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WORKING PAPER

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From:	DK Delegation
To:	Working Party on Competitiveness and Growth (Internal Market)
Subject:	Denmark's written comments on the Platform-to-Business Regulation proposal

NOTE

26. september 2018

Danish amendments to PRES CA no. WK 9907/2018 INIT

DK would like to thank the PRES on the work on the P2B regulation.

In general the Danish government supports the intention to promote fairness and transparency for business users of online intermediation services. Increased competition will benefit business users as well as consumers. The proposal from the Commissions generally strikes a fine-balance, which should be maintained. It is also important to acknowledge the broad scope of application of the proposal, that concerns many online intermediaries of different sizes and spans across multiple sectors. Therefore it is important to maintain a horizontal, light-touch approach.

It is important for the Danish government that we find the right balance between the advantages that more transparency and better redress can give business users and consumers on the one hand, and administrative burdens on the other. Therefore, this regulation should not become so rigid and detailed that we risk inhibiting innovation and growth.

It is important that EU legislation is based on sound evidence of market failures and proper impact assessment.

We set out below the DK's comments to PRES amendments WK 9907/2018 INIT. DK reserves the right to submit further comments on this proposal and its further amendments.

PRES CA no. WK 9907/2018 INIT	DK amendments
(5) Online intermediation services and online search engines, as well as the commercial transactions facilitated by those services, have an intrinsic cross-border potential and are of particular importance for the proper functioning of the Union's internal market in today's economy. The potentially unfair and harmful trading practices of certain providers of those services in respect of business users and corporate website users and the lack of effective redress mechanisms hamper the full realisation of that potential and negatively affect the proper functioning of the internal market. In addition, the full realisation of that potential is hampered, and the proper functioning of the internal market is negatively affected, by diverging laws of certain Member States which, with a varying degree of effectiveness, regulate those services, while other Member States are considering adopting such laws.	(5) Online intermediation services and online search engines, as well as the commercial transactions facilitated by those services, have an intrinsic cross-border potential and are of particular importance for the proper functioning of the Union's internal market in today's economy. The potentially unfair and harmful trading practices of certain providers of those services in respect of business users and corporate website users and the lack of effective redress mechanisms hamper the full realisation of that potential and negatively affect the proper functioning of the internal market. <u>In addition, the full realisation of that potential is hampered, and the proper functioning of the internal market is negatively affected, by diverging laws of certain Member States which, with a varying degree of effectiveness, regulate those services, while other Member States are considering adopting such laws.</u> <u>Justification</u> In general we support harmonized rules that ensure a well-functioning single market and avoid legal fragmentation. Thus, <u>we disagree with the deletion of the last sentence in recital 5.</u> We obvious believe that national rules fragment the single market making it difficult for companies to operate.

(6) A uniform and targeted set of mandatory rules should therefore be established at Union level to ensure a fair, predictable, sustainable and trusted online business environment within the internal market by ensuring, in particular, that the business users of online intermediation services are afforded appropriate transparency as well as effective redress possibilities throughout the Union. Those rules should also provide for appropriate transparency as regards the ranking of corporate website users in the search results generated by online search engines. At the same, those rules should be such as to safeguard the important innovation potential of the wider online platform economy. It is appropriate to clarify that this Regulation should be without prejudice to national civil law such as the rules on the formation or modification of a contract, the validity of terms and conditions, the validity of the retention or termination of a contract, the rules on liability and tort rules. Member States should therefore remain free to apply national laws which prohibit or sanction unilateral conduct or unfair commercial practices.	(6) A uniform and targeted set of mandatory rules should therefore be established at Union level to ensure a fair, predictable, sustainable and trusted online business environment within the internal market by ensuring, in particular, that the business users of online intermediation services are afforded appropriate transparency as well as effective redress possibilities throughout the Union. Those rules should also provide for appropriate transparency as regards the ranking of corporate website users in the search results generated by online search engines. At the same, those rules should be such as to safeguard the important innovation potential of the wider online platform economy. It is appropriate to clarify that this Regulation should be without prejudice to national civil law such as the rules on the formation or modification of a contract, the validity of terms and conditions, the validity of the retention or termination of a contract, the rules on liability and tort rules. Member States should therefore remain free to apply national laws which prohibit or sanction unilateral conduct or unfair commercial practices. <u>Justification</u> In general we support harmonized rules that ensure a well-functioning single market and avoid legal fragmentation.
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	The wording of PRES CA on recital 6 do seem to interfere with the scope of this regulation, since it mentions contract law, termination of contracts etc. We support the light touch approach of this proposal where transparency in terms and conditions, etc. is the main focus. This is the reason why, it is of great importance that member states cannot deviate from the scope of this regulation. If so, we will lessen the effect of this regulation.
(16) A provider of online intermediation services can have legitimate reasons to decide to suspend or terminate the provision of its services, in whole or in part, to a given business user, including by delisting individual goods or services of a given business user or effectively removing search results. However, given that such decisions can significantly affect the interests of the business user concerned, they should be properly informed of the reasons thereof at least [x] days before the entry into force of that decision, with a statement of reasons for that decision in a verifiable manner such as on a durable medium in a retrievable manner. The statement of reasons should allow business users to ascertain whether there is scope to challenge the decision, thereby improving the possibilities for business users to seek effective redress where necessary. In addition,	(16) A provider of online intermediation services can have legitimate reasons to decide to suspend or terminate the provision of its services, in whole or in part, to a given business user, including by delisting individual goods or services of a given business user or effectively removing search results. However, given that such decisions can significantly affect the interests of the business user concerned, they should be properly informed of the reasons thereof at least [x] days before the entry into force of that decision, with a statement of reasons for that decision in a verifiable manner such as on a durable medium in a retrievable manner. The statement of reasons should allow business users to ascertain whether there is scope to challenge the decision, thereby improving the possibilities for business users to seek effective redress where necessary. In addition,

requiring a statement of reasons should help to prevent or remedy any unintended removal of online content provided by business users which the provider incorrectly considers to be illegal content, in line with Commission Recommendation (EU) No 2018/334⁴. The statement of reasons should identify the objective ground or grounds for the decision, based on the grounds that the provider had set out in advance in its terms and conditions, and refer in a proportionate manner to the relevant specific circumstances that led to that decision. The requirement of verifiability should enable business users to retrieve decisions of online intermediation services regarding the suspension or termination of their services at any point in time.	requiring a statement of reasons should help to prevent or remedy any unintended removal of online content provided by business users which the provider incorrectly considers to be illegal content, in line with Commission Recommendation (EU) No 2018/334⁴. The statement of reasons should identify the objective ground or grounds for the decision, based on the grounds that the provider had set out in advance in its terms and conditions, and refer in a proportionate manner to the relevant specific circumstances that led to that decision. The requirement of verifiability should enable business users to retrieve decisions of online intermediation services regarding the suspension or termination of their services at any point in time. <u>Justification</u> With the amendment to recital 16, burdens will be laid on the platforms. We believe it is an unnecessary burden, especially for small enterprises to provide a business user with a decision of suspension or termination [X] days before the decision enters into force. A [X] days implementation period will interfere with the platforms right to do business, if i.e. a platform has a certain policy of what is to be sold on the platform. If a business user contradicts the platforms policy, then the platform is forced to sell the business users products in [X] more days.
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(16a) However, where a provider of online intermediation services is required to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, under a regulatory obligation pursuant to national or Union law, or in order to benefit from the liability exemption as laid down in Article 14 of Directive 2000/31/EC, the period of at least [x] days should not apply. Nonetheless, the provider of online intermediation services should provide the business user concerned with a statement of reasons for any such course of action taken in a retrievable manner within [x] days.	(16a) However, where a provider of online intermediation services is required to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, under a regulatory obligation pursuant to national or Union law, or in order to benefit from the liability exemption as laid down in Article 14 of Directive 2000/31/EC, the period of at least [x] days should not apply. Nonetheless, the provider of online intermediation services should provide the business user concerned with a statement of reasons for any such course of action taken in a retrievable manner within [x] days.
(17) The ranking of goods and services by the providers of online intermediation services has an important impact on consumer choice and, consequently, on the commercial success of the business users offering those goods and services to consumers. Providers of online intermediation services should therefore outline the main parameters determining ranking beforehand, in order to improve predictability for business users, to allow them to better understand the functioning of the ranking mechanism and to enable them to compare the ranking practices of various providers. The notion of main parameter should be understood to refer to any general criteria, processes, specific signals incorporated into algorithms or	(17) The ranking of goods and services by the providers of online intermediation services has an important impact on consumer choice and, consequently, on the commercial success of the business users offering those goods and services to consumers. Providers of online intermediation services should therefore publicly outline the main parameters determining ranking beforehand, in order to improve predictability for business users, to allow them to better understand the functioning of the ranking mechanism and to enable them to compare the ranking practices of various providers. The notion of main parameter should be understood

other adjustment or demotion mechanisms used in connection with the ranking. The description of the main parameters determining ranking should also include an explanation of any possibility for business users to actively influence ranking against remuneration, as well as of the relative effects thereof. This description should provide business users with an adequate understanding of how the ranking mechanism takes account of the characteristics of the actual goods or services offered by the business user, and their relevance to the consumers of the specific online intermediation services.	to refer to any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking. The description of the main parameters determining ranking should also include an explanation of any possibility for business users to actively influence ranking against remuneration, as well as of the relative effects thereof. This description should provide business users with an adequate understanding of how the ranking mechanism takes account of the characteristics of the actual goods or services offered by the business user, and their relevance to the consumers of the specific online intermediation services. <i>Justification</i> The parameters of ranking is also of great importance for consumers when searching for or buying a product on a platform, if the consumer is to find the best product at the cheapest price.
(21 new)	<u>(21 new) The observatory on online platform economy should analyze and look into how platforms access and exclusive right to use data generated on the platforms effects the competition on the platform, between platforms and the upcoming of new digital business models.</u> <i>Justification</i> Access to and use of data, including personal data is important in the value creation in the online platform economy. Platforms exclusive

	righto access to data generated on the platforms may lead to anti-competitive behavior.
(24) Mediation can offer providers of online intermediation services and their business users a means to resolve disputes in a satisfactory manner, without having to use judicial proceedings which can be lengthy and costly. Therefore, providers of online intermediation services should facilitate mediation by, in particular, identifying at least two mediators with which they are willing to engage. The minimim number of mediators to be identified aims at safeguarding the mediators' neutrality. Mediators which provide their services from a location outside the Union should only be identified where it is guaranteed that the use of those services does not in any way deprive the business users concerned of any legal protection offered to them under Union law or the law of the Member States, including the requirements of this Regulation and the applicable law regarding protection of personal data and trade secrets. Nonetheless, providers of online intermediation services and their business users should remain free to jointly identify any mediator of their choice after a concrete dispute has arisen between them. In order to be accessible, fair, and as swift, efficient and effective as possible, all identified those mediators should meet certain set criteria.	(24) Mediation can offer providers of online intermediation services and their business users a means to resolve disputes in a satisfactory manner, without having to use judicial proceedings which can be lengthy and costly. Therefore, providers of online intermediation services should facilitate mediation by, in particular, identifying at least two public or private mediators with which they are willing to engage. The minimum number of mediators to be identified aims at safeguarding the mediators' neutrality. When defining mediators, objective, fair and non-discriminatory conditions should be applied. Mediators which provide their services from a location outside the Union should only be identified where it is guaranteed that the use of those services does not in any way deprive the business users concerned of any legal protection offered to them under Union law or the law of the Member States, including the requirements of this Regulation and the applicable law regarding protection of personal data and trade secrets. Nonetheless, providers of online intermediation services and their business users should remain free to jointly identify any mediator of their choice after a concrete dispute has arisen between them. In order

	to be accessible, fair, and as swift, efficient and effective as possible, all identified those mediators should meet certain set criteria. <i>Justification</i> It is important to ensure that the individual or joint set up of one or more independent mediator organisations does not lead to a direct or indirect market foreclosure through the establishment of “closed forums” and industry-based standards/ certification schemes. Hence, industry-based standards may work as an entry barrier and – as an effect – work as a competitive advantage for large, established entities.
(28 new)	(28 new) In order to ensure proper compliance with and effective enforcement of the rules laid in this regulation member states should appoint a competent authority or designate a body. <i>Justification</i> In order to ensure proper compliance with this regulation, member states should ensure adequate and effective enforcement. It should be up the member states to decide whether it should be a public authority or a designated body.
(28) Codes of conduct, drawn up either by the service providers concerned or by organisations or associations representing them, can contribute to the proper application of this Regulation and should therefore be encouraged. When drawing up such codes of conduct, in consultation with all relevant stakeholders, account should be taken of	(28) Codes of conduct, drawn up either by the service providers concerned or by organisations or associations representing them, can contribute to the proper application of this Regulation and should therefore be encouraged. The Codes of Conduct should be transparent, objective, fair and non-discriminatory. When drawing up such

the specific features of the sectors concerned as well as of the specific characteristics of micro, small and medium-sized enterprises.	codes of conduct, in consultation with all relevant stakeholders, account should be taken of the specific features of the sectors concerned as well as of the specific characteristics of micro, small and medium-sized enterprises. <u>Justification</u> It is important to ensure that the codes of conduct do not lead to a direct or indirect market foreclosure through the establishment of “closed forums” and industry-based standards/ certification schemes. Hence, industry-based standards may work as barrier to entry and – as an effect – work as a competitive advantage for large, established entities.
<u>Article 1</u> Subject-matter and scope 1. This Regulation lays down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency and effective redress possibilities. 2. This Regulation shall apply to online intermediation services and online search engines provided, or offered to be provided, to business users and corporate website users, respectively, that have their place of establishment or residence in the Union and that, through online intermediation services or online search engines, offer goods or services	<u>Article 1</u> Subject-matter and scope 1. The purpose of This Regulation is to contribute to the proper functioning of the internal market by the layings down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency and effective redress possibilities. 2. This Regulation shall apply to online intermediation services and online search engines provided, or offered to be provided, to business users and corporate website users, respectively, that have their place of establishment or residence in the Union and that,

to consumers located in the Union, irrespective of the place of establishment or residence of the providers of those services and irrespective of the law otherwise applicable to contracts concluded with the providers of those services. 3. This Regulation shall be without prejudice to national civil law, in particular contract law and national laws which prohibit or sanction unilateral conduct or unfair commercial practices.	through online intermediation services or online search engines, offer goods or services to consumers located in the Union, irrespective of the place of establishment or residence of the providers of those services. 3. This Regulation shall be without prejudice to national civil law, in particular contract law and national laws rules which, in conformity with Union law, prohibit or sanction unilateral conduct or unfair commercial practices. 4. This Regulation shall be without prejudice to Union law applicable in the areas of judicial cooperation in civil matters, competition, consumer protection, electronic commerce and financial services. <u>Justification</u> In general we support harmonized rules that ensure a well-functioning single market and avoid legal fragmentation. We <u>support the proposed amendment from SK</u> both on article 1, paragraph 1, 3 and 4. The wording of PRES CA on article 1.3 do seem to interfere with the scope of this regulation, since it mentions contract law, termination of contracts etc. We support the light touch approach of this proposal where
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	transparency in terms and conditions, etc. is the main focus. This is the reason why, it is of great importance that member states cannot deviate from the scope of this regulation. If so, we will lessen the effect of this regulation.
<i>Article 4</i> Suspension and termination 1. Where a provider of online intermediation services decides to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, it shall, in a retrievable manner, provide the business user concerned, at least [x] days before that decision enters into effect without undue delay, with a statement of reasons for that decision in a verifiable manner. 2. The statement of reasons referred to in paragraph 1 shall contain a reference to the specific facts or circumstances that led to the decision of the provider of online intermediation services, as well as a reference to the applicable objective ground or grounds for that decision referred to in Article 3(1)(c). 3. Where a provider of online intermediation services is required to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, (a) under a regulatory obligation pursuant to national or Union law, or	<i>Article 4</i> Suspension and termination 1. Where a provider of online intermediation services decides to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, it shall, in a retrievable manner, provide the business user concerned, at least [x] days before that decision enters into effect without undue delay, with a statement of reasons for that decision in a verifiable manner. 2. The statement of reasons referred to in paragraph 1 shall contain a reference to the specific facts or circumstances that led to the decision of the provider of online intermediation services, as well as a reference to the applicable objective ground or grounds for that decision referred to in Article 3(1)(c). 3. Where a provider of online intermediation services is required to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user, (a) under a regulatory obligation pursuant to national or Union law, or

(b) in order to benefit from the liability exemption as laid down in Article 14 of Directive 2000/31/EC, the period referred to in paragraph 1 shall not apply. The provider of online intermediation services shall nonetheless provide the business user concerned with a statement of reasons in a written form for any such course of action taken within [x] days.	(b) in order to benefit from the liability exemption as laid down in Article 14 of Directive 2000/31/EC, the period referred to in paragraph 1 shall not apply. The provider of online intermediation services shall nonetheless provide the business user concerned with a statement of reasons in a written form for any such course of action taken within [x] days <i>Justification</i> With the amendment to article 4, paragraph 1, burdens will be laid on the platforms. We believe it is an unnecessary burden, especially for small enterprises to provide a business user with a decision of suspension or termination [X] days before the decision enters into force. A [X] days implementation period will interfere with the platforms right to do business, if i.e. a platform has a certain policy of what is to be sold on the platform. If a business user contradicts the platforms policy, then the platform is forced to sell the business users products in [X] more days.
<i>Article 5</i> Ranking 1. Providers of online intermediation services shall set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters.	<i>Article 5</i> Ranking 1. Providers of online intermediation services shall set out in their terms and conditions the parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters, by providing an easily and publicly available

Where those main parameters include the possibility to influence ranking against any direct or indirect remuneration paid by business users to the provider of online intermediation services concerned, that provider of online intermediation services shall also include in its terms and conditions a description of those possibilities and of the effects of such remuneration on ranking.	<u>description, drafted in clear plain, intelligible and unambiguous language on the online intermediation service</u> Where those main parameters include the possibility to influence ranking against any direct or indirect remuneration paid by business users to the provider of online intermediation services concerned, that provider of online intermediation services shall also include in its terms and conditions a description of those possibilities and of the effects of such remuneration on ranking. <i><u>Justification</u></i> The parameters of ranking is of great importance for both the business users and the consumers. It is important for business to know how and why their products are ranked the way they are. And it is important for the consumers when searching for or buying a product on a platform, if the consumer is to find the best product at the cheapest price. In Denmark we have experience with platforms ranking some business users products higher because of remuneration. This, of cause, makes an uneven level playing field for businesses. But it alsos hampers the consumer welfare, since it hampers the consumers ability to be active and choose the best product at the right price. When the ranking parameters are publicly available, then consumers also have the insight of how and
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	why certain products are ranked the way they are. If ranking parameters only appears in the terms and conditions, then it will be mainly the business users who have the insight.
<i>Article 10</i> Mediation 1. Providers of online intermediation services shall identify in their terms and conditions one two or more mediators with which they are willing to engage to attempt to reach an agreement with business users on the settlement, out of court, of any disputes between the provider and the business user arising in relation to the provision of the online intermediation services concerned, including complaints that could not be resolved by means of the internal complaint-handling system referred to in Article 9. Providers of online intermediation services may only identify mediators providing their mediation services from a location outside the Union where it is ensured that the business users concerned are not effectively deprived of the benefit of any legal safeguards laid down in Union law or the law of the Member States as a consequence of the mediators providing those services from outside the Union.	<i>Article 10</i> Mediation 1. Providers of online intermediation services shall identify in their terms and conditions one two or more public or private mediators with which they are willing to engage to attempt to reach an agreement with business users on the settlement, out of court, of any disputes between the provider and the business user arising in relation to the provision of the online intermediation services concerned, including complaints that could not be resolved by means of the internal complaint-handling system referred to in Article 9. Providers of online intermediation services may only identify mediators providing their mediation services from a location outside the Union where it is ensured that the business users concerned are not effectively deprived of the benefit of any legal safeguards laid down in Union law or the law of the Member States as a consequence of the mediators providing those services from outside the Union. <u>Justification</u>

	It should be possible for member states to designate a public entity that can be appointed a mediator in order to ensure proper compliance with the rules laid down in this regulation.
	<u>Article 13bis new - Enforcement</u> <u>1. Each Member State shall appoint a competent authority or designate a body or bodies responsible for adequate and effective enforcement of this Regulation.</u> <u>2. Member States shall lay down the rules setting out the measures applicable to infringements of the provisions of this Regulation and shall ensure that they are implemented. The measures provided for shall be effective, proportionate and dissuasive.</u> <u>3. The competent authority or designated body should give guidance to business users in detecting unfair practices from platforms.</u> <u>3. The competent authorities or designated bodies referred to in paragraph 1 shall be communicated to the Commission and made publicly available on the Commission's website.</u> <i><u>Justification</u></i> In order to ensure proper compliance with this regulation, member states should ensure adequate enforcement. It should be up to the member states to decide whether it should be a public authority or a designated body.

	The competent authorities or designated bodies should help and guide the business users to detect unfair and illegal practices from the platforms.
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