *Kamerakauf im Internet*, 2010 GRUR 248, para. 31; Federal Supreme Court, 15 April 2021, I ZR 134/20 – *Testsiegel auf Produktabbildung*, 2021 GRUR 979, para. 21; Court of Appeal of Düsseldorf, 25 November 2014, I-20 U 208/13 – *TUV-geprüft*, 2015 WRP 762, para. 13.

³¹ Müller (2021), p. 316.

³² *Cf.*, generally, Federal Supreme Court, 21 July 2016, I ZR 26/15 – *LGA tested*, 2016 GRUR 1076, para. 33.

³³ *Cf.* Alexander (2021), p. 693 (balancing of interests as a recognised procedure in the context of transparency obligations).

³⁴ Federal Cartel Office (2019), Ref. V-21/17, p. 124; Eckel (2017), p. 1268.

³⁵ District Court of Munich, 18 March 2015, 37 O 19570/14 – *Premium Partner*, 2015 WRP 781, paras. 4, 32.

Directive³⁶ or Art. 7(1) UCP Directive.³⁷ An online platform for the comparison of prices must disclose whether the basis of its comparisons is limited to users with a commission agreement.³⁸ Only the Regional Court of Hamburg demanded an explanation of the ranking algorithm used to achieve the ranking.³⁹

2.3 Evaluation

Even the legal regime prior to the enactment of the P2B Regulation and the Omnibus Directive had the potential to ensure transparency of rankings, particularly through Art. 7(1) UCP Directive. Yet, this potential was just not made full use of.⁴⁰ In practice, transparency was only imposed by the courts with regard to paid rankings. General information on the criteria underlying the ranking, however, was hardly required.⁴¹ Furthermore, the published court decisions only dealt with intermediation services. Search engines have not been the subject matter of case law so far.⁴² In addition, the courts did not require information in P2B relationships, even though the German Act Against Unfair Competition's integrated approach⁴³ would have allowed minimum requirements of transparency not only in the P2C relationship, but also in the P2B relationship.

Against this background, the new provisions in the P2B Regulation and the UCP Directive may be attributed a merely clarifying or declaratory effect in Germany in the technical sense. Yet the less-than-extensive court practice shows their justification. The potential of the previous regulatory regime has not been exhausted in practice. The new rules emphasise the right to information. By categorising information relating to ranking as a “typical materiality”⁴⁴ in Art. 7(4a) UCP Directive, the new rules' impact in practice is way more predetermined than under the regime of the general clause in Arts. 6(1) and 7(1) UCP Directive. Nevertheless, it is questionable whether the new provisions actually provide a clearer and more effective specification.

Hence, the following section undertakes to analyse the present regulatory framework. Especially with regard to the question of which level of detail of information really is and should be required in P2B and P2C relationships. The European legislature first introduced obligations for platform providers in the P2B

³⁶ District Court of Munich, 18 March 2015, 37 O 19570/14 – *Premium Partner*, 2015 WRP 781, para. 32; District Court of Berlin, 25 August 2011, 16 O 418/11, para. 4.

³⁷ Federal Supreme Court, 27 April 2017, I ZR 55/16 – *Preisportal*, 2017 GRUR 1265, para. 7; District Court of Hamburg, 23 April 2020, 324 O 234/19, 2020 GRUR-RS 19790, para. 13 *et seq.*

³⁸ Federal Supreme Court, 27 April 2017, I ZR 55/16 – *Preisportal*, 2017 GRUR 1265, para. 22 *et seq.*

³⁹ District Court of Hamburg, 23 April 2020, 324 O 234/19, 2020 GRUR-RS 19790, paras. 13 *et seq.*, 19.

⁴⁰ In the same sense: Peifer (2020), p. 415; Hofmann (2022), p. 783; *cf.* Podszun (2020/2022), p. F 37.

⁴¹ Only by District Court of Hamburg, 23 April 2020, 324 O 234/19, 2020 GRUR-RS 19790, paras. 5, 13 *et seq.*, 19.

⁴² Explicitly in favour of a different handling: District Court of Munich, 18 March 2015, 37 O 19570/14 – *Premium Partner*, 2015 WRP 781, para. 42; apparently of a different opinion Federal Supreme Court, 27 April 2017, I ZR 55/16 – *Preisportal*, 2017 GRUR 1265, para. 21.

⁴³ Deutscher Bundestag (2003), Drs. 15/1487, p. 15 *et seq.*; Alexander (2022), Sec. 5, para. 255.

⁴⁴ Term by Alexander (2023a), p. 19.

relationship with Art. 5 P2B Regulation. Subsequently, Art. 7(4a) UCP Directive was introduced to ensure transparency in the P2C relationship.

3 The Regulatory Framework *de lege lata*: Scope and Terminology

3.1 Art. 5 P2B Regulation: Two Types of Platforms

The P2B Regulation differentiates between two types of platforms. The P2B Regulation employs the paired terms “online intermediation services” and “business users”, on the one hand, and “online search engines” and “corporate website users”, on the other (Art. 1(1) P2B Regulation). However, in both cases, the platform operator (“Providers of online intermediation services”, para. 1; “Providers of online search engines”, para. 2) is the addressee of the transparency obligations pursuant to Art. 5 P2B Regulation, and the respective commercial users⁴⁵ are the beneficiaries of such obligations.

3.1.1 *Online Intermediation Services and Business Users*

In order to act as an intermediary between business users and consumers the platform must aim at the conclusion of contracts in B2C relations,⁴⁶ regardless of whether or where contracts are concluded⁴⁷ (Art. 2 No. 2 P2B Regulation). Besides, a contractual relationship between the provider of the online intermediation service and the business user is required (Art. 2 No. 2(c) P2B Regulation). “Business users” are defined as any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession (Art. 2 No. 1 P2B Regulation). As a consequence, a P2B2C relationship is needed.⁴⁸ Such relationships may come into existence, for instance, in the form of online marketplaces, app stores, booking platforms, rating platforms or comparison portals, as well as hybrid platforms where the operator acts both as intermediary and as direct supplier at the same time.^{49,50}

⁴⁵ As a generic term for business users of online intermediation services and corporate website users of online search engines.

⁴⁶ Busch, Schulte-Nölke and von Westphalen (2022), Art. 2, para. 28; Alexander (2023c), Art. 2, para. 11; Arncken (2023), Sec. 16, para. 27.

⁴⁷ Recital 10 P2B Regulation; Tribess (2023), Art. 2, para. 8; Busch, Schulte-Nölke and von Westphalen (2022), Art. 2, para. 28; Alexander (2023c), Art. 2, para. 12; Arncken (2023), Sec. 16, para. 25 *et seq.*

⁴⁸ Rohrßen (2019), p.344; Alexander (2020), p. 947.

⁴⁹ Busch, Schulte-Nölke and von Westphalen (2022), Art. 2, para. 31; Alexander (2023b), Art. 2, para. 17; Naumann and Rodenhausen (2020), p. 781.

⁵⁰ Recital 21 Omnibus Directive; Alexander (2023c), Art. 2, para. 15; Busch, Schulte-Nölke and von Westphalen (2022), Art. 2, para. 31; Busch (2019), p. 789; with regard to rating platforms: Müller (2021), p. 369 *et seq.*

3.1.2 Online Search Engines and Corporate Website Users

An online search engine is a digital service that allows users to conduct searches and returns results (Art. 2 No. 5 P2B Regulation). Unlike in the case of online intermediation services, no existence of a contractual relationship between the provider of the online search engine and the corporate website user is required.⁵¹ This is due to the different operating mechanisms: online search engines typically use crawlers to search the internet for new websites, which are then automatically indexed. A corporate website user is a person who uses an online interface to offer goods or services to consumers for purposes relating to its trade, business, craft or profession (Art. 2 No. 7 P2B Regulation). Hence, a P2B2C relationship is likewise necessary with regard to search engines.

3.2 Art. 7(4a) UCP Directive: Consumer “Possibility to Search” (Platform Neutrality)

The UCP Directive takes a different approach by not distinguishing intermediation services from search engines. As stated in Art. 7(4a) UCP Directive, the provision applies to all undertakings “providing consumers with the possibility to search for products offered by different traders or by consumers”. The approach is platform-neutral and based on the functionality⁵² of the platform (“possibility to search”) because the different modes of operation are irrelevant from a consumer’s point of view. Article 7(4a) UCP Directive starts from the perspective of the consumer and governs the P2C2B/C relationship. The location where the legal transaction is concluded is as immaterial as a contractual relationship between the platform and the supplier. In principle, intermediation services and online search engines, in the sense of Art. 5(1) and (2) P2B Regulation, are also covered by the broad scope of Art. 7(4a), first sentence UCP Directive. It comes almost as a surprise that online search engines as defined in the P2B Regulation are expressly excluded from its scope by a fiction in Art. 7(4a), second sentence UCP Directive. At the moment, undertakings “with the possibility to search” in the sense of Art. 7(4a) UCP Directive are only intermediation services.

4 Ranking Transparency Requirements

Other than the scope of application, as regards online ranking transparency requirements the provisions in P2B and P2C relationships are similar. The core obligation imposed on platform operators is the duty to disclose the main parameters that influence the ranking and their relative importance (cf. Art. 5(1), (2) P2B Regulation; Art. 7(4a), first sentence UCP Directive). The open structure of this obligation needs clarification. To facilitate compliance with the transparency requirements for platform providers, the European Commission has issued non-

⁵¹ Recital 26 P2B Regulation.

⁵² Cf. Alexander (2023a), p. 20.

binding⁵³ guidelines⁵⁴ as called for by Art. 5(7) P2B Regulation. The Guidelines can also be consulted for interpretation of the UCP Directive.⁵⁵

The crucial (and corresponding) questions, which this article intends to answer, are how much transparency is really required and whether the transparency requirements under the P2B Regulation and the UCP Directive differ. In accordance with the chronological order of the legislation, it is necessary to first deal with and identify the content of the transparency requirements set forth in the P2B Regulation, as they also provided guidance to the legislature in drafting the Omnibus Directive.⁵⁶

4.1 Transparency Obligations Pursuant to Art. 5 P2B Regulation

The transparency of online ranking is governed by Art. 5 P2B Regulation. Article 5(1) and (2), in conjunction with Art. 5(3), (5) and (6), P2B Regulation specify the requirements for intermediation services und search engines. The obligations are split into two paragraphs with a different wording (Art. 5(1) and (2) P2B Regulation). Thus, before addressing the requirements imposed by the P2B Regulation, it is worth considering whether the separation and different wording result in different standards for intermediation services and search engines.

4.1.1 Differences of Transparency Obligations for Providers of Intermediation Services and Providers of Search Engines?

Providers of intermediation services have to set out “the main parameters” and “the reasons for the relative importance of those main parameters as opposed to other parameters” in their terms and conditions (Art. 5(1) P2B Regulation). Providers of search engines have to set out “the main parameters” and “the relative importance of those main parameters by providing an easily and publicly available description” on the respective search engines (Art. 5(2) P2B Regulation).

First of all, there are differences in the place of publication. The reason for this distinction is obvious: only intermediation services require a contract with the supplier⁵⁷ (Sect. 3.1) and it is only natural to link the information duty, as a duty between the parties, to the contract terms. Likewise, the Commission Guidelines provide for different places of publication.⁵⁸ Other than that, there is a notable difference in the wording as regards the object of disclosure: “main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters” vis-à-vis “main parameters,

⁵³ European Commission (2020), Guidelines OJ C 424/1, para. 9; Alexander (2021), p. 693.

⁵⁴ European Commission (2020), Guidelines OJ C 424/1.

⁵⁵ Alexander (2023a), p. 21.

⁵⁶ Cf. recital 21 Omnibus Directive; Omsels (2022), p. 275.

⁵⁷ Recital 26 P2B Regulation.

⁵⁸ European Commission (2020), Guidelines OJ C 424/1, para. 110 *et seq.*

which individually or collectively are most significant in determining ranking and the relative importance of those main parameters”.⁵⁹

In addition, only Art. 5(2), second sentence P2B Regulation explicitly stipulates topicality. While the different wording in the immediate sequence of the provisions may indicate a different substance, the Guidelines deal jointly with intermediation services and search engines.⁶⁰ According to the Guidelines, both types of platform providers are supposed to give reasons for the relative importance of the main parameters as opposed to other parameters.⁶¹ The Commission also ensures that both types of platforms are subject to the same topicality requirements by inferring the obligation for intermediation services to keep the information up to date from the use of the present tense “determining” in paragraph 1.⁶² Article 5(3), (5) and (6) P2B Regulation already stipulate common obligations for both types of platforms. Article 5(4) P2B Regulation is again based on the absence of a contractual relationship, as the obligation for intermediation services ensues from Arts. 4(5) and 3(1)(c) P2B Regulation.

Consequently, the differences in wording should be considered as merely imprecise drafting.⁶³ The formal separation into two paragraphs is due to the fact that a contract only exists in case of intermediation services. In both cases, the relative importance as opposed to other parameters and the reasons therefor have to be stated. In both, the information must be up to date. Solely the place where the information is to be published differs corresponding to the different functioning of intermediation services and search engines as described above. As regards the subject matter of disclosure duties, the same standards apply to both types of platforms.

4.1.2 *Scope of Transparency Requirements Under the P2B Regulation: Which Level of Detail is Required?*

The key legal terms that require clarification are “main parameters”, “relative importance” and “reasons”. Basically, they circumscribe the required depth and detail of information to be disclosed. Hence, the key question that must be addressed is which level of detail is required or how it is determined.

In the recitals, the term “main parameter” is defined as any general criteria, processes, specific signals incorporated into algorithms or other adjustments or demotion mechanisms used in connection with the ranking (recital 24 P2B

⁵⁹ Busch (2022a), Art. 5, para. 46; Schwamberger (2023), Sec. 10, para. 42; Busch (2019), p. 793; Alexander (2021), p. 693; Schneider and Kremer (2020), p. 1133.

⁶⁰ European Commission (2020), Guidelines OJ C 424/1, paras. 11 *et seq.*, 15 *et seq.*, 32 *et seq.*, 39 *et seq.*, 76 *et seq.*, 85 *et seq.*, 93 *et seq.*

⁶¹ European Commission (2020), Guidelines OJ C 424/1, para. 22 (“Articles 5(1) and (2) require that providers give information not only of the main parameters, but *also the reasons* for the relative importance of those main parameters *as opposed to other parameters.*”).

⁶² European Commission (2020), Guidelines OJ C 424/1, para. 120.

⁶³ In the same sense: Busch (2022a), Art. 5, para. 47.

Regulation). However, this is not helpful to finding out which parameters are the main parameters⁶⁴ as the Omnibus Directive defines the simple term “parameter” with the same words (recital 22 Omnibus Directive). In addition, the P2B Regulation lacks even an attempt to explain the term “relative importance” of the parameters. When this task is left to the courts and legal doctrine, care has to be taken to construe the concept of “main parameters” and “relative importance” autonomously based on Union law and in a uniform manner throughout the Union.⁶⁵

Wording and legislative history: The attribute “main” was adhered to although the EU Parliament had requested the disclosure of all parameters in principle.⁶⁶ This was not adopted in the trilogue negotiations. As a consequence, the need to limit the information duties to the essentials has to be accepted as a baseline. Apart from that, it is unclear where the line of demarcation between “main” and “ancillary” has to be drawn and whether the relative importance should be (and at all can be) expressed as a percentage.⁶⁷

Telos and context: The purpose of the provisions on online ranking transparency is to improve predictability for commercial platform users, enabling them to optimise their offers, their technical presentation and thus their visibility, as well as to compare the ranking practices of various providers.⁶⁸ This might advocate an obligation to provide rather more than less detailed information. On the other hand, full transparency might lend itself to manipulations by business users to the detriment of consumers. For this reason, according to Art. 5(6), first sentence P2B Regulation, algorithm transparency is not required. Here, and elsewhere, the indirect purpose of consumer protection (recitals 3, 4, 8 and 27) of the P2B Regulation surfaces.⁶⁹ Corresponding to the aforementioned conflict of the interest in information of commercial platform users and the interest in the protection of trade secrets of the platform providers, Art. 5(6), second sentence P2B Regulations states that the obligations to disclose information as to the ranking mechanism pursuant to Art. 5 P2B Regulation shall be without prejudice to the Trade Secrets Directive (EU) 2016/943.⁷⁰ In this context, the legislature also points out that the

⁶⁴ In the same sense: Busch (2022a), Art. 5, para. 25; Middelhoff and Schneider (2022), p. 112.

⁶⁵ Uniform interpretation of EU law: ECJ, 21 October 2010, C-467/08 – *Padawan*, EU:C:2010:620 2010 EuZW 951, para. 32; ECJ, 2 April 2009, C-523/07 – *A*, para. 34; ECJ, 18 January 1984, C-327/82 – *Ekro*, EU:C:1984:11, para. 11; Wegener (2022), EUV, Art. 19, para. 28; Riesenhuber (2021), Sec. 10, para. 4 *et seq.*; Grundmann (1997), p. 208 *et seq.*

⁶⁶ Committee on the Internal Market and Consumer Protection (2018), A8-0444/2018, Amendments 24, 25, 88.

⁶⁷ Busch (2022a), Art. 5, para. 46; Busch (2019), p. 793, gives an example with concrete percentages; in favour: cf. Köhler (2023a), Sec. 5b, para. 3.10 (with regard to the German implementation of Art. 7(4a) UCP Directive); Omsels (2022), p. 279 (with regard to Art. 7(4a) UCP Directive); also critical: Middelhoff and Schneider (2022), p. 112.

⁶⁸ Recitals 24, 26 P2B Regulation; Alexander (2021), p. 693 *et seq.*; Naumann and Rodenhausen (2020), p. 789.

⁶⁹ Cf. Höppner and Wick (2022), Art. 15, para. 13, fn. 58; Graf von Westphalen (2023), p. 125 *et seq.*; Voigt and Reuter (2019), p. 787.

⁷⁰ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157/1 (“Trade Secrets Directive”).

provided information should lead to an “adequate understanding” of the functioning of ranking (recital 27) and “appropriate transparency” should be afforded (recital 7, Art. 1(1) P2B Regulation). This implies that the determination of the required level of detail needs a balancing of the interest in information and the interest in trade secret protection,⁷¹ flanked by the interest of consumers in avoiding manipulation. It is questionable whether the need for this process of balancing is reflected in the present wording of Art. 5 P2B Regulation.

Which level of detail? Information obligation vs. trade secret protection: The relationship between the P2B Regulation and the Trade Secrets Directive, addressed in Art. 5(6), second sentence P2B Regulation, may contribute to the determination of the required level of detail of the information. In principle, the term “without prejudice” means “without (...) being prejudiced” not only in German law but in EU law as well.⁷² Where coexistence between the two relevant sets of rules is possible, both shall apply, whereas the Trade Secrets Directive takes precedence if a parallel application is impossible.⁷³ However, the legislature of the P2B Regulation has stressed that consideration of the commercial interests of the platform providers should never lead to a refusal to disclose the main parameters determining ranking and, whilst the Regulation shall be without prejudice to the Trade Secrets Directive, the description given should at least be based on actual data on the relevance of the ranking parameters used (recital 27).

Yet, these two statements (Art. 5(6), second sentence P2B Regulation and recital 27) do not exclude each other. Trade secret protection and information obligations are not mutually exclusive.⁷⁴ It is only the legal consequences (disclosure or secrecy) that are exclusive with regard to one and the same piece of information because information loses its trade secret status if it becomes known (Art. 2 No.1(a) Trade Secrets Directive) and, as stated in Art. 5(1) and (2), first sentence, and Art. 3(1)(b) P2B Regulation, the information pursuant to Art. 5 P2B Regulation is generally accessible.

It is preferable to construe “without prejudice” not as a rule of precedence, but rather as a rule of interpretation. Otherwise, the information obligation according to the P2B Regulation would be taken *ad absurdum* because the platforms could evade the information obligation by simply keeping it secret.

Hence, the scope of the information obligation is intentionally undefined and in need of determination through a balancing with trade secret protection on a case-by-case basis. This approach⁷⁵ is also preferable in terms of *effet utile*⁷⁶ as it ensures

⁷¹ In the same sense, in favour of a balancing on a case-by-case basis: Alexander (2021), pp. 693, 695; Middelhoff and Schneider (2022), p. 114.

⁷² Cf. ECJ, 14 July 1977, C-8/77 – *Sagulo*, EU:C:1977:131, para. 11; Wolff (2012), p. 34; with regard to Art. 5(6), second sentence P2B Regulation: Busch (2019), p. 793; Alexander (2020), p. 952.

⁷³ In the same way, in another case: ECJ, 14 July 1977, C-8/77 – *Sagulo*, EU:C:1977:131, para. 11; cf., generally, Wolff (2012), pp. 32, 34.

⁷⁴ Similarly: Schneider and Kremer (2020), p. 1134; for exclusivity: Alexander (2021), p. 694 *et seq.*; Middelhoff and Schneider (2022), p. 114.

⁷⁵ As a result, for a balancing as well: Alexander (2021), pp. 693, 695; Middelhoff and Schneider (2022), p. 114.

⁷⁶ Riesenhuber (2021), Sec. 10, para. 45; Möllers (2020), Ch. 5, para. 108 *et seq.*

that both sets of EU rules are effective, not with regard to the same piece of information, but in general. The concept of the Trade Secrets Directive confirms this approach as its scope of protection is likewise undefined and in need of concretising by a balancing with other interests because, according to Art. 5(d) Trade Secrets Directive, Member States shall ensure that an application for the measures, procedures and remedies provided for and in this Directive is dismissed where the alleged acquisition, use or disclosure of the trade secret was carried out for the purpose of protecting a legitimate interest recognised by Union or national law. Neither the protection of trade secrets nor the information of commercial users may claim primacy.⁷⁷ On the contrary, the two sets of rules mutually determine their scope of protection.

It is possible to link this result to the wording of Art. 5(6), second sentence P2B Regulation referring to the Trade Secrets Directive in total, thus rendering Art. 5(d) Trade Secrets Directive applicable, which in turn subjects the protection of trade secrets to interests protected by EU or Member States' law. At first glance, the referral seems to result in a circular argument as one cannot infer from the information obligation in Art. 5 P2B Regulation that it always leads to a "legitimate interest recognised by Union law" in the sense of Art. 5(d) Trade Secrets Directive, while at the same time the P2B Regulation should apply "without prejudice" to the Trade Secrets Directive. This contradiction can be resolved as Art. 5(d) Trade Secrets Directive⁷⁸ only relates to a "*legitimate* interest". As a consequence, the wording of the Trade Secrets Directive is open for balancing.

In summary, the parallel application of the P2B Regulation and the Trade Secrets Directive is not only possible but necessary. Both sets of rules have an undefined scope of protection and are necessary to concretise each other. Article 5(6), second sentence P2B Regulation refers to Art. 5(d) Trade Secrets Directive where the term "legitimate" requires a balancing of the interest in trade secrets protection with the conflicting interest in information recognised by the P2B Regulation. Through the described chain of references, the result of the balancing exercise becomes part of the P2B Regulation.

Consequently, the wording of Art. 5(6), second sentence P2B Regulation ("without prejudice") is able to contribute to the process of determining the required level of detail through balancing. However, it need not be mentioned that the circular referral is over-complicated from a technical point of view. The legislative objective to ensure "adequate understanding" through a balancing in which the interest in disclosure versus the interest in secrecy, flanked by the consumer interest in the prevention of manipulation, are balanced on a case-by-case basis could be reflected more clearly in the wording of Art. 5 P2B Regulation.

Which level of detail is required according to the Guidelines of the Commission? In particular, the question of the relative importance is the critical question in the area of tension of the information obligation and the trade secret protection. The

⁷⁷ As a result, as well: Alexander (2021), p. 693; Middelhoff and Schneider (2022), p. 114; Schneider and Kremer (2020), p. 1134.

⁷⁸ Against this: Alexander (2021), p. 695, who considers Art. 5(d) to be unsuitable but links the result to the German Act for the Protection of Trade Secrets, Sec. 2, No. 1 ("*berechtigtes Interesse*"). Confirming: Deutscher Bundestag (2018), Drs. 19/4724, p. 28.

obligation in Art. 5(1), (2) and (5) P2B Regulation to disclose (the reasons for) the relative importance and information about whether and, if so, how and to what extent the rankings mechanism takes specific criteria into account comes very close to algorithm transparency or at least very detailed information.⁷⁹ In this regard, the Commission takes a more reserved approach in the Guidelines. The Commission considerably dilutes the condition: the relative importance “does not require the exact weighting [...] to be disclosed”.⁸⁰ In addition to the enumeration of parameters, a “‘second layer’ of explanatory information” is required, which providers can fulfil by describing, the “company-internal ‘thought process’”,⁸¹ without information about the exact weighting.⁸² Furthermore, it should be mentioned if there may be variations due to individual criteria.⁸³

4.1.3 Conclusion, Evaluation and Preliminary Proposal *de lege ferenda*

In conclusion, the P2B Regulation imposes the same requirements of duties to disclose information on intermediation services as on search engines. The standard aims to ensure *appropriate* transparency.⁸⁴ The key regulatory objective is *adequate* understanding. The determination of specific information duties requires a comprehensive balancing of the interests involved and the rationale behind the applicable rules. Based on this finding, in the following, Art. 5 P2B Regulation will be looked at with regard to its suitability for achieving this objective.

The report by the Commission on the first review of the implementation of the P2B Regulation revealed that most of the platforms failed to give full effect to Art. 5 P2B Regulation because most of them did not offer any explanations and, even if they did, these were rather general.⁸⁵ This corresponds to unclear requirements.

The neuralgic point of the transparency requirement is the relative importance of parameters and, associated with this,⁸⁶ the required depth of information and the level of detail. The decisive criterion should be only which information is necessary for an adequate understanding of the ranking process. By contrast, full information including specific weightings entails the risk of manipulation and reveals trade secrets. In the same vein, lengthy aggregations without highlighting the more relevant criteria are not helpful.⁸⁷

The proposal of Naumann and Rodenhäuser for an information statement, which suggests that platforms present the five most important positive and negative

⁷⁹ Middelhoff and Schneider (2022), p. 112; Höppner and Schulz (2019), p. 2334.

⁸⁰ European Commission (2020), Guidelines OJ C 424/1, para. 46.

⁸¹ European Commission (2020), Guidelines OJ C 424/1, para. 22.

⁸² European Commission (2020), Guidelines OJ C 424/1, para. 46.

⁸³ European Commission (2020), Guidelines OJ C 424/1, para. 48 *et seq.*

⁸⁴ Recital 7 P2B Regulation.

⁸⁵ European Commission (2023), COM(2023) 525 final, p. 10.

⁸⁶ For the connection, *see* European Commission (2020), Guidelines OJ C 424/1, p. 7, fn. 10 (referring for “relative importance” to Sec. 6.2. “Level of detail”).

⁸⁷ In the same sense: Busch (2022a), Art. 5, para. 33; Omsels (2022), p. 279; Naumann and Rodenhäuser (2020), p. 790.

ranking criteria, followed by specific recommendations for improvement, is convincing in this regard.⁸⁸ As a fair balance, platforms should be obliged to present their main parameters and the basic concept behind the interplay that is common to every process of generating a list of results. Instead of an obligation to give reasons, the focus should be on explaining the concept and the main parameters' content because the P2B Regulation aims to achieve "adequate understanding"⁸⁹ but does not contain any judgments about certain ranking practices. However, an obligation to give reasons is equivalent to a justification. Article 5(2), first sentence P2B Regulation therefore only speaks of a "description", and the German version even more appropriately uses the term "*Erläuterungen*", i.e. "explanations". In view of the telos of the P2B Regulation to enable commercial platform users to optimise their visibility, platform operators should be requested to mention whether and, if so, to what extent commercial platform users are able to influence the ranking. Beyond that, no information concerning relative importance is (from the perspective of the telos) necessary.

Although the Guidelines contain such a purpose-oriented and adequate interpretation to some extent, the wording of Art. 5 P2B Regulation could be improved to reflect more clearly the legislature's objective of predictability through appropriate transparency, which is to be determined by a comprehensive balancing of interests. The objective of adequate understanding and the interests to be taken into account are only mentioned in the non-binding recital 27. In the normative part, only Art. 5(5) P2B Regulation offers a wording that is open for a balancing ("adequate understanding"). Yet, the need for such a process exists when determining the core obligations under paragraphs 1 and 2 of Art. 5 P2B Regulation as well. In fact, the legislature's intention that the level of detail of information to be disclosed by platforms is to be determined through a process of balancing is currently only reflected in an over-complicated way through a circular referral in the wording of Art. 5(6) P2B Regulation ("without prejudice").

This leads to the following provisional proposal *de lege ferenda*. In the proposal, paragraphs 1–5 replace the present Art. 5(1)–(3), (5) and (6) P2B Regulation. While, apart from the paragraph numbering, Art. 5(4) and (7) P2B Regulation remain unchanged.

Article 5 Ranking

1. Providers of online intermediation services and online search engines shall explain in an appropriate manner their ranking concept and the main parameters of the ranking. The explanations shall be sufficient to enable the business users and corporate website users to obtain an adequate understanding of whether, and if so to what extent, the ranking mechanism can be influenced, in particular by the following:
 - (a) direct and indirect payments;
 - (b) the characteristics of the products offered;
 - (c) as regards online search engines, the design characteristics of the website.

⁸⁸ Naumann and Rodenhausen (2020), p. 790 *et seq.*

⁸⁹ Recital 27 P2B Regulation.

2. Explanations shall not be given inasmuch as they may give rise to a concrete risk of manipulation. If the ranking information is protected by trade secrets of the providers of online intermediation services or online search engines, an explanation is adequate if it results from a balance of the interests protected pursuant to Article 1(1) as a legitimate interest recognised by Union law pursuant to Article 5(d) Directive (EU) 2016/943 and the interest in protection of trade secrets as protected by the Directive (EU) 2016/943.
3. Providers of online intermediation services shall incorporate the explanations in their terms and conditions.
4. Providers of online search engines shall provide the explanations easily and publicly available on their online search engines.
5. The explanations shall be kept up to date.

In the above proposal, the requirement of adequacy is integrated into the core obligations. Instead of giving reasons, the focus lies on explaining. The word “how” in Art. 5(5) P2B Regulation has been removed as it unreasonably interferes with the protection of trade secrets in all conceivable cases. In terms of relative importance and specific details on extent, these are only required for those parameters that can be influenced by the commercial users. Beyond that, it is sufficient to simply state that a parameter is a main parameter. The use of “in particular” indicates that the list is not exhaustive and any other parameters that can be influenced should be mentioned accordingly. Given the factual connection, consideration could also be given to inserting Art. 7(3)(b) P2B Regulation after paragraph 2 of the proposal.

4.2 “Similar Transparency Requirements” According to the UCP Directive: Mind the Gap?

As the P2B Regulation only applies in the P2B relationship, Art. 7(4a) UCP Directive was intended to introduce “similar transparency requirements” in the P2C relationship (recital 21 Omnibus Directive). Following this route, Art. 7(4a) UCP Directive obliges platform providers to inform about the main parameters determining the ranking and the relative importance of those parameters as opposed to other parameters. While this indicates the existence of parallel, if not identical standards, it is obvious that the provisions in Art. 5 P2B Regulation and in Art. 7(4a) UCP Directive directly protect different groups of platform users. This begs the question, whether there are different information requirements in the P2B and the P2C relationships.

From one perspective, the provisions were not to be understood in the same way, as they serve different purposes by protecting different information interests of different addressees.⁹⁰ The differences were, in particular, expressed in the level of detail of information required.⁹¹ Similarly, others argue that the provisions were based on the same information needs, but a distinction between the requirements in

⁹⁰ Busch (2022a), Art. 5, para. 9; Busch (2019), p. 792 *et seq.*; Omsels (2022), p. 275 *et seq.*

⁹¹ Omsels (2022), p. 276.

the P2B relationship and the P2C relationship had to be made in respect of the level of detail of information as far as intermediation services are concerned.⁹²

However, it could also be a case of similar requirements in the sense that congruent information interests are to be satisfied without the need for differentiation in terms of the level of detail of information.

The question whether only “similarity” has been intended and achieved or rather identity is called for indeed depends on the protected information interests. The teleological interpretation has to resolve whether, according to the legislature, there is a difference in interests and whether different transparency requirements in general or related to the level of detail of information apply. Thereby, conclusions can be drawn from Art. 7(4a), second sentence UCP Directive and a comparison of the underlying guiding concepts of the provisions.

4.2.1 *Similar Telos: The Protected Information Interests of Commercial Platform Users and Consumers*

Article 5 P2B Regulation shall enable commercial platform users to optimise their ranking position and to compare the ranking practices of different platforms.⁹³ Similarly, Art. 7(4a) UCP Directive is intended to respond to the experience that rankings have a significant impact on consumers’ purchasing decisions, and hence should enable consumers to optimise the satisfaction of their needs, to assess the significance of a ranking position and to compare platforms.⁹⁴ Corresponding to the main problem of non-transparent rankings mentioned above, first of all, the ranking information serves the purpose to enable *both* sides, namely commercial users and consumers, to make an informed transactional decision⁹⁵ about whether and how to use the platform. In this sense, commercial platform users and consumers have the same interest in information vis-à-vis the platform provider to make their transactional decision. Both are in a dependency relationship with the platform provider. Information – of both – and thus the safeguarding of choice is the key to avoiding the creation of dominant positions on the market for platform services.

Although the perspective of consumers and commercial platform users is “mirror-inverted”,⁹⁶ the objectives of both provisions are to be achieved with one and the same piece of information: namely, if certain criteria influence the ranking and to what extent. With this one piece of information, commercial users can optimise their ranking position, on the one hand, and consumers can assess the informative value of the ranking, on the other hand.

From this perspective, both provisions protect groups of persons who are interested in the *same type* of information. The question only remains whether this entails the same level of detail of this information to be provided.

⁹² Alexander (2023d), Art. 5, para. 5a; Alexander (2023a), p. 20 *et seq.*; Alexander (2020), p. 952.

⁹³ Recital 24 P2B Regulation; Busch (2022a), Art. 5, para. 3.

⁹⁴ Recital 18 Omnibus Directive; *cf.* Busch (2019), p. 792; Feddersen (2022), p. 791; *cf.* Lettl (2022), p. 806.

⁹⁵ Alexander (2020), p. 947.

⁹⁶ *Cf.* Alexander (2023d), Art. 5, para. 5a.

According to the Commission, professional users might “require and be able to understand more detailed and more technical information than consumers”,⁹⁷ which prima facie is a convincing starting point given that professional users making use of platform services as a distribution channel will have both the resources and a lively interest in finding the online distribution channel that maximises their sales. On that basis, the level of detail of information would not be the same in the P2B and P2C relationships. However, the exclusion of search engines in the P2C relationship and a comparison of the underlying guiding concepts of the two provisions suggest otherwise.

4.2.2 *Conclusions to Be Drawn from the Exclusion of Search Engines in Art. 7(4a), Second Sentence UCP Directive*

According to Art. 7(4a), second sentence UCP Directive, the transparency requirements of Art. 7(4a), first sentence UCP Directive do not apply to providers of search engines. The reason for this is that search engines are already required by Art. 5(2) P2B Regulation to inform publicly and in an easily available way about the ranking (recital 21 Omnibus Directive, cf. Sect. 4.1.1).⁹⁸ The exclusion of search engines from Art. 7(4a) UCP Directive is not based on the assumption that consumers are less worthy of protection vis-à-vis non-transparent result lists as produced by search engines, but rather on the assumption that there is simply no need for an additional, separate obligation to provide information, as search engines are already obliged under Art. 5(2) P2B Regulation to provide public ranking information to which consumers have access. For this reason, the European legislature deemed it sufficient that this single obligation contained in the P2B Regulation should apply in both relationships. This regulatory concept is necessarily based on the premise that the consumers’ interest in information is sufficiently protected by the information originally designed for the P2B relationship.⁹⁹ Otherwise two different provisions for providers of search engines would have been necessary. The exclusion shows that, according to the legislature, the same requirements in the same level of detail exist for search engines vis-à-vis corporate website users, as well as consumers, as there is simply one provision for both.

This result that with regard to search engines the same requirements in the same level of detail exist vis-à-vis corporate website users, as well as consumers, also allows drawing conclusions about the information requirements pertaining to intermediation services. Firstly, the same content requirements apply to intermediation services as to search engines (cf. Sect. 4.1.1). Secondly, since the business users of intermediation services and the corporate website users of search engines are often identical, the same¹⁰⁰ need for protection exists. Thirdly, the conception of Art. 7(4a) UCP Directive is due to the chronology of the legal framework. The

⁹⁷ European Commission (2020), Guidelines OJ C 424/1, para. 105, *see also* para. 97.

⁹⁸ Recital 21 Omnibus Directive, Deutscher Bundestag (2021b), Drs. 19/27873, p. 36; Alexander (2023a), p. 20; Alexander (2021), p. 692; Omsels (2022), p. 277 *et seq.*; Büscher (2022), p. 7; Sosnitsa (2021), p. 333.

⁹⁹ In the same sense: Alexander (2023a), p. 20 *et seq.*

transparency requirements were created in the P2B Regulation first.¹⁰¹ As in the case of intermediation services a contract always exists as a prerequisite, it was only natural to lay down the obligation there. This distinction gave rise to the separate provision for search engines. Only afterwards¹⁰² did the legislature amend the UCP Directive in line with the requirements of the P2B Regulation. Because it is nigh impossible for consumers to access information contained in a P2B contract and such contract has binding effect only between the parties in general, a separate provision safeguarding the consumers' information vis-à-vis intermediation services became necessary (cf. recital 21 Omnibus Directive). Therefore, Art. 7(4a), first sentence UCP Directive is based on practical considerations as well.

Thus, the legislature's premise that traders and consumers can be satisfied by the same online ranking information, particularly as regards depth and detail, can be transferred to intermediation services.

One simple argument may be put forward against the conclusion of the *identity* of the transparency obligations: the single requirement of information might coexist with the distinction of substantive transparency obligations if the information duties imposed on platform providers via Art. 5 P2B Regulation simply exceeded the information duties imposed on undertakings under Art. 7(4a) UCP Directive. Then, of course, the more detailed and technical information owed to professional users would suffice at any rate to keep consumers informed with regard to search engines. Nevertheless, this could be criticised because more information is not necessarily better information for the consumer. Too much information may result in an information overflow; too technical information may be unintelligible. Such an argument, however, already assumes that the P2B Regulation requires more (technical) information that may be unintelligible for consumers. This assumption has to be confirmed with regard to the guiding concepts underlying the legal acts first.

4.2.3 Underlying Guiding Concepts

Surprisingly, and somewhat counterintuitively, a comparison of the underlying guiding concepts, in other words the model of a consumer and the model of a commercial platform user the legislature had in mind when drawing up the provisions, further speaks in favour of (nearly) identical requirements in P2B and P2C relationships.

However, the European Commission has a different view. According to the European Commission, professional users might *require and be able to understand* more detailed and more technical information than consumers.¹⁰³ This points to different guiding concepts.¹⁰⁴

Guiding concepts should facilitate the application of laws as they concretise and balance the underlying principles of the law.¹⁰⁵ It has to be taken into account that

¹⁰⁰ Cf. recital 26 P2B Regulation.

¹⁰¹ Cf. European Commission (2018b), COM(2018) 185 final; European Commission (2018c), COM(2018) 238 final.

¹⁰² Cf. recital 21 Omnibus Directive.

guiding concepts have to be derived from positive law; otherwise there is a risk of legal practitioners projecting their own ideas of legal policies onto it.¹⁰⁶ It must be clarified, therefore, whether the above-mentioned standpoint of the Commission can be derived from the legislative concept.

The UCP Directive takes as a benchmark the guiding concept of the average consumer, who is reasonably well-informed and reasonably observant and circumspect,¹⁰⁷ whereas the guiding concept of the P2B Regulation is less clear. Some suggest an “average commercial user”¹⁰⁸ as a benchmark.

On the one hand, the average consumer is unlikely to understand detailed technical information. Indeed, he would rather be overstrained by too much information and react to an “information overload”¹⁰⁹ with rational apathy.¹¹⁰ The partially raised objection that only professional readers (typically consumer associations or consumer law enforcement authorities) need to be able to understand the information¹¹¹ is not convincing. The primary function of the transparency requirement is the empowerment of individual consumers to make an informed choice in the actual, concrete situation of their transactional decisions. It is the consumer himself who shall be enabled to understand and assess the ranking on the basis of the information provided on the platform in the specific situation. The goal of the transparency requirements vis-à-vis consumers within the framework of Art. 7(4a) and (1) UCP Directive requires that information is immediately intelligible for consumers, as Art. 7(2) UCP Directive states.

On the other hand, commercial users in general understand deeper, more detailed information. There is no question that larger companies with an IT department or highly knowledgeable external advisors are able to understand significantly more. Yet, even if the P2B Regulation may be built on a notional “average commercial user”, the question remains of what kind of “average commercial user” this is. The legislative history of the P2B Regulation and the theoretical reasoning behind transparency requirements show that the primary goal was to protect market participants with evidently inferior bargaining power as a means of protecting the functionality of the market (Sect. 1). Therefore, it is perfectly convincing that the P2B Regulation is primarily concerned with the strengthening of *micro, small and medium-sized enterprises* (“SMEs”) (recital 2).¹¹² Large companies are typically already on an equal footing with the platform providers, irrespective of the scope of information they are entitled to and despite the information deficit, as the demand

¹⁰³ European Commission (2020), Guidelines OJ C 424/1, para. 105, *see also* para. 97.

¹⁰⁴ Busch (2022a), Art. 5, paras. 9 and 34.

¹⁰⁵ Riesenhuber (2021), Sec. 10, para. 47.

¹⁰⁶ Riesenhuber (2021), Sec. 10, para. 48.

¹⁰⁷ Recital 18 UCP Directive; *cf.* Sect. 1.2.1, fn. 14.

¹⁰⁸ European Commission (2020), Guidelines OJ C 424/1, para. 17; Busch (2022a), Art. 5, para. 34; Alexander (2023a), p. 15 *et seq.*

¹⁰⁹ Hacker (2017), p. 116 *et seq.*; Fezer (2010), p. 580; Rehberg (2007), pp. 285, 320; Hofmann (2022), p. 785.

¹¹⁰ *Cf.* Peifer (2021), p. 1454.

¹¹¹ Hofmann (2022), p. 785; generally, Peifer (2021), p. 1454; Fezer (2010), p. 580.

for their products may even make the platforms dependent on the products of large suppliers. As shown, the legislature had SMEs in mind and, in terms of knowledge about the technical operation of intermediation services or search engines and the underlying ranking mechanisms, SMEs have more in common with the model consumer than with a large enterprise.¹¹³

Even if a gap may remain at present, it is marginal and the “demandable levels of detail” are converging. On the one hand, consumers are becoming increasingly familiar with the digital environment. Consequently, their technical understanding will grow. On the other hand, in the P2B relationship it is not the guiding concept of the “average (large) commercial user” that applies, but the guiding concept of the “average SME”. At the same time, the information interest of the “average SME” is limited by the necessity of balancing it with the platforms’ legitimate interest in protecting its trade secrets and the public interest in avoiding a risk of manipulation (Sect. 4.1.2). The trade secret protection limits the platform operator’s duty to disclose information both *vis-à-vis* commercial users and consumers,¹¹⁴ but from the current perspective of the model consumer rather only has a limiting effect in the relationship to the model SME. Hence, the gap between the “demandable depths of information” in the P2C relationship, on the one hand, and the P2B relationship, on the other hand, if it exists at all, appears to be marginal enough to justify a uniform standard. The same, not too deep and detailed information is required.

The guiding concepts, derived from the conflicting interests, underlying principles and worthiness of protection, according to the legislature, therefore prove the assertion of the Commission that commercial platform users could require and understand more in-depth information than consumers to be a fallacy without any legal foundation.

4.3 Consequence: One Group of Platform Users

The requirements concerning the content and level of detail of information in P2B and P2C relationships, with regard to search engines and with regard to intermediation services, are not only similar, they are the same.

To summarise, this legislative intention firstly can be derived from the exclusion of search engines in the UCP Directive and the transferability of the idea underlying this legislative decision to intermediation services. Secondly, the underlying model addressees of the information (average consumer, average SME) lead to approximately the same “ability to understand” in a rather normative sense. Thereby, the worthiness of protection (“ability to request”) is limited by the need for a balancing with the protection of trade secrets and the protection against manipulation. The underlying guiding concepts also show that the “same level of detail” is meant in a way that not overly deep and detailed information is required and, in this way,

¹¹² Naumann and Rodenhausen (2020), p. 777 *et seq.*; Höppner and Schulz (2019), p. 2329.

¹¹³ Cf. European Commission (2015), COM(2015) 192 final, para. 2.1. (states consumers and SMEs jointly).

¹¹⁴ Cf. recital 23 Omnibus Directive (“without prejudice to Directive (EU) 2016/943”); Alexander (2021), p. 692.

provide further clarification on the first question about the specific (determination of the) level of detail required. The word “*similar*”, hence, is only justified in that the relevant provisions deal with two different relationships. In terms of the content and level of detail of the information to be provided, however, the requirements are the same.

Consequently, the above analysis reveals that the provisions for intermediation services are now doubled. Just like consumers are able to access the public online ranking information supplied by search engines, business users are able to access the public information of intermediation services supplied pursuant to Art. 7(4a) UCP Directive. *De lege lata*, intermediation services are exactly in the situation that has led the legislature to exclude search engines from the scope of Art. 7(4a) UCP Directive. The current existence of two provisions for intermediation services is inconsistent with the practically and teleologically convincing approach in Art. 7(4a), second sentence UCP Directive, where both interests of both groups are brought together in one provision, namely Art. 5(2) P2B Regulation. As the teleological interpretation shows, and since P2B and P2C requirements are the same, not only with regard to search engines but with regard to intermediation services as well, commercial platform users and consumers form not two separate groups but *one group of users* in needing protection vis-à-vis the platform. Hence, the only reasonable conclusion is to merge¹¹⁵ Art. 5 P2B Regulation and Art. 7(4a) UCP Directive into *one* provision, into one “platform-to-user (P2U) Regulation”.

Before proposing a legal framework *de lege ferenda* taking the findings into account, one further aspect, namely, the relation of the discussed information obligations to other (transparency) provisions shall be looked at.

5 Relation to Other Provisions

The provisions considered so far are not the only ones that impose ranking (transparency) requirements.

5.1 Further Transparency Provisions

5.1.1 “Similar Requirements” Pursuant to Art. 6a(1)(a) Consumer Rights Directive?

Article 6a Consumer Rights Directive¹¹⁶ was introduced by Art. 4 No. 5 Omnibus Directive and applies alongside¹¹⁷ (cf. Art. 6a(1) Consumer Rights Directive) the

¹¹⁵ In favour of a conflation as well: ELI (2019), p. 25 *et seq.*; presented by Busch et al. (2020), pp. 670, 673, fn. 13; Podszun (2020/2022), p. F 76.

¹¹⁶ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304/64 as amended by the Omnibus Directive (*cf. supra* fn.6) (“Consumer Rights Directive”).

¹¹⁷ Wendehorst (2022), Sec. 312I, paras. 17 and 19.

afore-discussed provisions. Article 6a(1)(a) Consumer Rights Directive obliges to inform in a publicly accessible way about the main parameters of the ranking and the relative importance. The necessary prerequisite is an online marketplace (Art. 2(1), No. 17 Consumer Rights Directive), which, unlike the platforms pursuant to the provisions considered above, must allow the conclusion of B2C or C2C contracts through their own software.¹¹⁸ Because of similar requirements¹¹⁹ and a narrower scope of application,¹²⁰ Art. 6a(1)(a) Consumer Rights Directive does not provide more protection than Art. 7(4a) UCP Directive. In addition, Arts. 1, 3(1) and 6a(1) Consumer Rights Directive are linked to the contract between the business user and the consumer.¹²¹ As a consequence (contractual) claims founded on infringements of the platform's information obligations can only be directed against the business user and not the platform itself.¹²² In German civil law doctrine, the provider of the online marketplace is not a third party within the meaning of German Civil Code, Sec. 123(2), but is attributed to the sphere of responsibility of the business user.¹²³ But the fact that business users are just as exposed as consumers to information asymmetries vis-à-vis platforms speaks against this attribution. Article 6a(1)(a) Consumer Rights Directive thus contradicts the perception (cf. Sect. 4.3) that business users and consumers form one group needing protection vis-à-vis the platform. Consequently, Art. 6a(1)(a) Consumer Rights Directive should be dropped.

5.1.2 *The Approach of the Digital Services Act*

Recently, the Digital Services Act (DSA) was introduced. The approach in Art. 27 DSA¹²⁴ is to be welcomed. With regard to content, the same ranking transparency requirements as in the other legal acts are required, but without differentiating between commercial platform users and consumers.¹²⁵

¹¹⁸ Deutscher Bundestag (2021a), Drs. 19/27655, p. 29; Schulte-Nölke (2022b), Sec. 312l, para. 1; Wendehorst (2022), Sec. 312l, paras. 5 *et seq.*, 8 *et seq.*, 19; Schmidt (2022), p. 132; Ring (2022), p. 207 *et seq.*

¹¹⁹ Schulte-Nölke (2022a), Sec. 312l, para. 2; Wendehorst (2022), Sec. 312l, para. 19; Schwamberger (2023), Sec. 10, para. 70.

¹²⁰ Wendehorst (2022), Sec. 312l, para. 19; *cf.* Schmidt (2022), p. 136.

¹²¹ Schwamberger (2023), Sec. 10, para. 77 *et seq.*

¹²² *Cf.* Schwamberger (2023), Sec. 10, paras. 77, 79 *et seq.*

¹²³ Wendehorst (2022), Sec. 312l, para. 47.

¹²⁴ Regulation (EU) 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), OJ L 277/1 (“DSA”).

¹²⁵ Schwamberger (2023), Sec. 10, paras. 27, 36 *et seq.*

5.2 Provisions Going Beyond Transparency

Apart from the fact that the transparency provisions also indirectly impose a certain substantive requirement on the ranking by presupposing that the ranking is determined in a non-arbitrary manner¹²⁶ but directed by a system of main parameters which must be depictable, the question arises of how the transparency provisions correlate with provisions imposing specific substantive requirements on the ranking mechanism.

5.2.1 The Principle of Art. 1(4) and (5) P2B Regulation

The P2B Regulation applies in principle without prejudice to other provisions (Art. 1(4) and (5) P2B Regulation). The transparency rules cannot be inferred *argumentum e contrario* that the ranking practice be considered unassailable provided it has been made transparent (Sect. 4.1.3).¹²⁷ This is convincing because transparency rules can only enable market participants to make informed and free transactional decisions if options for decision-making exist, and, hence, require that the market has not yet been “tipped”.¹²⁸ If dependencies exist for reasons other than information asymmetries, transparency alone will not help; it takes regulations directed at the substance of the ranking process.¹²⁹ In this context, provisions like Art. 101 f. TFEU,¹³⁰ Art. 38 DSA, Arts. 5 and 6(5) DMA,¹³¹ Arts. 8 and 9 UCP Directive, and Sec. 4 Act Against Unfair Competition¹³² come into play. Standards pertaining to the ranking mechanism itself could also result from Art. 4 Directive on Misleading Advertising.^{133,134}

5.2.2 Comparative Advertising (Art. 4 Directive on Misleading Advertising)

Comparative advertising means any advertising that identifies a competitor or the products offered by a competitor (Art. 2(c) Directive on Misleading Advertising).

¹²⁶ Recital 24 P2B Regulation.

¹²⁷ Generally, Alexander (2023b), Art. 1, para. 19; Schulte-Nölke (2022a), Art. 1, paras. 42 and 44; Alexander (2020), p. 949.

¹²⁸ Podszun (2020/2022), pp. F 41 *et seq.*, 64 *et seq.*, 88; Alexander (2023a), p. 15; Alexander (2020), p. 949 *et seq.*; Kumkar (2022), p. 562.

¹²⁹ Similarly, Podszun (2020/2022), p. F 64 *et seq.*; Kumkar (2022), p. 562.

¹³⁰ Alexander (2020), p. 949; Polley et al. (2019), p. 497 *et seq.*; Hoffer and Lehr (2019), p. 16 (“self-preferencing”).

¹³¹ Regulation (EU) 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), OJ L 265/1 (“DMA”); Busch (2022a), Einleitung, para. 15.

¹³² Ohly and Sosnitza (2023a), Sec. 8a, para. 4; Hofmann (2022), p. 786; Alexander (2020), p. 949; Alexander (2018), p. 768 *et seq.*

¹³³ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376/21 (“Directive on Misleading Advertising”).

¹³⁴ Omsels (2022), p. 281.

Advertising requires a representation in order to promote sales (Art. 2(a) Directive on Misleading Advertising). Representations made by third parties in order to promote another person's competition are covered as well.¹³⁵ Yet, the term "advertising" requires an intention to promote any market actor's competition (Art. 2(a) Directive on Misleading Advertising: "in order to promote the supply of sales or services").¹³⁶ This requirement helps to insulate consumer associations and information intermediaries, namely neutral test institutes and media, that contribute to market transparency by means of comparative product tests from liability under unfair competition law.¹³⁷ While the same reasoning also applies to price comparison platforms and rating platforms in principle,¹³⁸ the platform leaves the area of neutral information if it grants users a better ranking position in return for payment (e.g. in the form of a commission); in such a case, the intention to promote exists.¹³⁹ Moreover, the low requirements for a comparison¹⁴⁰ may easily be fulfilled in online rankings,¹⁴¹ at least with regard to intermediation services. The provision of comparative advertising applies alongside the P2B Regulation (Art. 1(5) P2B Regulation) and the UCP Directive,¹⁴² on the one hand, because of their different causes of concern: in one case it is the unfair advantage in competition, in the other it is the lack of transparency. On the other hand, because of different aspects of reference: general, abstract ranking information is not within the scope of Art. 4 Directive on Misleading Advertising, but, if at all, the ranking result, the surface where the query results are presented, could be.¹⁴³ However, in the light of Arts. 11 and 16 of the Charter of Fundamental Rights of the European Union a proportionate interpretation may be necessary.¹⁴⁴

A ranking based on non-obtrusive payments by the supplier is not objective because it is not based on relevance and thus infringes Art. 4(c) Directive on Misleading Advertising.¹⁴⁵ This could lead to overregulation. As a starting point,

¹³⁵ Federal Supreme Court, 9 February 2006, I ZR 124/03 – *Rechtsanwalts-Ranglisten*, 2006 GRUR 875, para. 22 *et seq.* (as an unspoken premise); Sack (2021), Sec. 6, para. 36; Menke (2020), Sec. 6, para. 64; Stier and Schneider (2016), Sec. 6, para. 24; Beater (2011), Sec. 16, para. 1496; Lettl (2007), p. 938; Alexander (2018), p. 771.

¹³⁶ Restrictive: Glöckner (2020b), Sec. 6, para. 206; Fezer et al. (2016), Sec. 6, para. 54.

¹³⁷ Peifer (2020), Sec. 6, para. 198 *et seq.*; Koos (2016), Sec. 6, para. 59.

¹³⁸ With regard to price comparison platforms: Peifer (2020), Sec. 6, para. 199; with regard to rating platforms: Ohly (2023a), Sec. 6, paras. 29, 75; Engert (2018), p. 337.

¹³⁹ Müller (2021), p. 354 *et seq.*; Engert (2018), p. 337; Lettl (2007), p. 942; Glöckner (2020b), Sec. 6, para. 224; *cf.* Koos (2016), Sec. 6, para. 58; *cf.* Ohly (2023a), Sec. 6, para. 29.

¹⁴⁰ Federal Supreme Court, 2 April 2015, I ZR 167/13 – *Staubsaugerbeutel im Internet*, 2015 GRUR 1136, para. 19; Köhler (2023b), Sec. 6, para. 79; Glöckner (2018), p. 1153; Ohly (2018), p. 138.

¹⁴¹ Glöckner (2020b), Sec. 6, para. 224a *et seq.*; Engert (2018), p. 337; *cf.* Alexander (2018), p. 770 *et seq.*

¹⁴² Recital 6 UCP Directive.

¹⁴³ Similarly, Omsels (2022), p. 281 *et seq.*; Middelhoff and Schneider (2022), p. 114.

¹⁴⁴ Generally, Glöckner (2020b), Sec. 6, paras. 114 *et seq.*, 120 *et seq.*; Ohly (2023a), Sec. 6, para. 40; *cf.* Opinion of Advocate General Trstenjak, 24 November 2010 on ECJ, C-316/09, para. 70 *et seq.*

¹⁴⁵ Müller (2021), p. 364; *cf.* Scherer (2001), p. 92.

Art. 4 Directive on Misleading Advertising permits comparative advertising.¹⁴⁶ Its objective is to prevent the distortion of competition, detriment to competitors and an adverse effect on consumer choice.¹⁴⁷ As ranking parameters are often related to the past (e.g. click rate, contracts concluded), payments offer an opportunity for new entrants in the market to attract attention.¹⁴⁸ Contrary to first appearances, there may be efficiency gains and competition may be promoted: if consumers know that a higher position in the ranking has been paid for, they are inclined to scroll through further offers.¹⁴⁹ One reason for this is that additional payments for an attractive ranking position may result in higher prices for consumers.¹⁵⁰ More often, in this case, consumers tend to purposefully scroll further to find non-sponsored offers. As a consequence, highly ranked suppliers have to assert themselves with good offers if they want to be attractive not only to consumers with high search costs.¹⁵¹ This positive effect occurs as soon as “paid for” positions are clearly marked in the lists of search results.¹⁵² At the bottom line, payments for ranking are unlikely to have an adverse effect on consumers and mislead them to the detriment of lower ranked competitors. Rather, payments have an “anti-advertising effect”¹⁵³ if they are disclosed. A *per se* prohibition according to Art. 4 Directive on Misleading Advertising appears not to be required and to be an inadequate overregulation.

Even though the Directive on Misleading Advertising, unlike the UCP Directive, does not include the requirement of an appreciable impairment,¹⁵⁴ the above result could still be taken into account by the principle of proportionality.¹⁵⁵ Transparent paid-for rankings are not appreciable, and therefore do not constitute an unfair practice. A *per se* prohibition would be unproportional. Another approach could be an interpretation in line with the fundamental rights of the EU and the regulatory purpose.¹⁵⁶ The most convincing way is to link the result to the requirement of objectivity directly. The disclosed payment should be considered objective. Either way, as a result, Art. 4 Directive on Misleading Advertising must be reduced to the unfairness or inadmissibility of intransparency. It does not prohibit the practice of paid-for rankings. Because of the fact that Art. 4 Directive on Misleading Advertising presupposes the relevant information to be presented *in* the list of search results (as this is its only area of application), it constitutes a further

¹⁴⁶ Ohly (2023a), Sec. 6, para. 7; Wagner-von Papp (2022), Sec. 10, para. 141.

¹⁴⁷ Recitals 3, 9 Directive on Misleading Advertising.

¹⁴⁸ Engert (2018), p. 334.

¹⁴⁹ Engert (2018), p. 334 *et seq.*

¹⁵⁰ Engert (2018), p. 334.

¹⁵¹ Engert (2018), p. 334 *et seq.*

¹⁵² Engert (2018), p. 334 *et seq.*

¹⁵³ Term by Lettl (2007), p. 939.

¹⁵⁴ Deutscher Bundestag (2015), Drs. 18/4535, p. 17; Glöckner (2020b), Sec. 6, para. 587a; Sack (2015), p. 130.

¹⁵⁵ *Cf.*, in general, on the opinion that appreciability has to be taken into account on the basis of the principle of proportionality: Koos (2016), Sec. 6, para. 37 *et seq.*; Menke (2020), Sec. 6, para. 36; Koos (2005), p. 1101 *et seq.*; Peifer (2011), p. 6.

¹⁵⁶ Glöckner (2020b), Sec. 6, para. 593; Köhler (2023b), Sec. 6, para. 21; Ohly (2023a), Sec. 6, para. 40.

transparency obligation beyond Art. 7(4a) UCP Directive, though probably not beyond No. 11a Annex I UCP Directive.¹⁵⁷

6 Conclusion and Summarizing Proposal *de lege ferenda*

Transparency of rankings is crucial for competition on online platform markets. The present regulatory framework is characterised by unclear wording and inconsistent duplication of information duties.

From the key objective of ensuring *adequate* transparency it follows that the determination of the required level of detail of information needs a balancing of the interest in information of commercial platform users and consumers versus the interest of the platform in the protection of trade secrets, flanked by the interest of consumers in avoiding manipulation.

In this regard, the differences between the platform providers' obligations vis-à-vis commercial platform users (P2B relationship) and consumers (P2C relationship) are marginal. Following from the same interests and in the same way protected interests and the underlying guiding concepts (average consumer, average SME) in terms of the content and the level of detail, the information requirements in P2B and P2C relationships are so close that a differentiation will hardly be possible in practice. In both relationships deep and detailed information is not required. In this respect, the legislature took a teleologically convincing approach with regard to search engines.

At least since the entry into force of the additional obligation to publicly inform according to Art. 7(4a) UCP Directive, Art. 5(1) P2B Regulation has become just as redundant as a separate provision for search engines would be in the P2C relationship.

Consequently, in line with the existing regulatory structure with regard to search engines, the *telos* and the underlying guiding concepts, the EU legislature should merge Art. 5 P2B Regulation, Art. 7(4a) UCP Directive, Art. 6a(1)(a) Consumer Rights Directive and Art. 28 DSA into one provision, in one *Platform-to-User Regulation (P2U Regulation)*.

With respect to information obligations in the platform economy, the legislature should move away from the separation of B2B and B2C relationships, at least with regard to ranking. Commercial platform users and consumers form *one group of users*, who are both more or less dependent on the platform due to information asymmetry. The interests of both could sufficiently be taken into account by *one single* provision.

¹⁵⁷ Not clear: Sosnitza (2023b), Anhang (zu § 3 Abs. 3), paras. 38, 40.

Once again, “less is more” applies to EU law. The existing transparency deficit is by no means better addressed with more and more provisions; any more effective combating of non-transparent online rankings, as called upon by the European Commission, rather needs a simplification of the legal framework, i.e. one single P2U provision with a clear wording instead of a P2B and an additional P2C provision. An adjustment of the DSA should also be considered.

The ranking information should be publicly available for all users. No distinction should be made between types of platforms, similar to the broad scope of Art. 7(4a) UCP Directive. In this way, the law remains open to new developments and takes account of the need to protect all users. Of course, any *P2U Regulation* could introduce specific chapters for issues that only arise in the P2B or P2C relationship. The enforcement of the regulation should be uniform as well.¹⁵⁸ Article 7(5) UCP Directive could be a possible way. The findings of this article could be implemented as follows:

Transparency of Online Rankings According to the P2U Regulation

1. Online platform providers shall explain in an appropriate manner their ranking concept and the main parameters of the ranking. The explanations shall be sufficient to enable the users to obtain an adequate understanding of whether, and if so to what extent, the ranking mechanism can be influenced, in particular by the following:
 - (a) direct and indirect payments;
 - (b) the characteristics of the products offered or of the websites;
 - (c) individual search preferences.
2. Explanations shall not be given inasmuch as they may give rise to a concrete risk of manipulation. If the ranking information is protected by trade secrets of the platform providers, an explanation is adequate if it results from a balance of the interests protected pursuant to this Regulation as a legitimate interest recognised by Union law pursuant to Article 5(d) Directive (EU) 2016/943 and the interest in protection of trade secrets as protected by the Directive (EU) 2016/943.
3. The explanations shall be provided publicly and easily accessible from the page where the query results are presented. The explanations shall be kept up to date.

Definitions

Platforms are undertakings that provide users with the possibility to search for products offered by different traders or by consumers.

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¹⁵⁸ The current inconsistent regulatory structure leads (in a mirror-inverted way) to an insufficient enforcement system in Germany: Nolteernsting (2024), p. 1449 *et seq.*

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