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WORKING PAPER

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From:	Presidency
To:	Working Party on Competitiveness and Growth (Internal Market)
Subject:	PRESIDENCY FLASH

Working Party CompCro (Internal Market) - Platform to Business Regulation

Location: Brussels

Date: **11** (full day) and **12** (morning only) Oct. 2018

Time: 10:00 AM

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PRESIDENCY FLASH

Dear Colleagues,

The Austrian Presidency is pleased to invite all delegations to the upcoming Competitiveness and Growth (Internal Market) Working Party meetings on the Regulation for Platform-to-Business Relations on 11 and 12 October 2018.

During these Working Party meetings, we will present and discuss the new Presidency compromise text on **all Articles and Recitals**. In order for you and your colleagues in the Capitals to have a better understanding of the reasons for our main amendments in advance, we have briefly summarised these below:

Article 1, Recitals 1-7 (Subject-matter and scope)

By listing certain Articles in Art. 1 Para 3, we have tried to assemble a flexible framework, especially taking into consideration future trilogue discussions. In this particular compromise text we acknowledge that national rules (as noted in Art. 1 Para 3) must in any case comply with the provisions on ranking, differentiated treatment, access to data, internal complaint-handling system and mediation as laid down in the P2B-Regulation.

In light of the practical questions on the legal consequences of non-compliance especially with Art. 3 Para 1, we see the necessity to have a clearer picture on which parts of the Regulation should leave no room for national provisions.

Article 2, Recitals 8-12 (Definitions)

For the sake of legal certainty, “durable medium” has been defined in Para 12. The definition originates from Directive (EU) 2016/97. Also, the definition of online intermediation services in Para 2 has been adapted to reflect the issues raised in the previous Working Party meetings.

Article 3, Recitals 13-15 (Transparency requirements for terms and conditions)

In order to emphasize the Regulation’s main aim and to outline that substantive contract law of MS should remain unaffected, we have changed the title of Article 3 to “Transparency requirements for terms and conditions”. We have also introduced two new options regarding the legal consequences of non-compliance with Art. 3 Para 1 and Para 2, which are explained below.

The current Art. 3 Para 3 lays down that all terms and conditions that are non-compliant with Para 1 or Para 2 shall be non-binding.

We had a closer look at this legal consequence and took into consideration especially the broad range of different types of terms and conditions which vary greatly in importance: While some provisions in terms and conditions may only regulate minor details, some may provide for essential terms that regulate the main content of the contract (e.g. provisions regarding listing on the platform). In certain cases an “unplain and unintelligible” term in a contract could even lead to the contract no longer being valid, should an essential term be deemed to be non-binding as laid down in the original EC-proposal. This could be detrimental for business users that rely on the existence of their contractual relationships with platforms.

In order to ensure the continuance of a contract in such cases, **Option 1** aims at mitigating this rather sharp consequence. It reflects that terms and conditions, or specific provisions thereof, that are not plain and intelligible should be interpreted to the detriment of the provider of online intermediation services, as opposed to them being non-binding. The legal assessment of whether such terms and conditions should be non-binding should then be left to the civil law and the courts of the Member States. Non-compliance with the other transparency requirements of Para 1 or the notification period in Para 2 should, however, render those terms and conditions to be non-binding; but: only unless their non-binding nature would be to the detriment of the business user.

Option 2 was drafted in light of existing civil law in MS, which already provide for legal consequences of non-compliance with transparency requirements in their contract law. Option 2 would provide for a complete deletion of any legal consequences at Union level regarding non-compliance with Para 1 and Para 2, thus leaving it up to the MS to provide for adequate and proportionate legal consequences on a case by case basis.

Article 4, Recitals 16-16a (Suspension and termination)

In the previous Working Party meetings it became apparent that a more balanced approach must be found for Art. 4.

For our new compromise text, we held on to the notion that business users must be protected against unjust and arbitrary “techniques” of platforms. In the end, these served as the inspiration not only for Art. 4, but for the entire P2B-Proposal, which is why we have held on to the time period in Art. 4 Para 1. We have introduced a time period of 10 days.

At the same time, we have regarded the platforms’ legitimate interest of wanting to react quickly to business users who do not comply with their terms and conditions. In the new Para 3 (b), it has been made clear that platforms should continue to be

allowed to suspend or terminate their services with immediate effect on the basis of a general legal principle or statutory provision of a MS. A general legal principle could, for example, be the right of a contracting party to terminate a contract for good cause. To our knowledge, this specific principle may not exist in codified, written form in some MS and could therefore be seen as a general legal principle.

Article 5, Recitals 17-18a (Ranking)

In order to avoid the “longest Recital in the history of the EU”, we have split Recitals 17 and 18 into four (17, 17a, 18, 18a). We acknowledged the concerns raised by some MS in the last Working Party meeting (especially regarding some of the more technical, less “self-evident” terms such social wrapping, external indicators etc.) and have adapted/simplified the Recitals accordingly.

Together with the EC we have also thoroughly analysed last week’s discussion on how trade secrets come in to play with ranking. Naturally, it is very difficult to pinpoint what exactly constitutes a trade secret, regardless of what sector (food industry, platform economy etc.) the secret belongs to. In order to prevent loopholes from emerging and to keep platforms and search engines from “hiding” behind trade secrets, we have decided to delete the original wording in Para 4 and Recital 18a.

Article 6, Recital 19 (Differentiated treatment)

Reflecting last week’s discussion, we have replaced the words “at least” with “in particular” while at the same time deleting the last sentence in Recital 19. Since platforms are in any case required to include a description of any differentiated treatment in their terms and conditions, the wording “in particular” aims at clarifying that especially those methods listed in points a to d of Para 2 must be part of that description.

Article 7, Recital 20 (Access to data)

See explanations regarding Article 6 above (to be read analogously).

Article 10, Recitals 24-25 (Mediation)

In order to eliminate any remaining doubts about the voluntary nature of mediation, the words “in any” have been replaced by “if they” in Para 3. To our understanding, this minor amendment clarifies that platforms and business users are never bound to engage in mediation and are by all means always entitled to refuse to enter into mediation proceedings. However, should both parties in a joint step choose to give mediation a chance and thus attempt to reach an agreement, they should do so in good faith.

Article 12, Recitals 27-27a (Judicial proceedings by representative organisations or associations and by public bodies)

Based on our assessment of last week's Working Party meeting, the Presidency compromise text on Art. 12 was received positively by MS. Our amendments include small technical changes and reflect certain comments made by MS. In particular, by adding the words "at least" in point a of Para 2b, we want to indicate that MS may provide for additional requirements that organisations and associations must meet.

Para 2b aims at introducing an option, not an obligation. It should be up to the MS to decide whether they want to designate organisations, associations or public bodies.

Article 12a, Recital 27b (Sanctions)

Many MS supported the Belgian proposal to introduce an enforcement mechanism to this Regulation, which is why we have drafted a new Art. 12a which aims at implementing this proposal. We have included two different implementation options.

Option 1 reflects the Belgian proposal, which has its origin in Art. 7 of the Geoblocking Regulation.

Option 2 is drafted in a more general manner. Both approaches have in common that the terms used therein ("measures" and "sanctions") allow for a very broad interpretation. The following should be emphasized with the wording used in Art. 12a, namely:

1. MS are not required to set up new bodies but can rather rely on bodies (authorities or courts) that already exist in their MS;
2. "Measures" or "sanctions" are not limited to administrative penalties ("fines"), but also include civil measures such as injunctions and interim measures.

The term "sanctions" has already been used in other acts of Union law, such as in Art. 13 of the UTP Directive or Art. 24 of the Consumer Rights Directive. With respect to these Directives, it was up to the MS to decide whether to introduce administrative penalties or civil measures.

The new Presidency compromise text for Articles 1-15 with their corresponding Recitals will most likely be uploaded to the Delegates Portal by 8 October.

We hope the explanations above are able to help you gain a preliminary insight into our amendments. We look forward to seeing you all on 11 and 12 October for another in-depth exchange!

Presidency Team for Internal Market (P2B),

Max, Tobias, Kevin